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Finality vs. enlargement: constitutive practices and opposing rationales in the reconstruction of Europe

ANTJE WIENER

Introduction

> [I]n the coming decade we will have to enlarge the EU to the east and south-east, and this will in the end mean a *doubling in the number of members*. And at the same time, if we are to be able to meet this historic challenge and integrate the new member states without substantially denting the EU's capacity for action, we must put into place the last brick in the building of European integration, namely *political integration*. The need to organize these two processes *in parallel* is undoubtedly the biggest challenge the Union has faced since its creation . . .
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> Crucial as the [2000] intergovernmental conference is as the next step for the future of the EU, we must, given Europe's situation, already begin to think beyond the enlargement process and consider how a future 'large' EU can function as it ought to function and what shape it must therefore take . . . Permit me therefore to remove my Foreign Minister's hat altogether in order to suggest a few ideas both on the nature of this so-called *finality* of Europe and on how we can approach and eventually achieve this goal.
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> (German Foreign Minister Joschka Fischer, Humboldt University, Berlin, 2000)[1]

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[1] Fischer 2000, http://www.auswaertiges-amt.de/www/de/eu_politik/aktuelles/zukunft/ausgabe_archiv?bereich_id = 0&type_id = 3&archiv_id = 97 (emphases added).

The issue of compliance in the international system of states, on the one hand, and why citizens obey the law, on the other, follow different trails of philosophical reasoning. Yet, as Thomas Franck points out, while 'there are differences between law's place in national society and the place of rules in the society of nations... those differences do not justify the closing of the international rule system to philosophical inquiry aided by the insights developed by the study of national and sub-national communities. On the contrary, the differences create a tantalizing intellectual symbiosis' (Franck 1990, 5). This observation raises the question of why legal philosophy has been mostly applied to national as opposed to international systems. In turn, this chapter's interest is in the dimension of international law – and international relations theory – that is brought into the European constitutional debate with the current enlargement proceedings. In other words, if the European legal order does not fall under international law, can enlargement be reasonably judged and its impact on the constitutional process be understood by applying the theoretical assumptions about compliance set out by international law/international relations theory? In the event of a negative response, what theoretical approach would be more helpful instead?

To elaborate on these questions, the chapter highlights the policy of conditionality, i.e. compliance with the accession *acquis*, as harbouring the rationale of rule-following that involves obeying rules without the possibility of reasoned change. It is pointed out that, while according to compliance procedures under international law rule-following behaviour is not considered as puzzling, as long as it is identified as legitimate based on transnational legal practices of internalization (Koh 1997, Chayes and Chayes 1995) or successful political processes of persuasion, shaming, learning and so forth,[2] with a view to the pending membership of the designated rule-followers in the enlargement process, the rule-following rationale is potentially anachronistic and therefore puzzling. It is even more puzzling given that the Europolity is neither an international organization nor a state but a new type of transnational politico-legal order with an evolving proto-constitutional framework. In this framework a key problem with compliance is that norms are often not properly specified. While the participants in the constitutional debate find it hard to agree on a compromise towards thinning out a thicket of institutionalized rules

[2] See Finnemore and Sikkink 1998; Risse, Ropp and Sikkink 1999; and Checkel 2001 among others.

and norms, the candidate countries are often forced to comply with norms which remain dubious and under-specified in the EU's very own context.[3] While the constitutional debate attaches an 'in progress' label to the EU institutional order,[4] the accession process requires clear reference to the status quo set by the 1993 Copenhagen criteria[5] and the related accession procedures, chapter developments and proposals. In other words, the EU's nature as a community, not a club, does not run well with the compliance rationale and its focus on the past.[6] Assessing the finality debate based on the logic of national constitutional law, i.e. based on a hierarchy of norms towards 'enhancing stability and predictability',[7] would imply squaring the circle. After all, and unlike most polities, the EU's commitment to accept democratic and European states as new members means that its external borders are, in principle, not fixed but in flux in a long-term perspective.[8]

While the EU's constitutional saga has long moved beyond the dichotomy of national and international law,[9] with many students of European integration treating the EU as a *sui generis* case with its own logic of European constitutional law,[10] or transnational law, the current situation of massive enlargement brings back elements derived from the logic of

[3] See, for example: De Witte 1998; Dimitrova 2001; Schwellnus 2001; Phinnemore and Papadimitriou 2002; and Amato and Batt 1998.

[4] As Wolfgang Wagner notes, for example, 'the dynamic character of the EU leads to the particularity that her institutional order is subjected to an almost permanent bargaining process' (Wagner 1999, 415) (translation from original German text by AW).

[5] For the criteria, see the Commission website at http://europa.eu.int/scadplus/leg/en/lvb/e40001.htm.

[6] For a critical perspective towards the 'club' approach, see Wallace 2002.

[7] On the hierarchy of norms in European law, see Bieber and Salome 1996.

[8] According to Article 49 TEU: '[A]ny European state which respects the principles set out in Article 6(1) may apply to become a member of the Union.'

[9] For a debate over the role of international and European constitutional law, see the 'Schilling–Weiler/Haltern Debate' (Schilling, Weiler and Haltern 1996) in which Schilling insists on distinguishing between the two approaches (Schilling 1996) while Weiler and Haltern argue that '*the blurring of this dichotomy* [international and constitutional] *is precisely one of the special features of the Community legal order and other transnational regimes*'. See Weiler and Haltern 1996, 1 (emphasis added). According to the latter authors, the key features that distinguish the European legal order from public international law involve 'the different hermeneutics of the European order, its system of compliance which renders European law in effect a transnational form of "higher law" supported by judicial review, as well as the removal of traditional forms of State Responsibility from the system'. See, Weiler and Haltern 1996, 2 at www.jeanmonnetprogram.org/papers/96/9610.htm.

[10] The existence of European constitutional law is usually derived from the constitutionalization of the Treaties.

international law[11] which deserve attention. The case is interesting since it has aroused little attention from either lawyers or political scientists despite raising analytical questions with relevance to a more interdisciplinary approach in both academic fields.

The case at hand can briefly be summarized as follows. The candidate countries are involved in complying with the internationally agreed conditions for membership according to the Copenhagen accession criteria up until the point of accession. At this point their status changes from candidate to law-abiding member bound by the EU's constitutional texts. Meanwhile, the Member States take part in a constructive approach towards finalizing the constitutionalization of the Treaties according to the provisions agreed in the Amsterdam Treaty of 1997[12] and the subsequent declarations at the 2000 Nice intergovernmental conference (IGC) and at the 2001 Laeken Summit[13] to the point of constitutional change at the forthcoming IGC in 2004. This change will put them into the position of having to obey the rules they created.

This chapter's focus on what are termed the opposing rationales of enlargement and finality re-invokes the question about separate or blurred disciplinary boundaries from a political scientist's point of view. The intention is to raise the critical question about the actual absence of blurring disciplinary boundaries and the impact of that absence on studying seemingly separated but, as it is argued, ultimately related action rationales that guide policy and politics in the EU, and which are constitutive towards a new transnational politico-legal order.

As part of the constitutional process leading up to the 2004 IGC, the two rationales – compliance with the accession criteria, on the one hand, and the debate over political finality, on the other – embody traits of the intellectual symbiosis highlighted above. They are interrelated and

[11] That is, 'international laws are thought *not* to be obeyed and the governance of international institutions and their norms *not* to be accepted' (Franck 1990, 6; emphases in text) unless discursive practices 'internalize' the interpretation of a new norm into the other partner's 'normative system' thus creating an interest in compliance with international conventions or treaties through 'transnational interactions' (Koh 1997, 2646; see also Chayes and Chayes 1995).

[12] On the necessary reforms for enlargement, see Protocol No. 7 to the Amsterdam Treaty; for a detailed timetable on institutional reform between the Amsterdam IGC and the Nice IGC, see the Commission's website at http://europa.eu.int/comm/archives/igc2000/geninfo/index_en.htm.

[13] For the Laeken Declaration, see http://belgium.fgov.be/europ/en_decla_laken.htm; for the Presidency Conclusions of the Nice Council Meeting (7–9 Dec. 2000), see http://ue.eu.int/Newsroom/LoadDoc.asp?BID = 76&DID = 64245&LANG = 1.

constitutive towards the evolving institutions of a new transnational order. Yet, while both enlargement and finality involve interactive practices, interaction in the enlargement process excludes the possibility of changing the rules that guide the practice of compliance. In turn, interaction in the finality debate is precisely geared towards innovation and change. This chapter highlights the apparent anachronism of the two action rationales by situating both within a 'larger process of transformation' (Tilly 1984). As part of this process, the practices of both enlargement and the finality debate are constitutive towards transnational institution building.[14] Considered from this analytical angle, the hermeneutic limits of a 'behaviourist approach to compliance', that values structure over agency and hence reduces the possibility of changing the rules, can be circumvented. It therefore allows a fresh view of the very practices that are part of the enlargement process, i.e. the interactions between the involved actors such as the candidate countries, Member States and EU representatives which are constitutive for institution building in the transnational realm, forging socio-cultural trajectories and social institutions in the process. Both are central to norm resonance and the implementation of legal rules, as will be discussed further below. Viewed within this larger context then, this chapter seeks to demonstrate that both the compliance and the finality rationale do have an impact on the substance of the evolving proto-constitutional setting in Europe.

Case: logics and action rationales

Both the enlargement process and the constitutional bargaining process are expressions of the same structural pressure, namely the logic of integration which states that all European and democratic states which have achieved particular economic, administrative and political standards defined in the accession *acquis* may join the EU. Yet, both processes differ considerably according to their respective action rationales. The difference between the processes lies in the possibility of institutional change (i.e. of norms and rules) entailed in each, and which may or may not result from social interaction in each process.[15] For example, the rule-following

[14] On the relational approach to state building, see Tilly 1975; on the discussion of constitutive practices and institutional change towards a new political order in world politics, see March and Olsen 1998.

