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Comment: Fact or artefact? Analysing core constitutional norms in beyond-the-state contexts

Antje Wiener

DEFINITIONS

There 'appears to be no accepted definition of constitutionalism but, in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights . . . however, the relationship between constitution and constitutionalism and the very boundaries of the concept of constitutionalism tend to become increasingly blurred' (Rosenfeld 1994: 3). *Constitutionalism* is a product made and remade through ongoing debates which reflect the contested quality of the very concepts encompassed by constitutionalism (Kahn 1999). As an 'academic artefact' (Weiler 1999: 223) constitutionalism provides a heuristic theoretical framework for lawyers and social scientists alike. It allows for a better understanding of the process and purpose of *constitutionalization*. While constitutionalism stands for a conceptual framework, constitutionalization details the actual process leading to the establishment of specific constitutional features (Stone Sweet 2002: 96). Most broadly defined, constitutionalism entails 'the normative discourse through which constitutions are justified, defended, criticised, denounced or otherwise engaged with' (Walker 2002: 318). The more narrowly defined *modern* constitutionalism addresses the rules, principles and procedures that regulate state politics with reference to their respect for core constitutional norms and their implementation within the limits of modern nation-states.

It provides different perspectives on the process of constitutionalization distinguishing between a meta-theoretical focus on possibilities and purposes of a constitution as well as a descriptive approach that establishes whether or not particular features of a constitution are in place (Harlow 2002).

ARGUMENTATION

The special issue focuses on the actual process of constitutionalization (what is happening on the ground and why?) rather than on theoretical debates or aspects of constitutionalism (what is happening or ought to happen to warrant democratic politics?). The editors' interest lies with the 'why' question which finds a puzzle that is to be explained rather than proceeding with the 'how possible' question which seeks to understand constitutive practices in context (Doty 1997; Wendt 1998; Fierke 1998). While the first approach explains behaviour, the second works with the assumption of contingency which does not consider structure and agency as distinct but as interrelated (Risse 2000; Wiener 2004). The editors argue that as a rational act towards positive integration, constitutionalization – narrowly understood as the institutionalization of human rights and parliamentarization as modern core constitutional norms – poses a puzzle for both rationalists and constructivists. The puzzle lies in the rationalists' search for explanations based on preference or power constellations, on the one hand, and the fact that constructivists find themselves hard pushed to attribute constitutionalization to learning and socialization, on the other. According to the editors, the way forward from this 'double puzzle' lies in situating decisions within fixed community environments which exert pressure on decision-making actors. The solution is offered by the 'liberal community hypothesis' (Schimmelfennig 2003: 89) which analytically links 'collective expectations for the proper behavior of actors with a given identity' (Katzenstein 1996: 5), for example, that of liberal democratic states. While modern constructivists would attribute appropriate behaviour to processes of socialization, the special issue's editors find actors entrapped and without alternative options for decision-making. At issue for them is therefore identifying independent variables which would help to explain constitutionalization despite the (state) actors' assumed rational interests.

To explain why 'state' actors would defer power by deciding to stipulate constitutional norms such as human rights, minority rights, alien rights and police co-operation supranationally, the editors have chosen to analyse particular moments that are part of the process of constitutionalization of core constitutional norms in the European Union's (EU's) supranational treaty documents. To do so, empirical research focuses on moments of Treaty revision which are analysed according to whether or not steps towards the institutionalization of particular constitutional norms did occur in the EU. And the contributors were encouraged to follow the editors' lead in working with this specific understanding of state actors in a modern constitutional context to 'explain constitutionalization' based on a specific comparative framework. The explanatory efforts are based on an analytic position which operates with a narrow rather than a broader understanding of integration. The latter would involve both social and political processes (Diez and Wiener 2003: 2). This narrow understanding of integration is combined with a narrow understanding of theory 'as a causal argument of universal, transhistorical validity and nomothetic

quality' rather than a broader understanding of theory 'in a rather loose sense of abstract reflection, which despite its abstract nature can nonetheless be context-specific' (Diez and Wiener 2003: 3).

