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## Conclusion: Through Uncharted Waters of Constitutional Quality. Navigating between Modern Statehood and International Organization

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### 1. Introduction

Picking up on the seafaring theme which introduced this book, it could be argued that the European Union's 'ship of state'<sup>1</sup> has taken so long to navigate the dire straits of contemporary non-state polities between the safe shores of statehood and treaty organization that a good portion of seamanship has evolved in the process.<sup>2</sup> In other words, it could be assumed that, through practice and over time, both the erstwhile incomplete vessel and its management have further developed under the constraints and opportunities of changing weather, tide, and winds. So much so, that upon reaching its current position, the crew has a story to tell (Della Sala 2010) and advice to offer on how to navigate these dire straits.<sup>3</sup> Such a perspective on the journey that started with signing a treaty in Rome in 1957 suggests that, while *formally*, on paper, the EU seems to be finally slowing down into a relatively settled existence as a treaty-based international organization with signing the Lisbon Treaty in 2009, *in practice*, it is now so highly advanced in its ways that it stands out among the group of international organizations as a value-based regional order. The chapters in this book share this view (see most explicitly, the contributions by Kumm and by Manners).

As a treaty-based organization the EU is *sui generis* in that it differs from all other organizations due to its constitutional features of legislative (European Parliament), judicative (European Court of Justice), and executive (the European Council, and the Council of Ministers) organs, as well as to the core democratic constitutional principles of modern statehood, including fundamental rights, democracy, human rights, equality, the rule of law and respect for minority rights.<sup>4</sup> The EU is a treaty-based organization with constitutional features. These features not only work to organize equal membership rights among all member states, they also include a specific EU citizenship establishing a direct link between citizens and the non-state polity.<sup>5</sup> After the long journey, when the EU often seemed like any other international organization with its member states sharing an interest in collaboration to secure peace, security, and prosperity, in 2010 the sum of the EU's social practices and their input on the constitutionalization of this organization's features over time suggest that the *sui generis* assumption is not outdated at all. But what does this observation imply for the advancement of a Political Theory of the European Union (PToEU), especially in light of more recent interdisciplinary developments in the fields of international relations theory and international law (Byers 2000; Slaughter 2004; Simmons and Steinberg 2007)?

This chapter argues that the value-added in this theoretical project consists in two aspects: first, as a theory that draws on democratic political theory and international political theory as well as European integration theory it facilitates a better understanding of the EU as a non-state political entity and legal order; secondly, by charting the so far largely uncharted waters of constitutional quality beyond the state, a PToEU offers an access point and guidance for other vessels that engage in similar journeys in the future. In the following, this concluding chapter seeks to demonstrate that the *sui generis* observation is both sustained by the EU's singular trajectory as an international organization in the twentieth century and challenged by the increasing constitutional quality beyond the state that has been noted elsewhere within the arena of international relations (Dunoff and Trachtman 2009). Both views have been brought to the fore through instances of contestation. With regard to the former, the EU's rocky passage, especially in the area of constitutionalism<sup>6</sup> brought contested views about the EU's constitutional purpose and performance to light in an extraordinarily public process that involved an unprecedented range of societal groups and political actors. With regard to the latter, contesting view, however, observations about the 'constitutionalization of the WTO' (Cass 2001), suggestions to work with the concept

of 'cosmopolitan constitutionalism' on a global scale (Kumm 2009, and in this volume), and notions of UN constitutionalism (Fassbender 1998b; Cohen 2008) indicate that the EU's specific experience may soon be comparable to that made by other international organizations.

The following sections zoom in on the EU's experience with position finding when navigating the waters of constitutional quality beyond the state. In doing so, they offer a reference frame for studies on other non-state entities that have to adopt their ways in order to navigate waters that were uncharted prior to the EU's journey. Two aspects are highlighted in this regard. *First*, the empirical reconstruction of the social practices of constitutionalism helps establish how the European trajectory differs from the quality of constitutionalism that is specific to other contexts, such as, for example modern or ancient constitutionalism (Tully 1995; McIlwain 1947; Wiener 2008). *Second*, as a type of constitutionalism that developed in relation with modern constitutionalism since the height of modernity in the mid-twentieth century (Giddens 1985), EU constitutionalism offers an important reference frame for other trajectories of constitutionalism that also emerged in relation with social practices as treaty-based institutions left the familiar moorings on the shore of international organizations. Among these are for example the UN and the WTO which are similarly situated in the historical context of late modernity, yet distinct from the EU as international organizations with a global rather than a regional focus. The challenge is particularly pressing as international organizations such as the EU are actively contributing to the constitution of the international legal order.<sup>7</sup> This chapter contends that a PToEU is helpful to better understand the distinct features of these new types of constitutionalism and their potential impact on global international relations. A PToEU thus builds an important bridge between modern social sciences theories of government and international political theory. Given space limitations, this enterprise will have to remain sketchy, focusing on core elements, potential for application, and possible contribution to global politics.

