

Editorial: Evolving Norms of Constitutionalism

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Abstract: *Constitutionalism offers an academically constructed framework that allows us to assess processes of constitutional change in their respective societal contexts. This article offers insights into different perspectives within the debate over ‘European’ constitutionalism and their potential consequences. It makes the point for a societal approach to assess the emergence and role of both, constitutional and sociocultural norms, pointing to the key role of social practices in this process. It proposes an approach to constitutionalism which elaborates on a shift of analytical focus from the ‘type of polity’ towards ‘social practices’ as key to evolving, interpreting, and implementing norms. It is argued that this choice of perspective matters. It has implications for subsequent moves including the selection of case studies and methodology. The distinct analytical choices are presented as four positions of constitutional choice.*

I Introduction²

The oft-mentioned perspective on the European Union (EU) as a polity that finds itself in a continuous process of becoming leaves academics and politicians alike appearing to constantly act or argue ‘as if’ the EU were an international organisation or a state. This take on the EU notwithstanding everybody is perfectly clear about the constraint entailed in the EU’s status as both ‘anti-state and near-state’.³ After all, while not necessarily or conceptually related to nation-states, ‘usually, talk about “constitution” or “the constitution” means the constitution of a state as the basic order and

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² This article draws upon several years of joint work on the topic with Jo Shaw for which funding has been received from the British Council and the German Academic Exchange Service’s Academic Research Collaboration Programme (ARC) Grant #1088 (1999–2000) as well as from the University Association of Contemporary European Studies (UACES) in the UK (2000–2002). The work presented in this special issue builds on a number of workshops which brought together an interdisciplinary and international scholarly community under the umbrella of a two-year study group on the topic for which financial support from UACES, Queen’s University Belfast, the University of Leeds, as well as the European Commission is gratefully acknowledged. The editors would also like to thank the workshop participants and members of the UACES study group as well as the German partners, especially Ingolf Pernice and U. K. Preuss who were central to beginning this project. I gratefully acknowledge financial support by two British Academy Small Research Grants # SG-34628 and # SG-31867, as well as a Social and Legal Studies Association Small Research Grant.

³ See Shaw, J. and A. Wiener, The Paradox of the ‘European’ Polity, NYU Law School Jean Monnet Working Papers, 10/99, (1999), <http://www.jeanmonnetprogram.org/papers/99/991001.html>

organisation of state and political life'.⁴ While the EU's analytical fuzziness remains challenging to politicians, policy advisers, and traditional, say, black-letter law or comparative governance approaches, the enormous constructive potential inherent in this fuzziness does raise interesting questions for both lawyers and social scientists who work with meta-theoretical, socio-historical, cultural, and constructivist approaches. To this group, the EU offers a case that most clearly demonstrates the impact of factors that remain less visible within the familiar context of stateness, namely, the central role of process, practices and becoming in constitutional politics. Thus, it is argued here that, in the absence of supranational statehood,⁵ it is precisely the perspective of impossibility attached to constitution building beyond the state that enhances the dynamic of the constitutional debate. In the current European context, there is neither agreement about the constitutional quality of the EU's basic texts, nor about the desirability of such a document.⁶ For example, the European Convention⁷ is faced with establishing three issues; first, do Europeans want a constitution? Second, do Europeans have a constitution already, and third, do Europeans want the constitution they have?⁸ There is however a plethora of proposals about constitutional change in the EU with the creativity of constitutional architects being pushed by the pressure of producing a workable idea until the forthcoming constitutional inter-governmental conference (IGC) in 2004. While this context raises considerable practical and analytical challenges to modern constitutional architects who trail the beaten track of stateness, it encourages others to peer beyond the analytical boundaries of that track and explore new paths of constitutionalism. One such path is provided by a shift in ontology from focusing on the system (i.e. the constitutional architecture, see more in detail *Shaw* in this issue) towards concentrating on its central parts (norms and practices) and their development within specific environments.⁹

⁴ See Boeckenfoerde, Ernst-Wolfgang. 'Geschichtliche Entwicklung und Bedeutungswandel der Verfassung', in E.-W. Boeckenfoerde (eds) *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (2nd edn) (Suhkamp, 1992), at 29 (translation from original; AW). As Moellers points out, in Weimar Germany an almost synonymous application of the terms 'state' and 'constitution' can be observed. See, however, his critical observation that, in turn, the terms 'Nation State' and 'constitution' are not necessarily compatible at all, given the German and English processes of state-building in particular, as opposed to the French Nation-State model, C. Moellers, 'Begriffe der Verfassung in Europa', A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht*, 2003, at 10–11; 16–17, respectively.

⁵ See Maastricht ruling of German Constitutional Court, 1993 'BVerfGE 89, 155—Maastricht': Zweiter Senat BVerfG.

⁶ 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'. See B. De Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process', in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing, 2002), pp. 39–57, at 39.

⁷ For the 2001 Laeken Council Declaration which set the rules and procedures for the European Convention, see http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm. See Shaw's contribution to this special issue in more detail on the Convention.

