

Comment: Global Constitutionalism and the Concept of Difference

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Introduction

The hidden facts of diversity, such as the socio-cultural circumstances that allow for and constrain social practices around the globe, do not normally take center stage in theoretical debates about justice and democracy (compare for many Rawls 1973). However, as social practices frequently cross the boundaries set by modern nation-states, the quest for more systematic knowledge about how diversity works has obtained more leverage in the social sciences. This is demonstrated by reference to studies of the “strange multiplicity” of constitutionalism (Tully 1995), global justice taking into account diverse individual capabilities (Sen 2009) or the indexicality that makes day-to-day interaction meaningful based on normative structures of meaning-in-use (Garfinkel 1967; Milliken 1999; Wiener 2009). All take notice of the fact that “experiences and expectations about fair and legitimate governance have become increasingly fragmented” and that subsequently “[o]ur ability to understand and interpret others and to tolerate difference, rather than overcome diversity is therefore at risk” (Wiener 2008, i). This book on the concept of difference offers a nice cut into that emerging debate. Its quest for conceptual distinction will account for the hidden facts of diversity. For its contributions offer novel perspectives on just and fair governance. This is the key research object which heuristic approaches to international relations such as global governance, world society studies and global constitutionalism are currently grappling with.

In this brief comment on Alec Stone Sweet’s study of the practice of human rights jurisprudence in Europe (this volume) the following highlights the advantage of this approach for the emerging interdisci-

plinary research program of global constitutionalism.¹ As I elaborate in some more detail below, Stone Sweet's reference to Christine Landfried's dual quality concept of difference demonstrates convincingly that this kind of empirical research on the practice of jurisprudence not only allows for addressing the general philosophical dilemma of human rights minimalism, it also tweaks out the specific quality of European constitutionalism. The remainder of this contribution proceeds in three further steps. Step one summarizes Landfried's political science difference approach as a systematic reply to socio-cultural perceptions of diversity. Step two places the diversity/difference discussion within the wider—interdisciplinary—research program of global constitutionalism. And step three then moves on to discuss Stone Sweet's empirical research on difference and the proportionality approach in Europe from that background. The conclusion summarizes the advantage offered by the dual concept of difference to studying the interplay between structure and social practices in the process of studying global constitutionalism as a social phenomenon rather than a legal concept.

Diversity and Difference

Notably, diversity is a Janus-faced concept. On the one hand, it has been identified as a problem for democracy: It prevents shared recognition about the meaning of speech-acts because these are, by definition, always uttered in an "unlimited community of interpretation" (Habermas 1992, 35). This problem has been enhanced by globalized practices of communication which project speech-acts into a range of contexts thus confronting an increasingly diverse audience (Buzan, Wæver and de Wilder 1997) without providing the opportunity of

1 This contribution draws on research conducted during the author's tenure of a fellowship at the Hanse-Wissenschaftskolleg/Institute for Advanced Study in 2011. It is a revised version of an earlier paper titled *Global Constitutionalism: Mapping an Emerging Field* (Wiener 2011). For research assistance I am thankful to Daniel Schlechter and Julia Frohneberg at the Chair of Political Science and Global Governance in Hamburg as well as Sabine Friedrichs and Christina Thiel at the Hanse-Wissenschaftskolleg/Institute for Advanced Study. Responsibility of this version of the paper is the author's.

direct engagement and, hence, shared access to contestation. On the other hand, however, diversity is necessary for establishing the basis for contestation², which, in turn, is a necessary requirement for democracy, justice, fairness and, generally, the conditions for bringing about the rule of law in a triadic political context (Stone Sweet 2002). Diversity thus plays out in a twofold fashion.

The constitutionalism debates have addressed this issue from two distinct perspectives which can be roughly summarized as noting that diversity needs to be overcome based on a strong shared identity (compare Habermas's argument on Europe) on the one hand, and that diversity should be maintained so as to allow for the impact of "multiplicity" as a condition for contested normativity and, therefore, democracy (compare Tully's argument about Canada, and Reus-Smit's argument on global order) on the other. As an activity, democratic constitutionalism strives to achieve an institutional context that allows for the equiprimordiality of constitutionalism and democracy (Tully 2002). This dictum reflects the tension between the modern tradition of Kantian regulism on the one hand, and Wittgensteinian pragmatism, on the other (Brandom 1998). It is distinct from the former with its emphasis on maintaining diversity as a necessary requirement for contestation as the core element of democratic constitutionalism. Yet in agreement with the former, it confirms the importance of an institutional framework which sets the rules for access to participation in all democratic activities. In agreement with the latter, it works with the constitutive power of day-to-day practices to identify the rules of the game (Fierke 1998), yet, it is critical of leaving the terrain of normatively rooted democratic rules altogether.