In the following discussion of the EU's comparability with other international organizations, I continue to borrow from seafaring language with reference to 'position finding' as the leading metaphor. The process indicates the activity of establishing the current position of a vessel on the map. It requires making adjustments so that the difference between the course steered and the course actually travelled over ground can be calculated, e.g. taking into account unknown currents, weather, tide, wind, and magnetic deviation. It can be conducted according to different methods, depending on the information that is available. For example, a position can be fixed by

taking 'cross bearings' with a compass that is pointing from a specific spot on the vessel towards two—or more—charted landmarks in the visibility range of the vessel. Alternatively, if such landmarks are not visible, the method of 'dead reckoning' allows the navigator to estimate a position depending on the course steered over a given period of time and at a given speed, and knowing that establishing the actual position will require correction according to current, wind, and magnetic deviation as the vessel moves over water during that period. The data used for that calculation are to be taken off the practice of sailing over time. Similarly, the following suggests analysing the EU's ship of state whilst finding its position on the uncharted waters of constitutional quality. To that end, the crew uses the signposts provided by *constitutionalism* (Section 2). In the process, the EU's journey is helped along by familiar landmarks provided by fundamental norms, organizing principles and standardized procedures of constitutionalism to take *cross bearings* (Section 3), providing the detailed information required to estimate positions with regard to normative progress of others, such as the UN, by *dead reckoning* (Section 4). Thus, the argument goes, the EU's ship of state might be charting the territory for other international organizations for decades to come (Conclusion).

## 2. Position Finding: Constitutionalism

Constitutionalism entails a framework of rules, norms, principles, and practices that reflects the constitutional quality of treaties, conventions, and agreements and is constituted through social practices i.e. in jurisprudence and/or academia. Given the contingency of this quality, constitutionalism differs according to time and place. At issue for students who seek to examine constitutional quality is an understanding of the diversity and commonality in the application and recognition of the respective interplay between familiar rules, norms, principles, and practices while applying them at a particular place and time. Based on this understanding, it is possible to carry out a bifocal analysis to assess both the stability and effectiveness of constitutional agreements in the eyes of their respective addressees, as well as the normative substance and durability of an agreement according to the normative standard of democratic legitimacy (see Walker, Eriksen, Müller in this volume). In other words, constitutionalism is a product made and remade through ongoing debates, reflecting the contested quality of its own very norms, rules, and principles (Lessig 1996; Kahn 1999). As a heuristic theoretical framework,

it entails meta-theoretical debates about questions such as why a constitution is legitimate, why it is authoritative, and how it should be interpreted, on the one hand, and a more descriptive approach that establishes whether particular features of a constitution are in place or not, including the assessment of constitutionalization as the process which leads to the establishment of such specific constitutional features, on the other (Craig 2001: 127; Maduro 2003*b*; Everson in this volume).

The reflection of the practice of jurisprudence and academic discussion about the law sustain the contextuality of constitutionalism. By contrast, *constitutionalization* is an exclusively descriptive concept that allows for process-based recollection of the formalization of constitutional change based on procedures and decisions (Rittberger and Schimmelfennig 2006). In this process, particular institutions and routine procedures adopt a legally binding quality which underlies the triadic practice of constitutional scrutiny (Stone Sweet, Sandholtz, and Fligstein 2001). For analytical purposes it is therefore important to distinguish between constitutionalization as the process that contributes to the institutionalization of pre-defined constitutional elements, on the one hand, and constitutionalism as an 'academic artefact' (Weiler 1999*a*), a reference frame constituted through debates involving academics and practitioners, on the other. The former allows for process tracing and does not usually involve a normative dimension; the latter includes both a constitutive and a normative dimension (Weiler and Wind 2003). This section addresses the latter concept. Its role in the social sciences has been coined through its application to specific contexts. Taking an interdisciplinary social science perspective it allows for distinguishing 'modern constitutionalism' from 'ancient constitutionalism' with regard to the type of social practice it identifies as central for the development of its conceptual parameters (Tully 1995).