[15] For a conceptual discussion of the possibility of change as a result of political process according to realist and constructivist approaches in international relations theory, see in particular Fierke 2002.

rationale that guides the enlargement process excludes contestation and change of norms and rules. Its only potential opening towards negotiation is the bargaining situation in which compliance rules are agreed.[16] This situation, in which rule-following action is structured with legal or normative pressure, is therefore the key arena in which understanding and a potential for norm resonance is developed through interaction.[17] In turn, the constructive rationale in the process of constitutional bargaining is geared precisely towards institutional change as the outcome of contentious deliberation. It is argued that the logic of integration (i.e. all European and democratic states will eventually come together to collaborate within one polity) which has replaced the logic of anarchy in the international realm (i.e. in the absence of government, states will not cooperate) as the context of political (inter)action in Europe exerts structural pressure for institutional adaptation on all actors – Member States, candidate countries and EU political organs.

Yet the two processes of enlarging the EU and debating its finality unfold according to two types of action rationales which differ crucially in their respective impact on change as a consequence of social interaction. Thus, the finality debate in preparation for the constitutional bargain at the 2004 IGC not only allows but also explicitly asks for the contestation and change of substantive and formal rules of the Europolity. After all, the goal of the constitutional debate is to change the current constitutional framework based on a negotiated compromise which refers to shared frameworks of reference. This constructive rationale thus entails social interaction such as deliberation and argument with a view to identifying and changing the formal institutional framework, i.e. the Treaties. Even though the interaction will largely remain limited to the exchange between elites, in this process social interaction is not a mere rule-following

[16] Key debates on why actors comply have been generated within international relations theories that relate political decisions and behaviour to the concept of law. Friedrich Kratochwil pinpointed the key question of this debate as 'why actors follow rules, especially in a situation of alleged anarchy' (Kratochwil 1984, 685). The elaborations on this question involve discussion of, for example, Zürn's point on the significance of the 'manner in which norms are generated' in a supranational context: for example, whether or not they are 'produced in the context of legitimate norm-forming processes' (Zürn 2000, 2). On the development of informal bargaining contexts that create frames of reference, see Risse 2000 and Puetter 2001.

[17] On the contested role of the 'legalness' of such norms, see in particular Finnemore and Toope who raise the question 'if policy makers do not know and do not care about the legal status of . . . rules, what reason do we have to think that "legalness" matters at all in compliance with norms?' (Finnemore and Toope 2001, 701).

activity but a constructive activity as well. In turn, compliance with the accession *acquis* excludes the possibility of contestation and change of substantive and formal issues. The compliance rationale states that, in order to acquire membership in a club, newcomers need to accept, adopt and follow the rules of that club. The rules are clearly stated and are not up for debate. For the candidate countries this implies a straightforward carrot–stick or means–end oriented behaviour. They are expected to initiate the adaptation of their respective administrative, judicial, political and regulative institutions according to European standards and conditionality so as to ensure compatibility with the Europolity. The logic of the compliance rationale is then set by this behaviour. It is neither expected nor supposed to change as a result of social interaction in the duration of the compliance process.[18]

Timing

The logic of collaboration towards integration and enlargement has created a situation of time pressure towards constitutional change in the EU. In light of this pressure, not only the substance of the forthcoming constitutional bargain but also the resonance with it in the 'fifteen-plus' domestic constitutional settings raise questions. While it has been observed that 'the timing is simply wrong' (Schmitter 2000, 1), the countdown of the constitutional process with a view to producing a constitutional agreement in 2004 has nonetheless begun. Notwithstanding the long, ongoing constitutionalization that has inspired countless more or less specific, if repeatedly stated, definitions among lawyers and political scientists which largely focus on 'the formation of a fairly structured polity' in the EU,[19] the prospect of moving towards a particular point at which massive widening and decisive deepening are scheduled has raised expectations and concerns about substantive and specific formal changes of the EU's constitutional framework. The relatively quick move has two major implications which this chapter will address in turn. The first implication is the much discussed issue among political scientists of institutional adaptation in the candidate countries, the Member States and the Europolity. That is: first,

[18] The constructive impact of social practices both on the evolving norms of constitutionalism within the Europolity over time and on the rule-following practice in the process of compliance with European (double) standards in the enlargement process is dealt with in more detail later in this chapter.

[19] See Castiglione 2002, 1; for discussion of the term see an overview in Schepel 2001, and extensive discussion in Craig 2001.

the candidate countries are under pressure to produce institutional change according to the conditions for accession; second, the Member States are expected to adapt to changes in a number of core policy areas including budget policy, agricultural policy, and justice and home affairs; and third, the Europolity's formal institutional framework will have to change as well. The second implication is the debated issue – particularly in legal and public and/or party-political circles – of political finality and substantive constitutional change. It involves philosophical issues of constitutional principles, the practices that forge and identify these principles, and the procedures to establish and safeguard these principles in the long run.

Institutional mis/fit

Analyses of institutional adaptation raise the question of 'fit/misfit' that has been studied extensively within the framework of Europeanization and the compliance literature.[20] By contrast, studying the implementation of, and/or resonance with, constitutional principles is less straightforward because it leads the researcher beyond the boundaries of 'material resources' towards exploring the terrain of 'associative resources'[21] and, depending on research perspective and interest, into the intellectual territories of law and sociology. In other words, in addition to the familiar material resources that define formal institutional fit or misfit, studying constitutional principles requires an analytical focus on informal and less tangible phenomena such as meanings and interpretations. In the social sciences, both types of resources are defined as institutions, albeit on a range from formal to informal (or 'soft' institutions).[22] They guide action and result from interactive social practices. The difference in studying each type of resources, material and associative, lies in understanding the way in which their respective impacts on politics unfold. Thus, formal institutions, such as administrative rules and procedures, are tangible and can be changed or adapted relatively quickly, to the extent that, in cases of misfit with the European model, change and adaptation are required.[23] In

[20] See, for example, Börzel and Risse 2000; Joerges and Zürn 2003.

[21] On the former, see Pierson 1996; on the latter, Wiener 2001.

[22] On the definition of soft institutions such as norms and rules, see in particular: March and Olsen 1989; Finnemore and Sikkink 1998; March and Olsen 1998; Jepperson, Wendt and Katzenstein 1996; Ruggie 1998; Kratochwil 1989; and Wendt 1999.

[23] Here, the Europeanization literature would add that misfit, and hence friction, increases the chance of Europeanization: see in particular the contributions in Cowles, Caporaso and Risse 2001.

the case of informal institutions, e.g. constitutional principles of equality or norms such as minority rights or gender rights, the question of fit or misfit is not as easy to establish (since the boundaries of associative resources are fuzzy), nor are constitutional principles as quick to adapt to predefined rules (since their meaning is embedded in particular contexts in which socio-cultural trajectories facilitate interpretation and understanding). While the degree of fit with European constitutional principles can hence be qualitatively assessed according to variation in associative connotation, adaptation to the respective European standards is less easily achieved, for constitutional principles are fuzzy in all contexts, European and domestic alike. It is this fuzziness which makes the associative resources that are central to the current constitutional process analytically so hard to handle.[24]

Theoretical framework and argument

The argument draws on two theoretical perspectives which are interdisciplinary in so far as they straddle the boundaries of law and the social sciences. The first perspective is a societal approach to compliance that builds on Habermas's facticity–validity tension (Habermas 1992) in order to elaborate on the societal impact on norm resonance across different contexts in world politics.[25] The second perspective draws on critical approaches to law in society, stressing the interrelation between social practices, the constitution of social institutions, and the impact of the law.[26] Since they do not begin with the assumption that successful implementation and institutional design are directly related, both offer helpful insights into addressing the mismatch between nominally agreed constitutional rules and norms (facticity), on the one hand, and their interpretation within their respective contexts of implementation, i.e. the EU Member States and candidate countries (validity), on the other. Underlying the following elaborations is an understanding of the term 'institution' as 'a group of laws, usages and operations standing in close relation to one another, and forming an independent whole with a united

[24] At the same time, however, fuzziness can be an asset, as this chapter seeks to reveal.

[25] For an elaboration of the 'societal approach' as opposed to the 'compliance approach' and the 'arguing approach' to norms in world politics, see Wiener 2002.

[26] For several contributions to this perspective which do not necessarily share a theoretical approach yet which all stress the interrelation between societal institutions, social practices and the impact of legal rules, see in particular: Shaw 1996; Curtin and Dekker 1999; and Finnemore and Toope 2001.

and distinguishing character of its own'.[27] The advantage of this rather flexible definition of an institution as including norms, rules and procedures over narrower definitions that understand institutions as social facts which entail behavioural rules either as collections of practices and rules or as standardized norms,[28] is the respective impact on, and relation with, actors' behaviour.

Law and society: social institutions

According to an Aristotelian perspective: '[C]onstitutions institutionalize the whole even as they themselves consist of an aggregate of institutions.'[29] The particular role of a constitution, from this perspective, lies in the fact that 'institutions also protect rules from changes in society *and* make it possible for rules to change with such changes'.[30] A constitution is then understood as a set of rules, norms and procedures which are rooted in a particular system of core constitutional values. These values include, most importantly, understandings about the legitimate organization of internal and external sovereignty, i.e. citizenship and borders, within this constitutional system. A constitution thus entails the legally confirmed rules that *ought* to be respected and followed within a particular polity. Whether or not the thus established substance of a constitution is, however, socially accepted, i.e. whether or not it resonates within a particular societal context, depends on the matching network of social institutions, or more generally on socio-cultural trajectories.[31] 'In other words, there is a direct relation between legal norms and rules – as objective thoughts – and

[27] See Onuf 2002, 218; cf. Lieber 1859, 305. As Onuf adds, '[E]ven today, it would be difficult to improve on this definition, which makes rules working together "through human agents" the central feature of any institution.'

[28] For a political science perspective to norms/institutions, see Finnemore and Sikkink 1998, 891; for an organizational approach see March and Olsen 1998, 948.

[29] See Onuf 2002; 218; cf. Lieber 1859, 343–6.

[30] See Onuf 2002, 222 (emphasis added); cf. Bull 1977, 56.