Christine Landfried has suggested overcoming the Janus-faced conceptuality of diversity and the related political ambiguity by working with the concept of difference instead (this volume). She proposes to work with difference as a more powerful concept. Accordingly, her approach rests on the argument that while diversity alludes to endless possibilities that seem all pervasive, difference with its notion of conflict, even "destruction of harmony and unity" has a more critical, almost 'suspicious' ring to it (Landfried, this volume, 15). This is precisely the powerful notion of difference as a political science concept

² Note that "contestation" is defined as the constitutive social practice of questioning meaning rather than the activity of disputing arguments in a legal process.

that lends itself to systematic comparative research in political science. As Landfried explains,

“Therefore, the fundamental question of this concept is how actors deal with difference. This means that politics is called upon to judge difference not prematurely as problematic but to consider in each case how the positive aspects of difference can be brought to fruition.” (ibid., 16)

To make use of the positive potential of difference then Landfried suggests studying how actors handle difference in structural contexts of decision making, as well as the way in which systematic differences between types of governance play out globally (ibid., 18). This approach to difference offers a powerful advancement, especially for research in political science, to address the Janus-faced role of diversity in global politics. The following first turns to constitutionalism as an interdisciplinary framework of reference for the project of studying difference and then turns to the way it is addressed by a case study on the practices of judges with regard to human rights jurisprudence in Europe.

Constitutionalism Unbound

Two general conditions matter for research on constitutionalism. First, the concept's meaning is qualified by the way it is enacted in practice. That is, its implication for real world politics and law is rarely the same in two places. This specific culturally derived quality has been emphasized by bifocal studies which took normative claims to the test based on comparative empirical research (Tully 1995; Wiener 2008). Subsequently, and secondly, despite claims about universalism the universal applicability of the concept remains contested. Moreover, this contribution notes that the growing interest in and enhanced reference to constitutionalism are not necessarily leading to conceptual precision thus risking to turn it into a catch-all concept. Subsequently, the concept's usefulness as a rigorous reference is put to the test just at the time when it finds its way into a range of sub-disciplines in the social sciences, among them, most notably international law and international relations theory. And, many scholars would argue that it may be extremely important for studies of global consti-

tionalism. I would agree, but contend that this potential requires establishing an interdisciplinary research program so as to be able to derive the key generic aspects of the concept.

This strong contextual dimension of constitutionalism means that the actual implications of “contemporary” constitutionalism remain to be specified when academic research claims or practical references in politics or jurisprudence are made. As James Tully has argued convincingly, given this contextual condition of constitutionalism, academic research needs to understand constitutionalism as *qualified* by time, space and place thus turning “modern” or “ancient constitutionalism” into specific versions of constitutionalism (Tully 1995) and leaving other potentially emerging versions of constitutionalism such as for example “global constitutionalism” to be assessed in detail by further large scale comparative research (Peters 2009; Dunoff and Trachtman 2009).

Constitutionalism commonly evokes references to modernity, including especially a written constitution, a democratic polity, typically in a context of a Western Europe or the global North. By way of negation it is probably fair to say that constitutionalism would not be related to so-called failed states or rogue states, the former having failed to apply liberal democratic norms such as the rule of law, democracy and so on, and the latter being in breach with the core values of the liberal community of United Nations member states in a significant manner. However, claims about constitutional norms, regulations and rights for example with regard to regional or global governance institutions demonstrate that constitutionalism has become “unbound.”³ The practices of constitutionalism now transgress the boundaries once set and regulated by the institutions that lie at the core of the political authority of modern nation-states (Tilly 1975), and which as such provided the blue-print for a model member state of the UN in the mid-twentieth century. With the transgression of those boundaries, claims about the changing quality of constitutionalism gain analytical power (Tully 1995). They are especially attractive for studies in global governance and global constitutionalism which seek to comprehend and improve the quality of inter-national relations (compare e.g. studies on United Nations reform).