LIMITATIONS

It is important to note that the special issue's main observation about a 'puzzle' only works on the condition of two assumptions made prior to the argument. That is, the constitutionalization of core constitutional norms in the EU as a beyond-the-state context is only unexpected and hence puzzling to those who share two specific limitations. The first limitation regards the observation of a 'double puzzle'. According to the editors, constitutionalization of, for example, human rights norms is puzzling for both rationalists *and* constructivists. This, however, is only the case with reference to a particular strand of constructivism. That is, while the observation of a puzzle works for 'modern constructivists' who analyse state behaviour in relation to structures, it does not work for 'consistent constructivists' who analyse agency – both state and non-state – as contingent and interactive (Doty 1997; Fierke 2006; Wiener 2007). The second limitation regards the observation of a puzzle writ large. Here, it is important to note that the situation of a puzzle can only be observed once a specific form of constitutionalism, namely 'modern constitutionalism', is taken as the reference frame. It does not work for constitutionalism in general. Only 'modern constitutionalism's' focus on 'the state' and the constitution's regulatory input on politics allow for the occurrence of a puzzle once states agree to 'give away' some of their sovereign power. In turn, a broader concept of constitutionalism encompassing different historical presentations of constitutionalism such as ancient, modern and contemporary (Tully 1995) would not justify the assumption that the constitutionalization of core constitutional norms such as human rights, democracy, the rule of law and citizenship in beyond-the-state contexts is puzzling. This broader concept of constitutionalism would not sustain the issue of a puzzle but analyse the type and quality of constitutionalism instead. Once these two limitations are accepted, the argument about the double puzzle can proceed. Any insight gained from the empirical research will accordingly be exclusively equipped to provide explanations for state behaviour that is enabled and constrained by the structural input of communities in a context that is otherwise working according to the Hobbesian logic of the Westphalian peace order. An unintended side effect of this approach is therefore, and importantly the editors' confirmation of modern constructivism as an exclusive approach which is geared to work in this historically specific context only.

The single authored contributions to this special issue that were added to the Mannheim team of researchers hint at the limitations underlying the specified framework of analysis provided by the editors. The reference to institutional change and the deference of the respective input of the series of independent variables ranking from constitutive rules, salience and legitimacy to coherence

and publicity to explain the interplay between rhetorical action and social influence, narrow empirical possibilities down. As the contributions by Lavenex, Wagner, Thomas as well as Schweltnus (even though the latter is part of the Mannheim team) show, while parliamentarization and institutionalization may be important aspects of constitutionalization, they are not necessarily the most indicative elements to understand how particular turns during the process of constitutionalization came about. A good example of such struggle with a limiting theoretical framework is Daniel Thomas's contribution. Here the constitutionalization of 'democracy' and 'the rule of law' as new membership conditions are analysed as a condition that has evolved through 'practice'. This practice involves – Birkelbach's – individual experience which contributed to 'intense contestation' as the first steps of constitutionalization. The contribution by Sandra Lavenex seeks to address the complexity of actor types and the range of structural input factors by adding 'an organizational variable . . . to this comparative analysis: the degree of pluralism of the decisional arena' (2006: 1287). Strictly speaking, the added pluralism would not fit the two limitations set by 'modern constructivism' and 'modern constitutionalism'. One could therefore raise the question whether Lavenex's empirical study would not be better conducted according to the insights of consistent constructivism and constitutional pluralism? Similar to Thomas's, the contribution by Wolfgang Wagner depends on analysing discursive interventions. To that end Wagner takes on board the additional element of 'types of arguments' which has been introduced by Guido Schweltnus as a key instrument of empirical analysis allowing for discursive analysis of justification. In the end, Wagner's argument displays a classic neofunctionalist spillover. That is, in a democratic constitutional context the constitutionalization of parliamentary and judicial control has been made indispensable by the communitarization of police operations under Schengen with the Amsterdam Treaty.

CONCLUSIONS

Reference to constitutionalism as an artefact has allowed us to assess prospects, pitfalls and peculiarities of constitutionalization in the EU for the past five decades. In the process, the artefact has been re/constructed to the extent that the constitutional pluralism reflects best the coexistence of a range of different types of constitutionalism which all contribute to and set the parameters of contemporary constitutionalism (Walker 2002; Tully 2002). Beyond-the-state constitutionalism provides a framework for contexts which are governed by a set of less stable and more contested norms than fully constitutionalized modern nation-states. These contexts lack the possibility to refer to a set of social institutions for recognition and appropriateness of legal institutions (Curtin and Dekker 1999; Finnemore and Toope 2001). In the absence of this set of social institutions, individually held associative connotations gain influence on the assessment of recognition and appropriateness. Cultural validity thus becomes an increasingly powerful reference

criterion for analyses of constitutionalization (Wiener 2006). To assess the potential acceptance of the constitutionalization of core constitutional norms in beyond-the-state contexts such as the EU, two dimensions of constitutionalism matter therefore. They include, first, meta-theoretical debates about constitutional legitimacy, authoritative reach and interpretation and, second, the empirical assessment of interrelations between particular constitutional norms and individual actors.

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