[31] As Deirdre Curtin and Ige Dekker write, '[T]he definition of legal institutions as a presentation of a state of affairs that ought to be made true in practice brings with it two conceptual realities. In addition to legal institutions, which are valid by virtue of a comprehensive legal system, so-called "social" institutions exist, in other words societal practices corresponding to the system of norms and rules of the legal institutions' (Curtin and Dekker 1999, 90). For a similar perspective, see Max Weber's observation that '[T]he legal rule perceived as an "idea" is not an empirical pattern or "organized rule", but a norm which is thought of as "ought to apply", that is surely not a form of being, but a value standard according to which the factual being can be evaluated, if we want juridical truth' (translated from the original German citation by the author) (Weber 1988, 349).

social reality' (Curtin and Dekker 1999, 91). Or, more broadly speaking, '[t]o be effective, obligation needs to be felt, and not simply imposed through a hierarchy of sources of law' (Finnemore and Toope 2001, 754). While it remains to be established how to measure this 'feeling' according to academic perspective and approach (e.g. behavioural or relational), for the time being it is important to note that, in order to be effective, the norms, principles and procedures of the constitutional text need to be matched by a set of social institutions in order to facilitate resonance with the constitution's substance.

In contrast to the constitutional text, social institutions are generated through social practices. They provide a contextualized filter, so to speak, through which the constitutional text gains meaning and political power. Depending on context, then, interpretations of constitutional substance differ. This variation in interpretation increases in situations where the constitutional substance is constituted outside the boundaries of a domestically established state of law, such as in the Europolity. That is, in situations where the socio-cultural trajectories and social institutions provide little overlap, divergence in associative connotation of constitutional substance prevails. This divergence is further increased by a number of contextual variables that enhance difference in associative connotations with 'Western' constitutional substance. As will be demonstrated, the emerging transnational order of the Europolity does indeed include social institutions that enhance the interpretation of, and resonance with, European transnational law. It also reveals, however, that, given this order's status of becoming, the enlargement rationale seems increasingly to lack legitimation. As the case studies below will show, the candidate countries are obliged to follow (double) standards, an interactive process which by itself creates standards that are not conducive to resonance with European constitutional norms.

The link between the 'oughtness' of legal texts and societal conditions that facilitate understanding and realization of constitutional rules and norms can be summarized in two propositions. First, the more interrelated constitutional rules and norms are with socio-cultural trajectories, the better the match between constitutional substance and societal acceptance. Second, the likelihood of resonance with constitutional norms increases with the degree of organic interaction that precedes the constitutional agreement. It follows that, in order to assess the degree of domestic resonance with European constitutional substance, it is necessary to identify the respective societal institutions such as rules, norms and procedures, in addition to the constitutional substance, in the three types

of contexts involved.[32] Both are difficult to assess since the oft-mentioned, albeit still analytically challenging, perspective on the EU as an ongoing stage of 'becoming' puts on academics and politicians alike a constant pressure of acting or arguing 'as if' the EU were an international organization or a state, despite being perfectly clear about the constraint entailed in the EU's status as both 'anti-state' and 'near-state' (Shaw and Wiener 1999). The enormous constructive potential of this analytical fuzziness has proved particularly difficult to exploit for the dogmatic legal tradition that prevails on the European continent and for political scientists, most notably those lawyers and political scientists who follow the conceptual trails laid down by the discipline of 'state sciences' (*Staatswissenschaften*) or, indeed, rational choice approaches to politics. In turn, theorists who are primarily interested in analysing process and change find the EU a less challenging object of study. Indeed, it is probably fair to say that to this group of academics (which includes lawyers and political scientists with a focus on meta-theoretical, socio-historical, cultural and constructivist theorizing) the EU represents a case that demonstrates most clearly processes that are less obvious or visible in other circumstances, namely the crucial role of process, practices and becoming in world politics. It is this focus on process, practices and becoming which suggests that the two apparently opposing rationales of rule-following and constructive debate are actually constitutive towards the transnational European order. Absent supranational statehood,[33] it is precisely the perspective of impossibility attached to constitution building beyond the state that enhances the dynamic of the constitutional debate.[34]

Facticity and validity: social practices

The societal approach to compliance centres on the observation that norms entail a 'dual quality' of both structuring and construction. It states that norms acquire social properties through their relation with social practices in particular contexts. Their meaning thus reflects, and is

[32] This chapter's limits do not allow for such an extensive empirical study. Instead it explores the link between social practices and institution-building, on the one hand, and societal institutions and law, on the other, as two conditions for resonance with the constitutional substance that stands to be negotiated at the forthcoming IGC in 2004.

[33] See the *Maastricht* ruling of the Second Chamber of the German Constitutional Court, 1993, BVerfGE 89, 155 – Maastricht.

[34] See also Bruno de Witte's cautionary use of the term 'European constitution' which he finds to 'presuppose a broad understanding of the term "constitution", cutting the umbilical cord connecting the constitution and the nation-state' (De Witte 2002, 39).

reconstructed by, social interaction (Wiener 2002). Absent social interaction, the meaning of norms is neither produced nor recognized (Kratochwil 1989, Onuf 1989). It follows that, to understand the role and function of norms, it is necessary to recall the practices that contributed to their origin. According to this approach, it is not only norms that are contested (which norm is valid?) but also their meanings (which meaning of a norm is valid?). Furthermore, norm validation does not exclusively take place in supra- or transnational contexts, but in domestic contexts as well. The transfer of norm validation between political arenas therefore must be considered as posing an additional challenge to norm resonance. Finally, norms entail varying degrees of prescriptive force. While 'thick' norms entail clearly defined, albeit contestable, prescriptive normative force, 'thin' norms usually lack clear prescriptions that would work like standardized rules. They are therefore open to various projected meanings.[35] Thin supranational norms raise the stakes for norm resonance in domestic contexts. They cause political reaction and make norm resonance unlikely. The type of political reaction depends on the socio-cultural trajectories that inform the interpretation of norms, as, for example, the nationally informed expectations about Union citizenship demonstrated.[36] It can be expected that, in the absence of a constitutional compromise on the supranational level, i.e. an agreement on 'thick' constitutional norms including shared norm validation and meanings, the potential for projected meanings of norms will undermine norm resonance and hence the political success of the constitutional process in the EU. That is, the absence of knowledge about what constitutional substance means in the current and future Member States opens the field for normative projection, which in turn is prone to generating political unrest, objection and backlash.

The type of constitutional change resulting from the supranational constitutional bargain is likely to entail 'thin' as well as 'thick' institutions. In contrast to substantiated and clearly defined thick institutions that entail standardized rules for behaviour, such as the EU legislation on the environment or on equal pay,[37] thin institutions carry few or no prescriptions for behaviour. They are therefore likely to bring conflicting expectations and public contestation to the fore. In other words, resonance with the institution's substance cannot be taken for granted. While compliance with

[35] I thank Theresa Wobbe for this specification (conversation in Berlin on 31 August 2002).

[36] These expectations were not informed by the 'thin' supranational institution of Union citizenship, but were rooted in national practices of citizenship, thus expecting Union citizenship to mean something akin to national citizenship (Wiener 2001).

[37] See Articles 175 and 141 EC Treaty, respectively.

either type of institution depends on whether or not the institution as a fact (facticity) resonates with the expectations raised in their respective contexts of implementation (validity), thin institutions are more likely to cause contention, as the reactions to Union citizenship[38] demonstrate. Politically, thin institutions pose a potentially greater hazard, precisely because clear rules of prescription undermine the certainty of behavioural predictions. The detached existence of Union citizens from 'their' polity, or, for that matter, the lack of social glue between the citizens and the European institutions, enhance the possibility of unintended consequences triggered by institution-building in the European non-state as the lack of prescriptive rules is enhanced by the perception of the Treaties as distant and empty.

In order to bridge this gap, a dialogic approach to politics builds on the two basic principles of constitutionalism and democracy; it is expressed by a third principle of constitutional recognition. The principle of constitutionalism implies that the discussion of successful norm-implementation needs to consider the (conceptually ingrained) power of norms. In other words, the fact that '[r]easonable disagreement and thus dissent are inevitable and go all the way down in theory and practice' must be appreciated, since there 'will be democratic agreement and disagreement not only *within* the rules of law but also *over* the rules of law' (Tully 2002, 207). It implies that deliberation over norms in bargaining situations is unlikely to cover the whole story if it is dealt with exclusively as a 'snapshot' situation. Instead, deliberation – as communicative action – is not reduced to a mere performance within a system of rules, but bears the potential for changing that system at the same time. In turn, the principle of democracy

> requires that, although the people or peoples who comprise a political association are subject to the constitutional system, they, or their entrusted representatives, must also impose the general system on themselves in order to be sovereign and free, and thus for the association to be democratically legitimate . . . These democratic practices of deliberation are themselves rule governed (to be constitutionally legitimate), but *the rules must also be open to democratic amendment* (to be democratically legitimate).[39]

It follows that, in principle, democratic procedures are a precondition for establishing the validity of norms. '[I]nstitutionalized deliberation and public debate, must, indeed, interact' (Joerges 2002, 146). According to

[38] See Articles 17–22 EC Treaty. [39] See Tully 2002, 205 (emphasis added).

the principle of constitutional recognition (Tully 1995), it is not the act of staking out more or less overlapping individual claims but the process of discussing the validity of such claims which will eventually produce shared constitutional norms. The challenge for the constitutional bargain thus, according to this principle, lies in establishing some sort of constitutional mechanism that warrants ongoing dialogue about cultural diversity. As Tully writes:

> [P]erhaps the great constitutional struggles and failures around the world today are groping towards a third way of constitutional change, symbolized in the ability of the members of the canoe to discuss and reform their constitutional arrangements in response to the demands for recognition *as they paddle*... [A] constitution can be both the foundation of democracy and, at the same time, subject to democratic discussion and change in practice.[40]

The ongoing debate over constitutional claims sets a framework in which agreement on shared values can be forged – and contested. This type of dialogical interaction between differing claims offers an alternative to competing over often mutually exclusive constitutional standpoints. Indeed, '[r]ealising this dialogical approach involves rethinking the role of both constitutions and democracy within the EU' (Bellamy and Castiglione 2001, 13). Establishing fair and equal conditions for the participation in dialogical interaction on constitutional substance thus has implications beyond the participatory dimension. It is constitutive for the evolving constitutional meaning itself. Yet, it has been observed that, as it stands, the EU does less to encourage and safeguard such dialogues than it does to 'circumnavigate' them.[41]

Argument

In the context of the wider Europe the compliance rationale leads to a focus on institutional adaptation within the national polities of the candidate countries. The most remarkable aspects of the compliance process are twofold. On the one hand, the norm-following candidate countries are not supposed to 'bargain' over the accession criteria once these have been set. Their performance is judged on strictly formal changes in the respective national institutional arrangements. On the other hand, and

[40] See Tully 1995, 29 (emphasis added).