It is helpful to distinguish between big-C and small-c constitutionalism. With constitutional quality expanding beyond the boundaries of modern states, other qualifications have been suggested by both lawyers and political scientists alike. These include descriptive distinctions between global and domestic perspectives that would distinguish between big-C constitutionalism on the one hand, and small-c constitutionalism, on the other. Here the former refers to the traditional domestic meaning of the concept while the latter is applicable to the context beyond the state (Walker 2006*b*: 12–14; Kumm 2009: 263). Small-c constitutionalism does not presuppose the existence of a written constitution. It merely presupposes the interplay between social and institutional practices in which claims to legality, legitimacy, and democracy are central. In a more narrow modern sense big-C

constitutionalism focuses on the basic ideas relating to justice, procedural fairness, and participation and the rule of law so as to allow relating institutional practices and policies of modern statehood to processes that develop beyond this type of statehood. More narrowly speaking, for lawyers, big-C constitutionalism refers to the context of domestic law considering constitutional law as '*the framing law of the modern age*' (Walker 2008c: 17).

Other conceptual distinctions separate functionalist from constructivist approaches to constitutionalism, where the former seek to establish formal limits of constitutional change (Dunoff and Trachtman 2009; Rittberger and Schimmelfennig 2006) while the latter include the constitutive practices at the fuzzy edges of constitutional quality (Reus-Smit 1997; Brunnée and Toope 2000; Falk 1993, cited in Dunoff and Trachtman 2009: 22). In light of the limited space of this final chapter, this is not the place to dwell on these distinct perspectives. However, it is important to note that the choice of perspective does not depend so much on disciplinary background and difference<sup>8</sup> as it follows epistemologically distinct theoretical standpoints. Leaving the debate about these distinct standpoints to one side, and turning to the approach of dense description in the absence of one convincing theory of constitutionalism, a contextual approach to constitutionalism allows for empirical openness when studying the diversity of meanings in contexts other than modern nation-states.

This perspective allows distinguishing the changing emphasis that the social sciences have put on organizational and cultural practices of constitutionalism over time. While modern constitutionalism stresses the role of organizational practices, ancient constitutionalism emphasizes the reference to cultural practices. Subsequently, Tully proposed working with the concept of 'contemporary constitutionalism' as one equipped to acknowledge the impact of both types of social practices, organizational and cultural (Tully 1995). Contextualizing constitutional quality is a first step towards understanding social recognition as a process that is more 'practical and permanent rather than theoretical and end-state oriented' (Tully 2002: 477). Thus, it is more helpful to distinguish the development of different types of constitutionalism over time than considering end-state scenarios which would—to return to the seafaring metaphor—borrow from either the statehood shore or that of international organizations, but would not provide the information required for navigating the uncharted straits of constitutional quality in between. For example, ancient constitutionalism puts a stronger emphasis on the social construction of the *nomos* while modern constitutionalism focuses on constitutional design to provide guidelines for the organization of a polity.

In order to recover the social construction of constitutional substance, Tully proposes to reconstruct multicultural dialogues by 'looking back to an already constituted order under one aspect and looking forward to an imposed order under the other' (Tully 1995: 60–1). This approach respects diverse expectations towards and interpretations of constitutional substance in multicultural societies. It allows for empirical appreciation of the distinct cultural and organizational practices of the past which have been constitutive for constitutional quality in specific context while keeping the normative target of equal access to participation in constitutional dialogues in sight with a view to present and future politics. These dialogues are reconstructed as discursive interventions that are constitutive for and enact 'normative structures of meaning-in-use' (Milliken 1999). Drawing on Derridian discourse theory, it is assumed that actors who interact within such a normative structure are prone to enacting and contributing to specific interpretations of norms and principles that matter to them (Weldes and Saco 1996). This process then is neither structurally induced nor agency-based but depends on structure and agency at the same time.<sup>9</sup> Thus conceptualized, constitutionalism is not about studying a legal document. Instead, it includes the social practices that represent both the generic—constitutive—and the contingent—historical—elements of a specific type of constitutionalism. For the global context this implies that if international interaction does not translate into large-scale social harmonization (as e.g. predicted as a probable development path by Karl Deutsch 1953) individual experience will lead to conflictive enactments of this structure. Contestation of fundamental norms is therefore to be expected in international encounters where actors cannot draw on shared social recognition because they, first, do not share a social context of origin and, secondly, have not had the opportunity to engage in interactive processes within international organizations over extended periods of time, so as to allow for social learning. The following section discusses some of the social practices that were constitutive for EU constitutionalism.