³ This term has been developed in an unpublished research proposal Antje Wiener and Stefan Oeter.

Over the past centuries, constitutionalism has acquired a meaningful role for political science and legal studies. Considering the variety of definitions and applications of the concept, J. H. H. Weiler's reference to constitutionalism as an "academic artefact" (1999) describes the concept's reach and attractiveness for twenty-first century political science and legal studies, and especially, for work on international relations very well. For it broadly summarizes constitutionalism as addressing "things constitutional". The leading questions for political scientists, i. e. "[w]ho gets what when and how" (Lasswell 1990), are therefore slightly modified to account for the "invisible constitution" of politics based on where, when and how rules, norms and principles are generated, and thus left to be addressed by research that focuses on comparative case studies taking account of specific contextual conditions. While it is not surprising that constitutionalism should have attracted a wide range of scholars from political science and legal studies, it's increasingly regular reference to studies of 'things constitutional' beyond the limitations of modern national states and in a time period that many have come to qualify as either "post-national", "post-modern" or "late modern", in any case, way past they high point of modernity in the twentieth century, does raise a number of questions for political scientists and legal scholars alike (Shaw 1999; Krisch 2009; Skinner 2002; Giddens 1985).

Tully's pioneering work on the "hidden" story of other than modern representations of constitutionalism brought an important reminder of the contextualized definition of constitutionalism to the fore (Tully 1995). Accordingly, constitutionalism is clearly an artefact, albeit not exclusively an academic one. Despite the reference to normative—universal—principles it is a socially constructed reference frame of politics and law. As such it is qualified by the social practices that enact its normative structure on a day-to-day basis. As Tully notes in his empirical study on the hidden practices of constitutionalism in Canada, the dimension of everyday practice and its constitutive input on the meaning of constitutionalism were largely lost during the modern period when modern Western nation-state formation excelled in establishing centralized regulative institutions. In the process, the social sciences have come to take modern constitutionalism as the regulative ideal of politics and law in the Western civilized world, thereby losing the notion of the particular circumstances of moder-

nity which were expressed through cultural practices and as such constitutive for the normative core of this type of constitutionalism.⁴ This—modern—type of constitutionalism bears a paradox however. As Loughlin and Walker point out,

“[m]odern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the ‘consent of the people’ and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. [This turns people into a] sovereign that cannot exercise sovereignty.” (2007, 1, citing Maistre)

Paradoxically, yet again, this modern concept of sovereignty is applied by a range of studies of global constitutionalism that seek to develop strategies for UN reform (compare Fassbender 2010; Cohen 2004; 2008).

In sum, the concept of constitutionalism comprises social practice, normative ideals and regulative output, and is, therefore both more and less than a written constitution (Maduro 2003; Kumm 2009). Even though the ownership of constitutional treaties is often contested (Haltern 2001; Kahn 1999) as it should be in any democratic society (compare Tully 2002) the concept of constitutionalism has proved quite helpful, especially when addressing emerging constitutional features in contexts beyond the state. As an artefact of sorts, and spanning from ancient towards modern and even European constitutionalism, the concept is increasingly referred to as a reference frame (Weiler 1999; Weiler and Wind 2003; Walker and Loughlin 2007). And many studies make a strong case for addressing the rising number and widening range of transborder issues in inter-national (read: between at least two actors with different national background) relations by referring in one way or another to constitutionalism. In the process constitutionalism has come to be used as an interdisciplinary concept in the social sciences. It is, however, rarely defined in interdisciplinary agreement. In fact, there is hardly any constitutionalist study that does not begin by offering the author’s particular definition of the concept.

⁴ See: Tully (1995) and compare generally the Chinese criticism of the Western version of modernity Wang Hui (2011).

For the purposes of systematic large scale comparative research constitutionalism analytical power lies in a *repertoire of indicators* defining the quality of politics and law, as well as the way these two societal fields interrelate based on conventions, regulations, doctrines and principles which have developed a particular routine in accordance with the context in which they have been practiced. The most familiar principles of constitutionalism are the rule of law, democracy, sovereignty and individual rights. All of these have, however, been developed, applied and implemented in different ways, pending on the place and time in history and the respective normative reference frame in a particular context. Constitutionalism is therefore roughly distinguishable according to three main indicators: place (where in the world?), period (when in the evolution of societies?) and practice (how were its principles enacted?).