[41] This is precisely where Bellamy and Castiglione (2001, 14) locate 'tensions within the EU'.

following the static and past-focused compliance rationale, the candidate countries are required to comply with norms that are *per se* defined in the past, and which, in addition, have been found to lack precision themselves. Compliance in the current enlargement process means institutional adaptation so that full membership in a community becomes possible. Yet, in the light of the ongoing constitutional debate and the focus on political finality, it is not even obvious what this membership will eventually mean: for example, 'Membership in *what*?'[42] Club or community? And, if the latter, what type? Here, recent efforts to theorize enlargement suggest membership in a club[43] while, by and large, the constitutionalism literature stresses membership in a community, if reluctantly and for want of a better term. According to the argument presented in this chapter, both assumptions need to be discarded as they provide insufficient information in the light of the social practices involved in the compliance process, on the one hand, and the evolving and contested norms that emerge in relation to these practices, on the other. After all, the boundaries of the EU are in flux, its political and legal rules are under ongoing construction, its constitutional status is one of becoming. In this context, the role of shared informal rules and practices, or the emerging soft institutions of postnational governance, provides an increasingly stabilizing function for politics.[44] This potentially important role notwithstanding, norms are subject to contention and reconstruction in relation to social practices. Their origins, roles and functions are therefore central to understanding governance in postnational times.[45]

When considered as a social practice as opposed to a mere act of rule following, compliance processes offer an additional angle that exceeds the behavioural dimension and brings the constructive dimension to the fore. This dimension matters in the European context in particular, since the EU is neither a club with clear boundaries or rules of entry, nor is it a constitutionally entrenched community with shared values and a common identity. From this background I seek to demonstrate how and

[42] See James Caporaso who wrote, with reference to citizenship in the Europolity, '[I]f citizenship is still thought of as membership, this approach raises the question "membership in *what*?"' (Caporaso 2004, 4).

[43] See Schimmelfennig and Sedelmeier 2002; for criticism see Wallace 2002.

[44] They may be likely to turn into something akin to a *Grundnorm* which provides guidance on the nature of legitimate governance beyond state boundaries.

[45] On the observation that studying the role of norms does not only involve their impact, but also their origin, see Ruggie 1998, 13.

why the opposing rationales of enlargement and constitutional process in the EU are interrelated, and how their interrelationship has an impact on emerging transnational institutions and hence the resonance of European constitutional substance.

The argument develops as follows. The behavioural approach identifies the reasons for actors' *interest* in compliance with norms, including, for example, acceptance, pressure, shaming or membership in either informally or formally constituted international communities, such as the global security community, the global society of civilized states or the OECD community, on the one hand, or the EU, on the other. Here, the research focus is on strategic choice at one point in time. In turn, the societal approach raises questions about the *impact* of compliance, e.g. how does compliance with norms resonate within particular contexts? The research focus is on the social practices in context. Put this way, the rules and norms defined by the different types of international documents can be studied within one single research framework as the research interest is no longer defined according to the central question of why comply?, but instead elaborates the constitutive dimension about the impact of compliance (Wendt 1998).

The distinctive action rationales, it is held, have political impact in the long term. According to a behavioural approach to compliance, the firm conditions for accession that structure the enlargement process are expected to lose political impact once enlargement is completed. The societal approach to compliance contradicts that claim. Building on the assumption that norms entail dual qualities, it is suggested that, as a practice, rule-following during the enlargement process is constitutive and therefore has an impact on the meaning of, say, minority rights. The general rule here is that the less clearly defined a norm, the more prone to projection and change through social practices it becomes. This is the case with a number of accession standards, a prime example being minority rights, which are not defined under the Treaty yet have been added to the accession *acquis*.[46] The meaning of minority rights is therefore likely to be coined by the enlargement process. It is expected that this meaning will loop back into the EU context. To elaborate on these observations, this chapter thus goes beyond the obvious question for political scientists about the likely outcome of a constitutional bargain and the likelihood

[46] For this observation and analyses see De Witte 1998; Amato and Batt 1998; Schwellnus 2001; and Wiener and Wobbe 2002.

of a constitutional compromise vs. a highest common denominator outcome at the 2004 IGC. Instead, it is argued that even if a constitutional bargain is struck, the question of domestic resonance with the rules and norms agreed among elites during the IGC remains. The bottom line of the argument is thus not to make normative claims about the necessity of a European constitution, nor is it to provide a political outlook on the future of the Europolity. Instead, I am interested in the long-term impact of compliance as a social practice and its constructive impact on the evolving norms of constitutionalism in the transnational European order. To suggest but a few possibilities as to how this constructive impact might evolve, given that the routinization of practices in particular policy areas establishes procedural rules that guide subsequent policy making (Tilly 1975, Kosłowski and Kratochwil 1994), possible outcomes of the current enlargement process may be, for example, the institutionalization of the policy of conditionality as a resource with a view to slowing down future enlargement processes; and the redefinition of the interpretation of minority rights which may turn out to be relevant beyond the enlargement process, for example by having an impact on the definition and application of minority rights policy in the 'old' Member States as well as raising critical questions about the EU's equality norm.

Evolving constitutional norms: a societal perspective

The structural pressure exerted on enlargement and constitutional change by the logic of collaboration towards further integration leaves little room for choice about the large issues, i.e. whether or not to enlarge and whether or not to change the EU's constitutional framework. The smaller issues, i.e. the policies which address the how and when of institutional adaptation and constitutional change, leave more room for strategic choices. In this situation of major change and normative entrapment,[47] the spotlight is on the practices and policy choices that are part of the processes of enlargement (e.g. conditionality) and constitution-building (e.g. the constitutional convention). While enlargement and constitutional change are by and large considered to be unchangeable and beyond critical discussion,[48]

[47] See Sedelmeier 1998; Schimmelfennig 2001; and Schimmelfennig and Sedelmeier 2002.

[48] Thus, Joschka Fischer, then President of the Council of Ministers, stressed: '[A]fter the Cold War the EU must not be limited to Western Europe, instead at its core the idea of European integration is an all-European project. Geopolitical *realities do not allow for a serious alternative anyhow*. If this is true, then *history has already decided about the "if" of eastern enlargement, even though the "how" and "when" remains* to be designed and decided.' See

the way both processes are orchestrated does create space for debate. Indeed, the practices underlying both processes do leave room for manoeuvre, adaptation and critical assessment. The intention of this and the following sections is therefore to explore this window of opportunity by relating the 'how', i.e. the impact of constitutive practices first on evolving European constitutional norms, second in the process of compliance, and finally in the current constitutional debate, with a view to offering an empirical basis from which to assess the 'what', i.e. the outcome that results from routinized practices, norms and shared understandings in the evolving transnational order.

European constitutional norms

In the following sections, I first identify a selection of evolving constitutional norms in the long-term process of European integration, and then turn to the compliance process.

Cooperation towards integration

It is by now commonly accepted that the EU, although once 'merely' a regime, has developed institutional features that reach beyond its original institutional and political design, and certainly beyond the purpose of managing economic interdependence.[49] While it was originally 'conceived as a legal order founded by international treaties negotiated by the government[s] of states, the high contracting parties, under international law and giving birth to an international organization' (Weiler 1997, 97), its current political quality is significantly different. As it now stands, it is not exclusively based on the original set of political and legal institutions, but has come to include shared norms, commonly accepted rules and decision-making procedures. Indeed, the 'constitutionalism thesis' would argue that 'in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law' (*ibid.*). Decision-making in the 'European' polity is not only guided

Die Zeit, 21 January 1999, 3 (emphases added). See also the Nice Summit Presidency Conclusions which state that: '[T]he European Council reaffirms the historic significance of the European Union enlargement process and the political priority which it attaches to the success of that process.' See http://ue.eu.int/Newsroom/LoadDoc.asp?BID = 76&DID = 64245&LANG = 1, at III.

[49] See Bogdandy 1999 and Pernice 1999.

by the shared legal and institutional property, the *acquis communautaire*, it is also both the result and part of an ongoing process of construction. For example, overriding national interest in particular issue areas has become a shared principle that is legally grounded in the practice of qualified majority voting in the Council of Ministers. In accepting this rule, *cooperation between states* has acquired the meaning of *cooperation towards European integration*. In the Europolity cooperation, therefore, entails more than the sum of the cooperating actors and the rules that guide them. It represents a belief – however contested and diffuse – in the project of integration.[50]

Shared democratic norms

General principles underpinning shared democratic norms in the EU include, for example, 'the right to equality' or the 'principle of legal certainty'. More generally, the Treaty involves four main groups of general principles, including rules and standards, economic freedoms, an emerging group of political rights, as well as a yet to be properly defined body of fundamental rights (Shaw 2000, section 9.2). From a legal perspective, the validity of these four groups of rights has been demonstrated by frequent and key references in court rulings.[51] From a political science perspective, democratic norms mainly include election procedures which allow citizens to vote and be elected in their community of residence.[52] This right has been brought to the fore in frequent contributions to the process of 'European' citizenship practice. Specifically, the European Commission has referred to the norm of equal access to political participation in the community where an individual is a resident with a view to establishing voting rights for EU foreigners (Wiener 1998, ch. 8). It has hence been taken on and referred to by advocacy groups that seek to establish voting rights not only for all EU nationals, but also for third-country nationals.[53] The important contribution of practices in the process of establishing shared norms has been specifically demonstrated by citizenship studies, reflecting the observation that a constitution is as legitimate as the procedure that has

[50] Helen Wallace makes a similar point in relation to the little-developed discussion about alternatives to European integration or, for that matter, European enlargement: see Wallace 2002.