### 3. Taking Cross-bearings: EU Constitutionalism

The EU's specific constitutionalism remains contested and importantly, the layer that has been constituted by the specific European patina or the embedded *acquis communautaire* (Wiener 1998; Merlingen, Mudde, and Sedelmeier 2000) remains invisible. Despite the repeatedly and publicly

voiced suspicion that the Lisbon Treaty really is not altogether too far off the original constitutional project, the EU is formally established as a treaty-based rather than a constitution-based international organization. Nonetheless, the perceived constitutional quality of this organization has been influential throughout the process of European integration, albeit notably with more impact among lawyers than among political scientists.<sup>10</sup> The EU's experience with this layer of constitutional patina matters for understanding the changing quality of other international organizations as well.<sup>11</sup> Due to tradition and treaty contents, formally, the most important fundamental norms in the EU's social context overlap with cosmopolitan norms of political theory, that have acquired some familiarity beyond the disciplinary boundaries of international public law as central principles of international law or *jus cogens* norms (Dixon 2007). Practically, however, these norms mean different things to different actors, pending on their context of interaction over extended periods of time (Brunnée and Toope 2000). Formally, fundamental norms constitute the entrance condition for new members of the EU. Over the years, and as part of the EU's *acquis communautaire*, they have become acknowledged, shared and actively protected by and through the EU's political and legal organs.

The practice of referring to fundamental rights, especially as expressed through and developed by the EU courts' jurisprudence, has been decisive for constituting a layer of constitutional patina which does not fit either the organizational practices of modern statehood (and hence big-C constitutionalism) or the organizational practices of a treaty-based international organization constituted under the rules of international, rather than domestic law. This patina is therefore considered to be the indicator of a distinctive type of EU constitutionalism. Among the most distinctive landmark cases were the rulings in *Van Gend & Loos*,<sup>12</sup> *Costa v. ENEL*,<sup>13</sup> the *Solange* and the *Martinez Sala* rulings, as they were constitutive for changing the interpretation of the fundamental norms of sovereignty, fundamental rights, and citizenship formally.<sup>14</sup> Thus, the ECJ's ruling in *Van Gend & Loos* established the principle of direct effect which confers rights on individuals which they can invoke before the national and Community courts. The principle promotes Community law becoming part of national law and strengthens its efficacy. In addition, it safeguards the rights of individuals in that they can invoke a Community provision, irrespective of whether a national text exists or not. The ECJ's ruling in *Costa v. ENEL* established the principle of supremacy of European law over national law in relation to matters covered by the Treaties. Both rulings have established a change in



the quality of member state sovereignty since the 1960s. They were instrumental to the process which the law in context school has conceptualized 'integration through law'.<sup>15</sup>

As Advocate General (AG) Poiares Maduro emphasized in his Opinion on *Kadi and Al Barakaat*<sup>16</sup> (hereafter: the *Kadi Case*) in 2008, since *Van Gend & Loos* this process has continued to shape the specific 'Community legal order' as autonomous both from the domestic law of the EU member states and the international legal order. It is a legal order in its own right despite being a treaty-based organization.<sup>17</sup> As the AG continues to argue, '[T]he claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights.'<sup>18</sup> This opinion and the subsequent ruling on *Kadi* by the ECJ stress the EU's responsibility to protect fundamental rights of individuals. Sustaining the fundamental rights tradition of the EU is therefore constitutive for a specific legal order which was to protect individuals against decisions following from the UN Security Council's Sanctions Committee.<sup>19</sup>

The rulings in these landmark cases of integration through law matter insofar as they redefine the boundaries of sovereignty. In addition to the cases noted above, this is particularly evident in the most recent opinion on the *Rottmann Case* where even more strikingly perhaps, the concept of 'European Citizenship' in distinction from both 'national citizenship' and 'Union citizenship' was brought to bear. As AG Maduro's final opinion on the dispute among *Rottmann v. Freistaat Bayern* notes,

*Union citizenship* presumes citizenship in a member state however it also represents an autonomous legal and political concept in relation to that of citizenship. *Citizenship of a member state* does not only establish access to rights bestowed through community law, it also makes us citizens of the Union. *European citizenship* represents more than a bundle of rights which as such may be bestowed also on those who do not have Union citizenship. It presumes the existence of a bond of political nature between the citizens of Europe, even though this is not a bond of belonging to one people. This political bond unifies the people of Europe. It rests on the mutually established obligation to open their respective political entity to other European citizens and to create a new form of civil and political commitment on the European level.<sup>20</sup>

The AG's reference to the 'bundle of rights' that constitutes a 'bond of belonging' even with 'those who do not have Union citizenship' suggests quite a considerable input of the cultural practices of constitutionalism which, akin to interstitial law in international relations, are

constitutive markers for a specific European quality of constitutionalism. To summarize, these landmark cases have added considerably to the EU's constitutional patina.<sup>21</sup> However, whether and how this patina will play out in politics, remains to be seen. As experience has revealed repeatedly over the years, the *acquis communautaire* is not as common as the concept would suggest.