In sum, to account for the socially constructed quality of constitutionalism without undermining the concept's substantive normative claims, it has been suggested distinguishing the practice dimension of constitutionalism as including both regulative and cultural practices (Tully 1995; Wiener 2008). On this basis it is possible to contextualize modern constitutionalism and thus understand its particularities in comparison with ancient, European, Asian and other distinct "artefacts" of constitutionalism. To illustrate the difference in understanding, for example, with reference to the fundamental norms such as democracy, sovereignty, human rights or the rule of law. For the latter and taking these distinctive indicators into account, the rule of law has indicated a range of different meanings: it meant freedom from popular tyranny in Aristotle's ancient Greece; it meant protecting individual rights according to Lockean liberalism; and it meant cupping the encompassing rights of the monarchs in eighteenth century England.⁵ Stone Sweet's case study on human rights offers yet another perspective on jurisprudence as a practice that maintains pluralist constitutionalism as the following section will elaborate.

⁵ For an excellent overview compare Tamanaha (2004).

A New Organizing Principle

By studying the practice of courts when adjudicating individual rights Alec Stone Sweet's contribution on "Managing Difference" offers a qualitative assessment of contemporary constitutionalism in Europe. His case study allows for insights into specific practices of constitutional judges as well as a deeper understanding of the quality of European constitutionalism. The research focus is on social practices in the area of human rights claims. The reference to Landfried's dual quality "concept of difference", i.e. as both embodying and therefore shaping difference in social structure and difference in action, allows Stone Sweet to include the normative dimension in addition to the practice of constitutionalism (compare Landfried and Stone Sweet in this volume). By doing so, Stone Sweet succeeds in addressing two problems: first, he seeks to find out more specifically whether structural discriminating features of difference are hardened by the practice of jurisprudence in the area of human rights. Second, he addresses the dilemma of human rights minimalism on a more general level of abstraction, arguing that reference to the concept of difference allows tackling this dilemma in a way philosophy cannot.

Managing difference in practice: human rights in Europe

Stone Sweet's research on the way human rights are implemented in Europe, and especially, in the European Union begins from the hypothesis

"the more any rights protecting court is effective, the more rights adjudication will undermine the kinds of macro-structures that reify difference identified by Landfried. If the hypothesis generally holds true, we might begin to assume that an unfolding rights jurisprudence is inherently parasitic and destructive of difference. At the same time, the power to subvert difference is also the capacity to leave it in place, or to re-inscribe (a potentially oppressive form of) difference in terms of rights." (Stone Sweet, this volume, 229)

This hypothesis works most constructively with Landfried's dual quality of structure: It takes the condition of dual quality as the normative condition of difference, and then turns to a study of jurisprudence on human rights claims to enquire whether the elements to

keep this constitutionally embedded structure of difference are in place. This is done with reference to the concept of constitutionalism. Given that constitutionalism matters for its potential to replace the missing third actor in a triadic system of democratic jurisprudence Stone Sweet turns his attention to the interrelation between an emerging “transnational arena of governance, with a right protecting court at its center” on the one hand, and “national-constitutional arenas of governance, which have their own governing organs, including rights protecting courts, for dealing with conflict”, on the other (ibid., 230). With reference to the conceptual framework of constitutionalism, it is now possible to address this interrelation as being mediated by social practice. The result is as stunning as it is convincing: Instead of prioritizing the “doctrine of judicial review” social practices of judges with regard to human rights jurisprudence have emphasized the preference to the more flexible method of “proportionality analysis” which “gives judges a centrality in the policy-making process” (ibid., 233). In the process the proportionality approach has become recognized as an appropriate norm, as an “organizing principle” that structures jurisprudence on a mid-range level, generated through interactive practice and therefore more likely to enjoy recognition as a shared norm than a fundamental norm that may be formally valid, yet lacks socially constituted appropriateness (compare Wiener 2008, 66, table 4.2).