[51] See, for excellent overviews of the courts' rulings and their impact on integration, among many others: Craig and De Burca 1998; De Burca and Weiler 2002; and Shaw 2000.

[52] See Article 19 EC Treaty.

[53] On the legal conditions for third-country nationals, see an overview by Hedemann-Robinson 2001. See also Shaw 2002; Day and Shaw 2002, 2003. On the normative reasoning for third-country nationals 'as Euro Citizens', see Follesdal 1998.

led to its implementation.[54] This dictum is as valid for citizens as for states as the constituent units of a polity.[55] Based on the discussion of different types of norms (social and legal), the distinction between the dual quality of norms (constructed and constitutive) and the impact of different types of norms in relation to their respective institutional and constitutional contexts, the following sections focus on the analysis of compliance and finality in the European constitutional debate.

Compliance with European (double) standards

As this section demonstrates, emerging 'double standards' in various policy areas such as human rights, minority rights, budget policy and freedom of movement for workers fly in the face of equality as a shared European constitutional norm and a key value in the finality debate.[56] Indeed, the lack of shared reference frames provided by the norm-setting EU for the norm-following candidate countries even with regard to accession criteria such as respect for minority rights or rules for national administration has been noted (Dimitrova 2001, 27). If the project of building, designing, revising or otherwise working on a European constitution is pursued, this context makes a successful development of the basic functions of a constitution, i.e. the foundation of legitimate authority and the task of social integration, problematic.[57] The following paragraphs briefly summarize the emerging two-class approach to EU membership by pointing to emerging deviations from the principle of equality in various policy areas.[58]

[54] See Wiener and Della Sala 1997; Lord 1998; and Hansen and Williams 1999.

[55] For example, studies on the concept of 'good international citizenship' which promotes an ethical foreign policy stressing the impact of moral principles such as the respect for human rights norms, over material gains in international politics (Wheeler and Dunne 1998).

[56] Note that equality is understood here as a norm that evolves through social practices and which therefore does not necessarily offer a sound basis for a legal case. Thus, the nature of that equality norm has always been a problem, in that it has always at least partially distinguished between insiders and outsiders (Article 12 EC), and also, so far as it is a general norm (e.g. equality in treatment of traders under the CAP or the customs union), it has always had to cede ground, as appropriate, to countervailing policy reasons, i.e. a lack of equal treatment can be justified. (I thank Jo Shaw for this observation.)

[57] On the basic functions of a modern constitution, see Frankenberg 2000, 258.

[58] See, for example, the observation by Danner and Tuschhoff, who find that candidate countries are about to turn into 'second-class members' (Danner and Tuschhoff 2002) at 2, www.aicgs.org/at-issue/ai-konzept.shtml.

Agricultural policy

Reactions to the Commission's proposals for enlargement negotiations,[59] in particular on the extended transition procedures in the area of free movement and agricultural policy, suggest that some Member States and candidate countries feel that they do not get what they have bargained for.[60] The lack of enthusiasm demonstrated by the Polish reaction to transition arrangements in the current eastern enlargement process of the European Union has not been received well in the EU. Jaroslaw Kalinowski, the Polish farm minister, 'attacked the European Commission's proposals [for incorporating new Member States into the EU's farm subsidy regime] as discriminatory, saying they were likely to leave the most efficient Polish farmers worse off after EU membership than they were before' and 'accused the EU of *double standards* for wanting to set in stone what new members would receive for the next 10 years, when the budget for the current EU was only set until 2006'.[61] This intervention was not well received in Brussels. Indeed, Poland was seen as causing 'irritation by demonstrating *an attitude of bargaining* that is often irreconcilable as well as by its *difficulties in understanding*'.[62]

Commission officials, like German Foreign Minister Fischer, tend to perceive enlargement and the political debate in the EU as two parallel events. Indeed, they insist on the separation of bargaining for membership from deliberation over substantive issues when stating that, for example, 'they [the candidate countries] *have to accept the rules of the game of the club* (of the 15 old member states), they have to implement our rules'.[63] When asked whether the participatory conditions for candidate countries in the accession process should be enhanced, another commission official replied: 'No, I don't think so... these are rules... and when you want to

[59] Note that the Commission proposes the draft negotiating positions. The Commission is in close contact with the applicant countries in order to seek solutions to problems arising during the negotiations. See: http://europa.eu.int/comm/enlargement/negotiations/index.htm.

[60] As the *Financial Times* reported, for example: 'Arguments over financing farm and regional aid in an enlarged EU represent the biggest potential obstacle to the successful conclusion of accession negotiations by the end of this year. Under the Commission's proposals, unveiled last month, enlargement would cost £40.2bn between 2004 and 2006. Poland, the biggest of the 10 states hoping to join the EU in 2004, rejects the Commission's proposals to phase in direct aid to farmers in new member states over 10 years. Meanwhile, existing EU states, such as Germany, the biggest contributor, are already manoeuvring to keep a lid on spending after enlargement.' *Financial Times*, 12 February 2002, 8.

[61] *Ibid.* (emphasis added).

[62] See *Frankfurter Allgemeine Zeitung*, 8 February 2002, 5. Translated from the original German text by the author (emphases added).

[63] *Ibid.* Translated from the original German text by the author.

become a member of the club, then these rules must be complied with... the rest can be negotiated once they are members of the club... I think that *for accession, one should set up a hurdle which they will have to deal with, see and accept*.'[64]

Instead of exploring the reasons for misunderstandings, the diplomatic discourse reveals the view of the candidate countries' duty to comply and the expectation that club membership comes at the cost of compliance. In a long-term perspective, however, such rigid expectations of compliance with EU rules may cause backlashes. A situation of lacking norm-resonance, such as the contested chapters on budget policy, might not even be in the EU's very interest once electoral politics come into play.[65] For example, Polish voters may feel compelled to vote against accession in order to maintain economic survival. As Mr Kalinowski pointed out, 'I need to convince our farmers to vote for accession... But how am I supposed to convince them if they will expect lower incomes after accession?'[66] Later that year Wladyslaw Serafin, president of the largest Polish farmers' union, 'Kolka Rolnicza', said that his organization would urge a 'no' vote on EU membership, adding that '[i]f EU proposals concerning the direct payments – I do not say 100 per cent – will not guarantee competitiveness to a Polish farmer, we will vote "no" in a referendum'.[67]

Minority rights

Observations on the request to comply with respect for minority rights as a condition of enlargement raise similar questions about double standards and a lack of resonance with accession norms in the candidate countries. Notwithstanding the Treaties, the European Commission added respect for minorities as a new condition for accession.[68] Thus the Copenhagen criteria stipulate:

> The Copenhagen European Council not only approved the principle of the EU's enlargement to embrace the associated countries of Central and Eastern Europe, it also defined the criteria which applicants would have to meet before they could join the Community.

[64] Interview with Commission official, EU Commission, Brussels, 28 August 2001 (emphasis added; this and all other interviews have been conducted by the author and are on file with the author).

[65] See, for example, Danner and Tuschhoff 2002; Merlingen, Mudde and Sedelmeier 2000.

[66] *Financial Times*, 12 February 2002, 8.

[67] See http://www.euobserver.com/index.phtml?aid = 7488 (9 September 2002).

[68] De Witte 1998; Fierke and Wiener 1999; Williamson 2000; Pentassuglia 2001; and Schwellnus 2001.

These criteria concern:

- the stability of institutions guaranteeing democracy, the rule of law, human rights *and respect for and protection of minorities* (political criterion);
- the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union (economic criterion);
- the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (criterion concerning adoption of the Community *acquis*).[69]

While in the Amsterdam Treaty conditions for enlargement are defined according to Articles 7 and 6(1) TEU, these conditions have been creepingly extended by informal EU policies. As Bruno de Witte noted less than a month after Amsterdam, 'the European Commission, in its opinion on the request for accession to the EU of a number of Central and Eastern European countries, insisted on the importance of what it called "respect for minorities" as one of the political criteria for membership in the European Union'.[70] Respect for minorities has hence been included in the EU's package of conditions for accession. Crucially, the acceptance of this condition is not expected as a result of formal procedures, since there are no legal instruments to put it into practice. Indeed, as de Witte observes,

> among the famous 'political criteria' set out by the European Union as conditions for the accession of, or – more generally – closer cooperation with, the CEECs [Central and Eastern European Countries], *the insistence on genuine minority protection is clearly the odd one out*. Respect for democracy, the rule of law and human rights have been recognized as fundamental values in the European Union's internal development and for the purpose of its enlargement, whereas *minority protection is only mentioned in the latter context*.[71]

Free movement

In the Chapter on Free Movement, the Commission also proposes limitations for the candidate countries. As the Commission explains:

> Research suggests that the impact on the EU labour market of *the freedom of movement of workers after accession should be limited*. However, it is expected that the predicted labour migration would be concentrated in

[69] See the Commission website at http://europa.eu.int/scadplus/leg/en/lvb/e40001.htm (emphasis added).

[70] See Agenda 2000 – Volume I: 'For a stronger and wider Union', 15 July 1997, 52, cited in De Witte 1998, 3.

[71] De Witte 1998, 5 (emphases added).

certain member states, resulting in disturbances of the labour markets there. Concerns about the impact of the free movement of workers are based on considerations such as geographical proximity, income differentials, unemployment and propensity to migrate. The EU was also worried that this issue threatened to alienate public opinion and to affect overall public support for enlargement.