Elsewhere the EU's political history has inspired political scientists to conceptualize the EU as 'normative power Europe' (Manners 2002, 2006*b*, and in this volume). Both of these rather foundational observations, i.e. the European legal order,<sup>22</sup> on the one hand, and normative power in Europe,<sup>23</sup> on the other, clearly, and—for the endeavour of conceptualizing a Political Theory of the European Union—notably, place the EU within the global order. The range and scope of the reactions triggered by both documents suggest that each is sending a powerful message to international actors and the emerging community of International Political Theory (IPT) scholars alike. From this background, and in conjunction with IPT, a PToEU perspective therefore matters in two ways. First, it is notable that constitutional developments generated through social practices in Europe have an impact on the way international relations are practised within the global realm. The interesting question that follows from this observation is whether and how this impact manifests itself empirically. Is it, for example, mainly value-based, or, does it have material consequences as well, which could be measured by analysing institutional change in other international organizations? In addition, and considering that both observations followed from the theoretically quite distinct perspectives of pluralist cosmopolitanism on the one hand, and a purer version of Kantian cosmopolitanism, on the other (Kleingeld 1998; Tully 2008*a*), it is secondly, important to discuss the normative dimension these observations have for the ensuing debate about UN constitutionalism (Cohen 2004, 2008; Fassbender 1998*b*, 2007; Slaughter 2005).

While the literature on constitutionalism remains largely unexplored by international relations theory, attracting only a few international political theorists, international lawyers and European lawyers have cast a very attentive eye on the impact of the expanding constitutional quality beyond the state.<sup>24</sup> Reflection upon the EU's own trajectory of emerging constitutional quality is a case in point, as the process of integration through law was long left to EU legal studies. As the ECJ's activities are beginning to straddle the line between international and domestic law, through jurisprudence that is no longer limited by its interaction with the constitutional courts of the member states, but which has begun to engage

with international relations beyond the EU, European constitutionalism has emerged as a clear contender of modern constitutionalism. So much so that some fear that European constitutionalism will replace modern constitutionalism in establishing a new duality in international law (De Búrca 2008; De Wet 2009). The history of its constitution through social practices will serve as a reference frame, to understand the puzzle of constitutionalism beyond the state with regard to other international organizations, such as, most pressingly, and arguably, most importantly for its universal claims, the UN.

#### **4. Dead Reckoning: UN Constitutionalism**

If constitutionalism analyses the role of fundamental norms, the type of actors, and the institutions and procedures through which legal and political decisions are made, then how might it be applied to international relations? Constitutionalism in a wider sense, as small-c constitutionalism, is associated with the study of the constitutive elements of legal and political practice that are central for the assessment of its legality or legitimacy. As an academic artefact it is meant to provide a reference frame for interdisciplinary research on constitutional quality beyond the state. In international relations, this quality has been conceptually addressed by students of different stripes including new liberal international law and neo-liberal institutionalism's 'legalization' approach (Abbott et al. 2000) as well as the perspective on 'interstitial law' suggested by international interactive lawyers and constructivists (Finnemore and Toope 2001; Brunnée and Toope 2000). The former would be more closely linked to the functionalist approach to constitutionalism while the latter would be most comfortably linked with a constructivist approach.<sup>25</sup> In any case, as a heuristic approach with increasingly global reach, constitutionalism is helpful to facilitate a better understanding of the qualitative change from treaty-based to constitutionalized international organizations which has been observed with an increasing number of international organizations. As Cohen has demonstrated, for example, the problem of equal access presents itself currently with regard to the contested notion of democratic legitimacy in relation to the UN's aspirational constitutionalism (Cohen 2008).

Following the summary of landmark decisions that were constitutive for establishing the special patina of EU constitutionalism, the remainder of this section turns to more recent observations of constitutionalism

within the framework of the UN. These discussions have been fuelled by the paradigmatic shift of international relations from assumptions about long-lasting peace following the end of the Cold War towards new security threats in a post-realist environment subsequent to the 9/11 atrocities. Most remarkably, this shift entails the enhanced political impact of the UN's Security Council. Notably, the UN SC's role has become more contested throughout this process. Becoming a beacon of reference for interventions, thus establishing an increasingly powerful role, came with raising concerns about the legitimacy of this institution's role. Despite being probably one of the most researched international institutions, the future of the UN SC and, relatedly, the UN's constitutional setting, remains unclear. What can be established with some conviction, however, is that the UN's ship of non-state has entered the uncharted waters of constitutional quality beyond the state without a safe shore in sight. To establish its position, it will have to turn to the practice of dead reckoning, i.e. estimating a position as the targeted point of arrival based on a certain steered course and correcting the course at given intervals throughout the journey.