This finding reflects the key importance of social practice when grappling with the increasing contextual diversity in which rights claims are raised and dealt with. As Stone Sweet notes, proportionality analysis “‘fits’ with qualified rights, and because it prioritizes rights protection while giving judges the flexibility to tailor outcomes to context, including highly-charged situations” (Stone Sweet, this volume, 233). This reference points to the potentially distinct conditions of place, such as a specific arena, and period, such as a moment of tension about competence, and practice, such as the process of jurisprudence. Neither can be grasped analytically by mere reference to formally valid norms or standardized procedures, instead, all require of the analyst to be able to capture other—constitutive and therefore decisive—details that ultimately qualify a particular rights claim. This shows both specific findings about the constitution of substantive quality of European constitutionalism, and, in addition this empirical research also makes more general claims. For it highlights the interre-

lation between universal principles such as e.g. the organizing principle of proportionality analysis, the social practice of jurisprudence and the finding of a specific preference with regard to principled practice on behalf of judges who operate in the emerging 'transnational' arena in Europe.

Thus, as Stone Sweet argues, with reference to the dual quality of Landfried's concept of difference it is possible to approach the long standing philosophical dilemma of human rights minimalism which is described by Joshua Cohen as a situation in which

"we can be tolerant of fundamentally different outlooks on life or we can be ambitious in our understanding of what human rights demand, but we cannot—contrary to the aims of many human rights activists—be both tolerant and ambitious." (Cohen 2004, 192; cited in Stone Sweet, this volume, 231)

Three indicators: place, period, practice

How does Stone Sweet's cases study fare with regard to the three leading indicators for research on global constitutionalism then? The place of the case study is Europe, the period falls into post-national/post-state/post-modern times, and the practice is that of jurisprudence. Notably, the brief summary of Stone Sweet's case study suggests that the questions with regard to the dual issue of constitutionalism as, first, unbound, i.e. extending beyond national boundaries and fragmented and, second, threatening the survival of legal pluralism can now be addressed based on the twofold specific and more general findings noted above. With regard to (1) the spread of constitutional practices across national boundaries, the case study convincingly shows that it is possible to generate a shared recognition of a new organizing principle of jurisprudence such as the proportionality approach, despite moving the practice of jurisprudence beyond the boundaries of the modern nation state. With regard to (2) the threat to erase pluralism based on an all-encompassing constitutionalism has been countered by the case study's notion of a historically specific quality of European constitutionalism which suggests pluralist constitutionalism through the practice of European jurisprudence (compare Walker 2000) rather than the spread of modern domestic constitutionalism on a global scale (de Búrca 2009).

Conclusion

This comment focused on Landfried's concept of difference and the way it has been applied by Stone Sweet when examining the practice of judges with regard to human rights claims in Europe. It argued that Stone Sweet's case study offers important insights for the emerging research program on global constitutionalism by demonstrating how the interplay between structure and practice constitutes specific constitutional meaning while upholding universal values of human rights. It demonstrates convincingly how attaching universality to its normative claims constitutionalism is always *qualified* by the context of its practice⁶ and demonstrates that by addressing rights in the process of jurisprudence courts both enact and reconstitute structures of difference through social practice.

This insight brings to bear an important cross-reference to social science research on the way actors in international relations enact "normative structures of meaning-in-use" (Milliken 1999, 132), and by doing so, reconstitute these structures. In doing so, they move within the given relatively stable structural context in a specific place, and by relating to these structures inscribe new meaning to them. The way this happens can be reconstructed with reference to discursive interventions in a given context (Wiener 2009). And I would suggest, that this is what the judges in Stone Sweet's case study on human rights claims do in Europe. The case study of European jurisprudence thus demonstrates nicely the way in which social practice and normative assumptions when enacted in a specific context make history: in this case they do so by generating a new organizing principle such as the proportionality approach. It therefore highlights the constitution of mid-range norms such as proportionality through day-to-day social practices of constitutionalism. Concluding from this particular case study the important outcome to note is then the organizing principle as an indicator of the specific quality of contemporary constitutional-

⁶ This interrelation of context and practice is not particularly new. Compare for example Chris Brown's essay about the "requirement" which places a quasi-constitutional document in front of a group that does not share the socio-cultural context in which the document has been drafted, and in which Brown makes an important observation about the interplay between the imperialism of modernity and the particularism of diversity (Brown 1988).

ism in Europe. Whether it has potential for becoming part of contemporary global constitutionalism needs to be demonstrated based on yet another empirical study.

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