The EU has not requested a transition period in relation to *Malta* and *Cyprus*. However for all other countries where negotiations are under way, a common approach has been put forward. Negotiations with the candidate countries are ongoing. The essential components of the transition arrangement are as follows:

- A two year period during which national measures will be applied by current Member States to new Member States. Depending on how liberal these national measures are, they may result in full labour market access.
- Following this period, reviews will be held, one automatic review before the end of the second year and a further review at the request of the new Member State. The procedure includes a report by the Commission, but essentially leaves the decision on whether to apply the acquis up to the Member States.
- The transition period should come to an end after five years, but it may be prolonged for a further two years in those Member States where there are serious disturbances of the labour market or a threat of such disruption.
- Safeguards may be applied by Member States up to the end of the seventh year.[72]

According to the transition rules agreed to among the negotiating partners of the current association procedures, the freedom of movement for citizens of the candidate countries will remain restricted, if for a limited period. Here, citizens may experience a growing feeling of unequal treatment under the EC Treaty that has all the potential to spark conflict in the Union.

Conclusion

The constitutional debate and the enlargement process follow internationally acknowledged, albeit informally constituted, rules of legitimacy. Thus, the constitutional process allows all EU Member States to participate in the bargaining process. Following the logic of consequentialism, argument and/or appropriateness, they are entitled and enabled to make their

[72] See the Commission website at http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/index.htm (emphasis added).

point within, first, the framework of the constitutional convention and, second, during the IGC itself. In the compliance process of EU enlargement, the rule-following candidate countries follow the internationally established procedural norms of good compliance, i.e. as applicants for membership in a club, they know that their interest in membership comes at the cost of rule-following. If both processes are perfectly in agreement with the shared rules of social legitimacy, why does this chapter challenge the fact that they are addressed as parallel rather than interrelated processes? Two reasons appear justified. First, the particular situation of a constitutional debate in relation to the forthcoming enlargement in the EU entails an important shift of actor identity from candidate to Member State role which is not without influence on behaviour. Indeed, as the enlargement case shows, with progress in compliance and reasonable expectations of the candidates to achieve membership relatively soon, the compliance rationale is taken less seriously by the candidate countries. As a consequence, notions of contention are gradually beginning to be mixed with rule-following behaviour on the part of the candidates. This deviation from the compliance rationale, while causing irritation on the part of the norm setters who expect the norm followers to comply, is not as problematic once placed within a long-term perspective. On the contrary, according to the societal approach to compliance, contestation is a crucial and necessary factor in the process of establishing the validity of a norm's meaning. Indeed, in the absence of contestation, norm validity is expected to be less stable, as the meaning of the norm remains thin and therefore prone to projections – a classic situation of unintended consequences of institution-building.[73] Secondly, the rules which the newcomers are expected to follow are not always clearly defined.

The constitutional debate: finality and compliance with evolving norms

The massive enlargement process currently under way has created pressure for institutional change in the EU. Member States and candidate countries, as well as the Europolity itself, are affected by the impending changes and pushed to (re)act in preparation for constitutional change and the enlargement which stands to be settled by a constitutional

[73] As Nicholas Onuf notes: '[T]he alternative to institutions by design are those that arise as the unintended consequences of self-interested human action' (Onuf 2002, 212). See also North 1990 and Pierson 1996.

bargain at the 2004 IGC. In contrast to previous enlargement rounds, at this point not only institutional adaptation but also constitutional reform have become a major political issue. It is reflected in a constitutional turn in European integration studies stretching beyond the boundaries of the legal discipline.[74] Indeed, constitutional issues appear in the jargon of European public and analytical discourse to the extent that it seems 'astonishing that so many scholars and politicians speak about the future constitution of Europe' (Zuleeg 2001, 1). As the Fischer speech emphasized, the major changes ahead reinforce the necessity to define the oft-mentioned 'finality' of European integration. Finality, as it was cast into the European constitutional debate, was intended to mean finishing the project of European integration, by adding the building block of political integration. As Joschka Fischer put it,

> what I want to talk to you about today is not the operative challenges facing European policy over the next few months, not the current [2000] intergovernmental conference, the EU's enlargement to the east or all those other important issues we have to resolve today and tomorrow, but rather the possible strategic prospects for European integration far beyond the coming decade and the intergovernmental conference. So let's be clear: this is . . . a contribution to a discussion long begun in the public arena about the 'finality' of European integration. (Fischer 2000)

Fischer thus clearly distinguished between the organizational or governance business that had been part of European integration for a long time, and the future project of constructing a common political community.

Finality

While the issue of finality has often caused little reaction apart from stifled yawns, at the current stage of massive enlargement discussions of finality are no longer as leisurely and idealistic as those of the European enthusiasts in the early decades of integration which resulted in papers on European identity, federal constitutions and political union which rarely passed the declaratory stage. Instead, the current pressure for institutional change requires a more hands-on approach to finality, i.e. identifying the

[74] However, the European constitutional debate is characterized by the absence of a shared constitutionalist approach. As Armin von Bogdandy notes: '[T]he divergence in approach and even the lack in systematic approaches to European Union law render an assessment of key approaches, main directions, and plausible decisions in the constitutional debate, an enormously complex exercise' (Bogdandy 2000, 209).

goal, purpose and limits of integration and specifying the measures for institutional reform for the more mundane reasons of political survival and perspective. If anything, Fischer's much-commented-on speech brought that message home. It was an invitation to think constructively, and the responses came from across Europe in debates over constitutional reform in politics, the media and academia. During the two years that followed the speech there were in fact few politicians or academics who denied an interest in the constitutional debate in Europe and a plethora of proposals were produced and discussed in public or semi-public settings. As a result, Ingolf Pernice observes that the 'constitution is no longer a taboo' in integration discourse (Pernice 2001, 3–4) and the 'constitutionalisation of the Treaties' has turned into an accepted policy objective.[75] Yet, this quantitative shift towards constitutional issues by no means indicates that a similar qualitative shift towards shared views on constitutional issues, let alone the emergence of shared European constitutional norms, is discernible as well. In fact, it is pretty obvious that the facticity of things constitutional and their validity do not go hand in hand. In other words, the constitutional debate brought a plethora of considerably diverging constitutional models to the fore, with little agreement on type, shape, legal status or substance of a constitutional text.[76]

The constitutional process seeks to revise the EU's Treaties with a view to enabling the EU to cope with the pending round of massive enlargement,[77] possibly adding to, but in any case changing, the constitutional quality of the Treaty. The enlargement process, in turn, follows primarily the logic of rule-following with a view to club membership.[78] While the constitutional process is relatively open regarding the substantive changes

[75] See, for example, European Parliament, Committee of Institutional Affairs, 2000, Report on the Constitutionalisation of the Treaties, Final A5-0289/2000, PE 286.949. Brussels: European Parliament. In this document the term 'constitutionalization' is applied to mean the drafting of a constitutional document, as opposed to the academic definition of the term as a process including sets of social practices that contribute to constituting and constructing the meaning of constitutional norms.

[76] The 2001 special issue of the *German Law Journal* expresses it thus in its editorial comments: '[T]he discussion about a European constitution, newly reignited by German Foreign Minister Joschka Fischer's speech last May, has been – so far – as thrilling as it has been disconcerting.' *Special Issue. Ever Closer, Ever Larger: European Constitutionalism – Quo Vadis?*, www.germanlawjournal.com, 1.

[77] Thirteen states currently have accession partnerships that entitle them to make membership applications to the EU. They are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia and Turkey. See the Commission website on enlargement at http://europa.eu.int/comm/enlargement/intro/index_en.htm.

[78] Schimmelfennig and Sedelmeier 2002; but see Fierke and Wiener 1999.

(yet not flexible regarding the time-frame), the enlargement process is not flexible at all in terms of its substantive compliance rules (yet not clearly limited regarding the time-frame). The bottom line regarding the role of norms is thus the following: first, in the constitutional process, rules and norms as well as their respective meanings leave room for constructive impact; secondly, in the enlargement process, rules and norms have a structuring role. Yet, it is the constitutional process which will identify rules and norms with a clear structuring role in the future. After all, the constitutional bargain that is expected to be struck at the forthcoming intergovernmental conference in 2004 will have legal implications for all Member States. Furthermore, depending upon the type of constitutional choice eventually made, the constitutional bargain is expected to develop not only structuring qualities, i.e. a power-limiting function that judicializes existing power such as in the English and German constitutions, but also constructive qualities based on the constitutional document that initiates a power-founding function of the constitution, such as in the US and French traditions.[79]

The lack of convergence in constitutional politics among EU Member States is to be expected within the fragmented multi-levelled Europolity.[80] It is an expression of multiple socio-cultural trajectories which have shaped the institutional and ideational framework that sets the conditions for institutional fit, informs Member State preferences and defines the need for adaptation. It is, however, interesting to observe that nationally distinguishable positions have become even more pronounced in the process, i.e. the French prefer to know what a constitution is for, the British prefer to experience constitutionalization as they go along and the Germans know what they want to control and how to do it.[81]

[79] For an overview of the respective traditions, see Möllers 2003.

[80] See Olsen 2002 for a critical assessment of the lack of institutional convergence in the European polity despite European integration.

[81] The differing positions on constitutional change include rifts even among political allies. For example, a project for a constitution drafted by Elmar Brok, the chairman of conservatives from the European Parliament, in cooperation with a German professor of constitutional law, was criticized by leading EU conservatives as being 'too academic' and 'too German'. Subsequently, seven conservative prime ministers meeting in Sardinia on 9 September 2002 would have to 'struggle to patch significant rifts over crucial points concerning in particular the election of the Commission's president and the rotating EU presidency... Their task will be difficult as several competing projects for a European constitution have so far been drafted by conservative politicians, and they all fail to gather support amongst right forces across Europe. Moreover, a persistent rift between a more federalist view, put forward by German Christian democrats, and a vision favoring keeping more powers for the EU governments will have to be healed.' See http://www.euobserver.com/index.phtml?aid = 7463 (6 September 2002).