The following seeks to illustrate the value-added of constitutionalism as a theoretical framework for the UN and its institutions, as they are cruising in the waters of constitutional quality, which have been charted to some extent by the EU's journey. It demonstrates the usefulness of the EU's experience for estimating positions of other vessels, and sheds light on the puzzling assessment of the UN reform in 2005. Two quite distinct assessments of the changing constitutional quality generated by this reform stand out. They include the shift from rights-based to value-based understandings of the fundamental norm of sovereignty as observed by Slaughter (Slaughter 2005), on the one hand, and the changing basis of legitimation of UN activity, especially the United Nations Security Council that Cohen has noted as a consequence of the UN's shift from being a treaty-based to becoming a constitutional organization (Cohen 2008). The assessments of Slaughter and Cohen differ to such an extent that one is left wondering whether the choice of theoretic tools can lead to such strikingly different findings. Or would it be more appropriate to conclude—as this chapter suggests—that, to avoid such starkly contrasting assessments of the UN, we need better theoretical and methodological approaches to grasp the substance and impact of such new phenomena as the way constitutional quality beyond the modern state works in international relations? After all, the first assessment—by an international lawyer—praises the reform as an improvement in the quality of international relations, while the second

discussion—by a political theorist—comes to the conclusion that the changing constitutional quality of the UN poses a threat to the principle of equality among sovereign states.

While Slaughter considers the UN reform as quite a monumental step forwards towards better quality control of international relations, grounded on a substantial shift from rights-based to value-based international politics (Slaughter 2005), Cohen issues a warning, considering the very constitutional quality of UN-governed international politics as a threat to the principle of sovereign equality among states as long as the UN Security Council is not reformed (Cohen 2008). The two perspectives evolve from Slaughter's focus on quality control procedures in the UN that are human rights based, and a related *grundnorm* change from sovereignty to civilian inviolability, on the one hand, and, on the other hand, Cohen's perception of a decline in legitimacy in international politics. She holds that due to the unequal constitutional roles assigned to the UN's member states by its founding treaty, a process which undermines the culture of equal sovereign quality of states and therefore requires measures of adjustments following constitutionalization (Cohen 2008). The question to be raised with regard to replying to the question of praise or threat involved with this change is whether, how and where constitutionalization of the UN has taken place.

The puzzling divergence in these two distinct assessments of the UN's current constitutional shape stems from reference to two different theoretical frameworks. The first view is derived from the theoretical background of new liberal theory of international law, drawing on liberal intergovernmentalism (Slaughter 2004; Moravcsik 1995, 1998; Moravcsik and Schimmelfennig 2009). It finds the UN reform promising, because of its potential to qualitatively improve international politics due to more specific control mechanisms with regard to respect for human rights. The second view is derived from pluralist constitutionalism. It considers the advancing constitutionalization of the UN a threat to the principle of sovereign equality of states as long as the legitimacy of UN bodies is not scrutinized to control for power balance within this originally treaty-based international organization (Cohen 2008). Compared to the century-old history of international politics and law, the expanding constitutional quality beyond the boundaries of modern nation-states in the twentieth and twenty-first centuries must be considered as a fairly recent development. How are we to understand the impact of institutional change of constitutional quality, given that such change has actually—formally—taken place, such as for example with the UN reform in 2005?

Recent assessments of constitutional change within the UN suggest that approaches that are fit to grasp these processes still have some way to go. An example for such theoretical and methodological shortcomings is represented by the two recent efforts to assess the meaning and impact of the UN's change from a treaty-based to a constitutionalized international organization which have been highlighted in this section. Turning to the academic artefact of constitutionalism that is now considerably accomplished by the EU's accumulated navigational practices, will provide helpful pointers. These include, most importantly, the project of establishing and maintaining democratic legitimacy that remains stable despite unequal power relations. To that end, the equiprimordiality of constitutionalism and democracy in a non-state organization would need to be warranted institutionally, prior to engaging in debates about changing the *grundnorm* of international law from sovereignty to civilian inviolability.<sup>26</sup>

## 5. Conclusion

This chapter proceeded in three steps. It first addressed the concept of constitutionalism as a reference frame. Secondly, it offered a brief overview of the trajectory of EU constitutionalism, highlighting landmark cases of the process of integration through law and discussing key instances of cultural and organizational practices of European constitutionalism. Thirdly, it turned to the more recent debate about UN constitutionalism, the impact of the UN reform and the future of international law. It was argued that theorizing the EU's *sui generis* experience matters in particular as other international organizations gain political clout and therefore raise the issue of how to legitimize their role in world politics. It was demonstrated that both the EU and the UN are increasingly influential as global actors that do not match the treaty-based roles foreseen in their respective original institutional settings. Their respective new political role is based on two pillars including first, the degree of constitutional quality; and second, the interplay of key policy elites and academics. A growing number of international organizations are developing a political potential that reaches far beyond the role of agent that they were assigned by states as their erstwhile principals (Zürn et al. 2007). The UN Security Council's Sanctions Committee's practice of black-listing was highlighted as one example where direct effect of supranational rules on individuals raises questions about the proper procedure to scrutinize the accountability of such actions.

In light of multiple crossings between political, societal, and constitutional boundaries, it is no longer obvious 'whose sovereignty' to take into account to make sure the principles of justice and fairness are respected when practicing international relations in the twenty-first century (Cohen 2008). Given the process of regional integration of some five decades which have been constitutive for the specific type of contemporary constitutionalism that is identifiable as 'European' (if referring to the EU polity), the EU experience offers a helpful reference frame with a view to addressing the developing constitutional quality in other contexts beyond the state such as, for example, the United Nations.

The theoretical perspectives developed by the contributions to this book matter in particular to theories that are struggling to conceptualize non-state features of international politics. For example, both international relations theory and international law, on the one hand, and political theory and domestic law, on the other, struggle to overcome the constraints of methodological nationalism. Leading questions raised by these disciplines and targeted by the contributions to this book are, for example, how do we understand and explain processes of contesting existing legal norms which are likely to generate new candidate norms in international relations? What is legal and what is legitimate under international law? Which reference frames are international actors to use? Does, for example, the formal validity of treaty law set the framework of reference, or, does social recognition as the perceived degree of appropriateness of a legal instrument set the yardstick for legitimacy?

With some readers, this book's title may have raised the question: why a Political Theory of the European Union, especially, at a time when the EU's 'ship of non-state' has just successfully navigated through the rocky straits of European constitution-making and safely arrived on the shore of international organization. Mooring on this side of the uncharted waters of constitutional quality beyond the state should indicate a relatively uneventful future, building on the well-known practices of regional integration through treaty-making. As this concluding chapter sought to illustrate, if far too briefly, the story the EU has to tell does not fit this picture. Contrary to the popular perception of the EU's constitutional process, especially its presentation in the media, which would appear to support a normalization of the EU as one among many other international organizations, this chapter suggested that it might be altogether justifiable to contend that on a deeper level, the social practices of constitutionalism have been constitutive for an ever more specific type of contemporary constitutionalism that is distinctively European.<sup>27</sup> This is so because it has been

generated through social practices of constitutionalism in the context of European integration over the past fifty years or so. In other words, the social practices of constitutionalism, both the more formal organizational practices and the informal cultural practices make the case for a Political Theory of the European Union.

## Notes

1. Compare the title picture on Moravcsik's monograph 'The Choice for Europe' (1998) as a metaphor for a single ship that transports the member states.
2. For comments on earlier versions of this chapter I would like to thank Hannes Hansen-Magnusson, Ian Manners, and Jürgen Neyer. Responsibility for this version is mine.
3. Note that it is important to clarify that this 'advice' is not considered as part of a European normative or liberal mission that is inherent in cosmopolitan or liberal concepts of the European Union. But it is a story which may be referred to upon specific request to compare experiences. This comparative concept of experience represents the pluralist cosmopolitan approach taken by this chapter (compare also Tully 2008a).
4. See former Article 6, TEU, now Article 2, Title 1 of the Lisbon Treaty at <http://www.consilium.europa.eu/uedocs/cmsUpload/st06655.de08.pdf> <accessed 6 Feb. 2010>
5. See Treaty of Lisbon, 2009, Article 8 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.' And, Article 8a 1: 'The functioning of the Union shall be founded on representative democracy. 2. *Citizens are directly represented at Union level in the European Parliament.*' See: [http://en.wikisource.org/wiki/Treaty\\_of\\_Lisbon/Article\\_1\\_-\\_Treaty\\_on\\_European\\_Union/Article\\_8](http://en.wikisource.org/wiki/Treaty_of_Lisbon/Article_1_-_Treaty_on_European_Union/Article_8), emphasis added AW.
6. Note that *constitutionalism* and *constitutionalization* are two distinct concepts. For details, see section 2 of this chapter.
7. See e.g. the European Court of Justice (ECJ) in its 2008 judgement on the *Kadi Case* which is discussed more in detail in section 3 of this chapter.
8. Such a distinction would be misleading, see e.g. Keohane's effort to chart the field in international relations based on the distinction between 'instrumental' political scientists and 'interpretative' lawyers (Keohane 1997).
9. Recall the so-called 'structure-agency debate' in IR that launched with Wendt's early constructivist paper in 1987 (Wendt 1987; Lapid 1989; Waever 1996).
10. Consider the process of 'integration through law' (Cappelletti, Seccombe, and Weiler 1986; Haltern 2003b).