Indeed, the constitutional proposals and/or blueprints demonstrate a radical shift from 'state-neutral wording' in constitutional language towards a remarkable lack of 'semantic precaution' (Haltern 2002, 8). This observation indicates a hardening of national bargaining positions in the constitutional debates that are expected at the end of the post-Nice process in 2004.[82]

The constitutional convention

Despite a lack of agreement about the how, why and what among promoters of a European constitution, let alone the critical voices of its opponents and, at best, cautious public enthusiasm for the project, since March 2002 a Convention on the Future of Europe[83] has been institutionalized. As a prelude with no precise formal link to the forthcoming IGC it offers, in principle, a new space for transnational deliberation. It may therefore have an important impact on preparing a European constitutional compromise. The convention entails three key issues. First, do Europeans want a constitution? Second, do Europeans have a constitution already? And third, do Europeans want the constitution they have?[84] It provides a space in which representatives of governments (member and candidate states), parliaments (member and candidate states, and the European Parliament), the Commission and the Council deliberate in preparation for the constitutional bargain that is to be struck at the 2004 IGC.[85] That bargain will entail the revision of the current Treaties in both formal and substantial ways. According to Declaration 23 on the future of the Union,[86] the following key issues need revision: the delimitation of powers between the European Union and the Member States (the principle of subsidiarity); the status of the Charter of Fundamental Rights proclaimed in Nice; the simplification of the Treaties 'with a view to making them clearer and better understood without changing their meaning'; and the role of

[82] This shift of perspective towards identifying national interest positions has been supported by Beate Kohler-Koch's work: see, for example, Kohler-Koch 2000.

[83] For the 2001 Laeken Council Declaration which set the rules and procedures for the Convention, see http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

[84] As one MEP states: 'To me, the question is not whether Europe has a constitution, instead the question is, whether Europe has the constitution it needs. And the answer is clear; the European Union does not have the constitution it needs.' Interview with MEP official, Brussels, 29 August 2001 (on file with the author).

[85] The convention provides strictly limited space for civil society organizations. For details, see Shaw 2003.

[86] As appended to the Nice Treaty signed on 26 February 2001.

national parliaments.[87] As the outcome of the expected bargain, a revised constitutional framework will set the standards for compliance in the fifteen Member States as well as the candidate countries who are soon to join. It will contain changes regarding institutional and substantive issues. More specifically, it will involve agreement among the participating heads of state and/or government about the formal institutional changes and procedures, such as the number of commissioners, the role and composition of the Council of Ministers, the establishment of new committees[88] and so forth. It will also involve agreement about substantive change, such as the type of constitutional document, and accordingly the role the TEU texts are to play in the future of the EU. For example, are they meant to limit political power based on a constitutional contract as some would wish,[89] or are they expected to create unity based on the constitutional moment?

While offering a new space for deliberation, the preparatory Convention will have little influence on remedying the expected gap in resonance with the new supranational constitutional norms, on the one hand, and the associative connotations they evoke in the respective domestic contexts of the fifteen-plus Member States in which they stand to be implemented, on the other. The gap, I would argue, is due to the detached and speedy way in which the constitutional process takes place, without leaving space for interaction or contestation over the meaning of the norms that are at stake. As a result, the revised institutions will be kept at that proverbial distance from the citizens who simply will not recognize them as 'theirs' and will keep seeing them as 'empty shells' (Haltern 2001, 5). Expressed in the language of political science, such empty texts mean 'thin' institutions that entail few prescriptions for behaviour; according to the societal approach, they offer little match with

[87] See 'Editorial Comments', 38 *Common Market Law Review* (2001), 493–7 at 494.

[88] See, for example, Pernice's proposal to establish a parliamentary subsidiarity committee: Pernice 2001, 8.

[89] As the British Foreign Secretary Jack Straw told the Edinburgh Chamber of Commerce: 'The convention's main aim must be to design a written constitution for the people and communities of Europe, not the political elites. This need not mean a long list of each and every activity of government, setting out in detail who should do what and at which level. But *there is a case for a constitution which enshrines a simple set of principles, sets out in plain language what the EU is for and how it can add value, and reassures the public that national governments will remain the primary source of political legitimacy*. This would not only improve the EU's capacity to act, it would help to reconnect European voters with the institutions which act in their name.' See the *Guardian*, 27 August 2002, at http://politics.guardian.co.uk/eu/story/0,9061,781293,00.html (emphasis added).

social institutions. Instead of providing clear rules for compliance, they are therefore likely to provoke unintended consequences. That is, they are likely to raise expectations based on associative connotations that have been developed within the respective contexts in which the norms stand to resonate.

The lack of closeness or mutual understanding between the EU's institutions and the citizens is nothing new in the history of European integration, and, one could add, why should it matter at all, if the Europolity is not expected to turn into anything akin to a nation state? I would argue that it does matter in the light of the fast unfolding constitutional discourse that could run the risk of creating a situation of what might be called 'constitutional entrapment'.[90] That is, a constitutional revision of the Treaties is expected at the 2004 IGC in any case, despite the lack of closeness (i.e. European identity, belonging), despite the absence of an interest in establishing a supranational community and despite the uncertainty about the outcome of the forthcoming IGC. Its substance is largely validated through deliberations among western European elites notwithstanding the (if now increasingly invited) contributions of central and eastern European participants at the convention and in day-to-day political deliberations in Brussels and Strasbourg.[91] Its final shape stands to be negotiated at the 2004 IGC. While the thus increased access to participation will prove important in the long run, it is unlikely to create the shared validity of European constitutional norms, given the short timespan and the divergence in socio-cultural trajectories involved. In the

[90] On the situation of 'entrapment' in the enlargement process, see the argument offered by Frank Schimmelfennig (Schimmelfennig 2001).

[91] See, for example, the 'repossess enlargement' initiative of the European Parliament. As the President of the European Parliament Pat Cox said in a parliamentary speech in Strasbourg on 15 January 2002: 'The greatest transformation in hand of course is enlargement. The time has come for us, the political class, to repossess enlargement. It is inevitably the case that the *acquis communautaire* requires an enormous amount of work on the part of the European Commission and on the part of the public service in the candidate states to deal with all of the detail. But surrounding that detail is the wider political challenge – and that is our challenge. This House is uniquely well-placed to lead the politics of the transformation towards an enlarged Europe... *I would like to ask you, especially in the political groups, to consider a formula where we can invite MPs from our political families from the candidate states to participate in our enlargement debates with us this year*, to create a sense of vitality, to create a moment which is a very European moment, and to do it in terms which allow us to hear the different voices. They may be voices of accord or discord on some of the issues, but it is a really vital time and I hope the House will find within its mechanisms, and through the groups, a willingness to explore and create this platform, to express in a parliamentary sense this new Europe' (emphasis added). See http://www.europarl.eu.int/president/speeches/en/sp0002.htm.

absence of time and space for contestation a constitutional compromise will therefore prove difficult to achieve.[92]

Learning from experience?

The cases of enlargement and finality demonstrate an interesting paradox. While the compliance conditions have been fixed, the candidate countries are judged not only by their performance as good norm-followers, i.e. their ability to implement the accession *acquis* and initiate institutional adaptation accordingly, but also by their *capacity to understand*.[93] Furthermore, while the accession criteria are not up for debate at this point in the accession procedure, the candidate countries are invited to participate in the finality debate, nonetheless. This invitation is double-edged though. Thus, on 25 January 2002 German Foreign Minister Joschka Fischer 'encouraged Poland and the other east and central European countries which apply for membership in the European Union, to *participate in the debate over EU finality*'.[94] As Fischer explained, the EU was to take on board more 'responsibility in the transatlantic realm'; hence 'closer European integration' was necessary. Debate over these issues, Fischer emphasized, would contribute to '*increase understanding for one another*'. Soon afterwards, the Laeken Declaration agreed on the procedural rules for the Constitutional Convention which sustains this invitation to participate in the European dialogue. Yet, at the same time, voice is not paralleled by vote. In other words,

> [T]he accession candidate countries will be fully involved in the Convention's proceedings. They will be represented in the same way as the current Member States (one government representative and two national parliament members) and will be able to take part in the proceedings *without, however, being able to prevent any consensus which may emerge among the Member States.*[95]

[92] Absent a constitutional compromise, the IGC is likely to fall back on constitutional bargaining in which national preference formation (Moravcsik 1991, 1998) and experience with national constitutional norms will provide the core guidance for actors' decision-making. Elsewhere I take this assumption further, based on a model that discusses four positions in the constitutional debate that negotiators are likely to draw on in the case of constitutional bargaining under time pressure (Wiener 2003, 3–5). For reasons of space, this line of argument will not be further elaborated here.

[93] See citation in n. 62 above in *Frankfurter Allgemeine Zeitung*, 8 February 2002, 5.

[94] *Frankfurter Allgemeine Zeitung*, 26 January 2002, 4 (emphasis added).

[95] Laeken Declaration, http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm (my emphasis); for the participating government and parliamentary representatives of the accession countries, see http://european-convention.eu.int/Static.asp?lang=EN&

The invitation to participate in order to overcome a lack of understanding, on the one hand, and the rigorous application of the policy of conditionality, on the other, bring rationales to the fore which are not only distinct and potentially counterproductive, but which at the same time may turn into an important asset in the constitutional debate. They are counterproductive for the project of establishing shared reference frames in the constitutional debate. After all, if the candidate countries remain excluded from processes of norm-validation, the likelihood of norm-resonance in the domestic contexts of the candidate countries will decline. In turn, they might become an asset, if the conflict over enlargement procedures and substance gains ground in the political debate. As Danner and Tuschhoff note, for example, the 'leaders took off their gloves and switched off the autopilot of enlargement negotiations. They *politicized the previously automatic process and charged the issues with conflicts.*'[96] While these authors predict a negative outcome of such politicization for the enlargement process, stating that 'that will be very difficult to settle. It is highly unlikely that the enlargement negotiations will be finalized according to the timeline established at Gothenburg. In fact, the added conflicts have the potential to prevent enlargement altogether',[97] a societal approach to compliance would not exclude a constructive outcome with a view to finality and the resonance of European constitutional substance. Thus, as the dialogic approach to politics suggests, access to participating in a potentially conflictive debate over accession criteria could contribute to enhancing the debate over constitutionalism which has long been considered as 'axiomatic, beyond discussion, above the debate' and as something which 'seemed to condition debate but not be part of it' (Weiler 1997, 98).