11. Consider, for example, the changing role of the United Nations (UN) or the World Trade Organisation's appellate body (Ikenberry and Slaughter 2006; Zürn et al. 2007; Weiler 2002).
12. Judgement of the Court, *Van Gend & Loos*, Case 26\_62 (5 Feb. 1963)
13. Judgement of the Court of 15 July 1964. *Flaminio Costa v. ENEL*. <http://eur-lex.europa.eu/LexUr...do?uri=CELEX:61964J0006:EN:NOT> <accessed on 5 July 2010>
14. For details see also Kumm in this volume, for the German Constitutional Court's *Solange* ruling, see Dunoff and Trachtman 2009.
15. For a summary, see Haltern 2003a.
16. ECJ, Cases C-402/05P and C-415/05P, 3 Sept. 2008.
17. Opinion of Advocate General Poiares Maduro, Case C-402/05 P, 28 Jan. 2008, p. 4 (details: <http://www.statewatch.org/news/2008/jan/ecj-kadi-ag-opinion.pdf> <accessed on 6 Feb. 2010>)
18. *Ibid.*, p. 7.
19. The Sanctions Committee was established based on UNSC Resolution 1267, e, 6, UN Doc S/RES/1267, 15 Oct. 1999. While originally established to counter Taliban activities, the committee's activity was later extended to address Al Qaida activities as well. Black-listing individuals is used as a key policy instrument to freeze funds and restrict movement of those listed (for further details, see Fromuth 2009, among others).
20. German original text: 'Die Unionsbürgerschaft setzt die Staatsangehörigkeit eines Mitgliedstaats voraus, stellt jedoch auch ein im Verhältnis zu dem der Staatsangehörigkeit autonomes rechtliches und politisches Konzept dar. Die Staatsangehörigkeit eines Mitgliedstaats eröffnet nicht nur den Zugang zu den vom Gemeinschaftsrecht verliehenen Rechten, sie macht uns zu Bürgern der Union. Die Europabürgerschaft stellt mehr dar als ein Bündel von Rechten, die als solche auch denjenigen verliehen werden könnten, die die Unionsbürgerschaft nicht besitzen. Sie setzt das Bestehen eines Bandes politischer Natur zwischen den Bürgern Europas voraus, obwohl es sich nicht um ein Band der Zugehörigkeit zu einem Volk handelt. Dieses politische Band eint vielmehr die Völker Europas. Es beruht auf der von ihnen eingegangenen gegenseitigen Verpflichtung, ihr jeweiliges politisches Gemeinwesen den anderen europäischen Bürgern zu öffnen und eine neue Form der bürgerschaftlichen und politischen Verbundenheit auf europäischer Ebene zu schaffen.' See: Schlussanträge des Generalanwaltes M. Poiares Maduro vom 30. Sept. 2009, Rechtssache C-135/08 Janko Rottmann gegen Freistaat Bayern (Vorabentscheidungsersuchen des Bundesverwaltungsgerichts [Deutschland]): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008C0135:DE:HTML> [translation from German original text, AW, emphases added AW <accessed on 5 July 2010>]
21. Compare e.g. the manifold cross-references by other courts on these opinions and rulings.

22. See e.g. the contributions by De Búrca 2008; Halberstam and Stein 2009; Posch 2009; Eckes 2009, among many others.
23. See e.g. the discussion in Diez and Steans 2005; Sjursen 2006; Pace 2007*b*, among many others.
24. See among many publications, De Búrca and Scott 2000; Weiler 2002; Loughlin and Walker 2007; Dunoff and Trachtman 2009.
25. For this very broad distinction, see Dunoff and Trachtman 2009.
26. On the latter debate, on which the limited space of this conclusive chapter cannot begin to do justice, see e.g. Slaughter 2005 and, critically, Benhabib 2007; on the former, see Tully 2002 and Owen 2002.
27. For such assessments, see e.g. Weiler and Wind 2003; Walker 2002, 2003*b*; Maduro 2003*b*, and Peters 2005.