Compliance with evolving norms

While making actors comply depends on the interaction between norm-setters and norm-followers, compliance still remains an action which is structured by a bargaining outcome in the past. During that debate, norm followers' capacities for adaptation to the norm-setting identities are assessed, and rules and procedures to guide future behaviour are settled. The finality debate, in turn, entails constructive possibilities. While the

Content = Candidats_Gouv and http://european-convention.eu.int/ Static.asp?lang = EN&Content = Candidats_Parl, respectively.

[96] See Danner and Tuschhoff 2002, 1 (emphasis added). [97] *Ibid.*

outcome of this debate does not necessarily mean producing a genuinely new structure, participants will inevitably bring their respective experience and beliefs to bear (Weber 1988, 153). In the absence of signposts in that debate, they are likely to draw on familiar constitutional concepts. However, given that a debate under conditions of truth-seeking does take place, the finality debate is *potentially open towards change*. In principle then, there is room for a constructive dimension in which deliberation can play an important part. The focus on 'fit' implied by the static character of the compliance rationale conflicts with the finality rationale then. If compliance thrives on establishing the 'goodness of fit' or rule-following for whatever reasons, then change is not the intended outcome and deliberation serves the single purpose of ensuring compliance. Subsequently, good norm-followers will rather abide by the rules than bend and contest them, and it has been noted that the candidate countries were good norm-followers – until early 2002. The compliance rationale suggests a successful outcome if and when actors can be successfully socialized into accepting the rules in a given context. In the absence of equal access to norm-construction under truth-seeking conditions, this socialization includes the pressure and even coercion – albeit, not overtly applied[98] – to fit in. Compliance is hence imposed rather than established interactively. Subsequently, the absence of shared validity of norm interpretation and meaning is likely to undermine resonance – as, for example, documented by the Polish case discussed above.

In sum, to comply with firm rules within the context of continuous change and adaptation to widening and deepening implies a countermovement; to comply with these rules with a view to achieving the right to participation in the finality debate – after the constitutional bargain – raises normative questions about the EU's democratic equality norm on the one hand, and political questions about the gap between validation and resonance of constitutional norms on the other. In other words, according to the societal approach to compliance, the candidate countries' exclusion from norm-validation in the compliance process, in addition to the lack of a clear identification of compliance standards (norms) – in the Copenhagen accession criteria – by the norm-setters in the enlargement process, enhances the resonance gap with supranational norms. An unintended outcome of the parallel procedures of finality and compliance

[98] As Checkel puts it, 'I define persuasion as a social process of interaction that involves changing attitudes about cause and effect in the absence of *overt* coercion' (Checkel 2002, 2) (emphasis added).

is a double pattern of identity formation. Like all interactive processes, both contribute to particular identity constructions. They result however in different identities, potentially in favour of European integration for those who participate in the finality debate and share the norm of collaboration towards integration (see above); while creating Europe as the 'other' for the designated norm-followers in the compliance process who have to deal with the double standards of minority rights, and the transition rules of delayed freedom of movement for workers, for example. While, in principle, the discourse which sets the 'border of order' (Kratochwil 1994) is open and contested in the finality debate, it is uncontestable and fixed in the compliance process. The compliance process therefore has the potential to create new borders of inclusion/exclusion within the wider Europe. The borders are set by belonging to a wider Europe in the finality debate, and by being assigned the position as norm-follower in the compliance situation.

Conclusion

In this chapter, I have argued that, according to the societal approach to compliance, interactive processes that establish and/or reproduce norms as well as the interrelation between context and socio-cultural trajectory of norms are key conditions of norm resonance. Guidelines for norm resonance include the following. Norm resonance is achieved with acceptance and shared interpretation of a norm's meaning by different actors, in different contexts, and over time. Three factors are central to analysing the potential for norm resonance across contexts: first, the plausible *validity* of a norm to both norm-setters and norm-followers established through interactive processes between both types of actors; second, the *transferability* of this validity between different contexts, e.g. supranational, transnational, domestic or other political arenas; and third, the *durability* of norm validity over time. It follows that contestation in the process of norm construction sustains the validity of a norm and hence lowers the stakes for norm resonance. In turn, despite clearly defined prescriptive standards of norms and strong behavioural indicators of rule-following, including institutional adaptation, the absence of possibilities for norm contestation raises the stakes for norm resonance. *In sum, the success of compliance with supranational norms increases with the degree to which norm contestation is possible in each context and stage of the compliance process.*

Accordingly, a policy of conditionality, in other words the 'take-it-or-leave-it approach' of the EU's accession policy, prevents norm-followers' access to norm validation. As a consequence, compliance is often simply performed in order to gain access to the club, and once that goal is achieved, interest in the supranational norms wanes. While it could be argued that this approach to accession is by now established enlargement practice in the EU, and hence raises no major political issue, it is contended that the massive enlargement round ahead differs in significant ways from previous rounds. For example, first of all, the current widespread and actively conducted finality debate defines a constitutional dimension that has been absent in previous enlargement situations. Thus, a number of concrete measures, e.g. the establishment of the Convention, have been taken since the Amsterdam IGC set the institutional conditions for adaptation in view of the forthcoming massive enlargement round. Secondly, the constitutional substance in most candidate states has been influenced by the context of command economies for a number of decades. Thirdly, and following up on the difference in political context conditions set by the cold war, the candidate countries' expectations towards EU membership are shaped by the previous East–West gap between freedom and democracy (Fierke and Wiener 1999). Finally, the candidate countries have established firm links and an emerging group identity amongst themselves: for example, the *Visegrad* group (V4) includes Hungary, Poland, Slovakia and the Czech Republic who have announced that they will continue to work together – similarly to the Benelux countries – after joining the EU.[99]

Instead of claiming that compliance with the accession conditions undermines successful resonance with a constitutional bargain, I have argued in this chapter that the more the conditions for access to participation in the process of validating constitutional norms are enhanced, the more likely it is that the constitutional bargain resonates well within the fifteen-plus domestic contexts. In turn, the more exclusive are the deliberations over constitutional change, the more likely is the growing resonance gap with the constitutional bargain. Following the dual quality of norms assumption of the societal approach, it was argued that, despite norm validation in the supranational Brussels arena, i.e. agreement on a type, style

[99] According to the Polish Prime Minister Leszek Miller, they 'are determined to speak with one voice as then it is stronger and will be respected at the end of accession talks with the EU'. See http://www.euobserver.com/index.phtml?aid = 7467 (6 September 2002).

and contents of a document of constitutional quality, the validity of that document's contents – such as the expected constitutional text(s) at the forthcoming 2004 IGC – remains likely to be contested in the domestic arenas of the EU Member States and candidate countries. The impact of the context-specific constitutional baggage brought to the negotiating table by the Member State representatives is expected to increase in relation to the absence of shared European constitutional norms. While these might be more pronounced in some policy areas than in others, the fact that the current constitutional process focuses on broad constitutional changes leaves sectoral constitutional revisions that stand to be more successful regarding the establishment of shared constitutional values unexplored. While the bargain in 2004 matters, it is not the end of the story but a mere stage in the process of constitutional change in the EU. *The litmus test of the bargain's success lies in the degree to which the agreed constitutional norms on the supranational level resonate within the domestic contexts.* Empirical studies will have to establish the degree of resonance, i.e. the fit between the supranationally established European bargain and the respective domestic constitutional norms; the main intention here is to flesh out the opposing action rationales and social practices towards the construction of constitutional norms with a view to the long-term success of the envisaged constitutional bargain.

I argued that, in order to establish constitutional norms that not only reflect the validation attached to them by norm-setters but also potentially resonate with the designated norm-followers, it is necessary to take a long-term perspective, instead of a snap-shot approach to constitutional bargaining. Only thus can crucial information about the socio-cultural trajectories of norms be gathered. For work on the EU's constitutional debate this implies a need to back away from staking out constitutional positions according to national interests, and to reconstruct the emergence of constitutional norms according to different, if at times overlapping, socio-cultural trajectories instead. Indeed, interests in and by themselves do not offer much information as to whether or not norms stand a chance of resonating. In other words, not only the fixed interests at the point of constitutional negotiation but also the constructed values and norms must be brought to interact in order to identify the emergence of European constitutional norms. Empirically, such a perspective needs to bring dialogues within different constitutive policy areas to bear. The key is to identify and allocate such processes in the Europolity, and to establish an institutional or constitutional mechanism which safeguards it over time. According to the principled perspective on dialogical politics, a main challenge to be

addressed by the current constitutional debate lies in establishing a space for deliberation and in making sure that the access conditions are fair and equal. The societal approach to compliance advanced in this chapter cast the view on the conceptual issue of how to institutionalize procedures according to a dialogic conception of politics which defines 'politics as contestation over questions of value and not simply questions of preference' (Habermas 1994, 3). Along this line, much recent work in European integration studies has pursued the question of how to establish institutionally procedures of deliberation that would accommodate the pluralist and multi-level character of political and legal procedures in the EU's fragmented polity. These studies all discuss how to maintain the principle of contestedness as a normative basis for democratic politics in the Habermasian sense that 'allows for the institutionalization of a public use of reason jointly exercised by autonomous citizens [and thus] accounts for those communicative conditions that confer legitimating force on political opinion and will formation' (Habermas 1994, 3). Work that tackles citizens' choices in a pluralist postnational polity (Maduro 2002), or that seeks to identify spaces for deliberation in processes of governance that are neither guided by a shared community nor organized according to liberal politics (Joerges and Neyer 1997), addresses 'precisely the conditions under which the political process can be presumed to generate reasonable results' (Habermas 1994, 3).

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