⁸ 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' (anonymous interview with MEP official, Brussels 29.08.01, on file with author). As Miguel Poyares Maduro points out, the question could also be put thus 'is there a Europe for the constitution', (Maduro 2002; on file with author) I thank Jo Shaw for alerting me to this perspective.

⁹ Walker, N., 'The White Paper in Constitutional Context (Part I)', in C. Joerges, Y. Meny and J. H. H. Weiler (eds), *Jean Monnet Papers Responses to the European Commission's White Paper on Governance*, 2001, <http://www.jeanmonnetprogram.org/papers/01/011001.html>.

The contributions to this special issue all take on that invitation based on a shared focus on the ontology of the parts rather than that of the system. They seek to contribute to the constitutional debate by proposing a focus on the very norms and practices that lie at the core of ‘becoming,’ as it is approached by lawyers, political scientists and sociologists respectively. The contributors of this special issue discuss the potential and limits of ‘European’ constitutionalism from conceptual, empirical, and analytical perspectives providing theoretical discussion and case studies to sustain their respective points. They contribute to the debate by developing and demonstrating an approach to constitutionalism which elaborates on a shift of analytical focus from the *type of polity* towards *social practices*. It is argued that this choice of perspective matters and has implications for subsequent moves including the selection of case studies and methodology, i.e. what is to be explained and where to look for clues, including the question of whether a statist, a *sui generis*, or, an organisational approach to the EU informs the choice of constitutional approach. Section II identifies different positions of constitutional choices according to four constitutional approaches. Section III summarises the main methodological elements of the ‘evolving norms approach,’ and the final section, Section IV introduces the five further contributions to this special issue, including their respective application of that approach.

II Approaches to Constitutionalism: Four Choices

The European constitutional debate is characterised by a lack of convergence in approaches to European Union law¹⁰ as well as in constitutional politics. This diversity does not come as a surprise within the EU’s fragmented and multilevelled polity. After all, it is an expression of multiple sociocultural trajectories that have shaped the institutional and ideational framework that set the conditions for institutional fit, inform Member State preferences and define the need for adaptation.¹¹ Yet, in the absence of a constitutional consensus,¹² the IGC is likely to fall back on constitutional bargaining in which national preference formation¹³ and experience with national constitutional norms will provide the core guidance for decision-making about tough and influential choices. Subsequently, politicians proceeding under time pressure are left wondering which constitutional choices are available. Work on policy learning, path dependence, and the routinisation of practices suggests that, in the absence of

¹⁰ 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’. See A. v. Bogdandy, ‘A Bird’s Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective’, (2000) 6:3 ELJ, pp. 208–238 at 209.

¹¹ For a critical assessment of lacking institutional convergence in the European polity despite European integration, see J. P. Olsen, ‘The Many Faces of Europeanization’, ARENA Working Papers, (2002).

¹² The term ‘consensus’ is applied here in the Habermasian understanding; see e.g. Habermas’s distinction between ‘compromise’ and ‘consensus’ as follows, ‘[B]argaining processes are tailored for situations in which social power relations cannot be neutralized in the way rational discourses presuppose. The compromises achieved by such bargaining contain a negotiated agreement (*Vereinbarung*) that balances conflicting interests. Whereas a rationally motivated consensus (*Einverständnis*) rests on reasons that convince all the parties *in the same way*, a compromise can be accepted by the different parties each for its own *different* reasons’, Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Blackwell Publishers, 1996) at 166; I thank Guido Schweltnus for this reference.

¹³ For this approach to decision-making in the process of European integration, see Moravcsik, A., *The Choice for Europe* (Cornell University Press, 1998).

acceptable shared choices, decision-makers are most likely to fall back on models which appear familiar according to their respective experiences within national environments. It is interesting to observe that nationally distinguishable positions have become more pronounced already. For example, as Ulrich Haltern observes, the constitutional proposals and/or blueprints demonstrate a radical shift from an effort to keep with 'state-neutral wording' in constitutional language towards a remarkable lack of 'semantic precaution'.¹⁴ This observation indicates a hardening of national bargaining positions in the forthcoming constitutional debates that are expected at the end of the post-Nice process in 2004.¹⁵

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 incoming candidate countries. It will contain changes regarding both institutional and substantive policy issues. More specifically, it involves agreement among the participating heads of state and/or government about first, 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,¹⁶ and so forth, not to mention ratification of the agreement at the national level. Second, it involves 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, e.g. are they meant to limit political power based on a constitutional contract, on the one hand, or are they expected to create unity evolving from a Madisonian constitutional moment, on the other? I argue, that the structural pressure to reconsider the EU's institutional design—particularly in the light of the current situation of impending massive enlargement—creates a situation in which decision-making is most likely to follow preferred constitutional choices (i.e. which constitutional model?), instead of deliberation over the meaning of constitutional substance (i.e. which meanings are entailed in a constitutional model?). It follows that a reasoned consensus based, for example, on the concepts of 'constitutional responsibility', or 'constitutional recognition',¹⁷ that would, in other words put into practice core 'European' values of norm validation, access to participation and contestation¹⁸ is unlikely. The explorative terrain of constitutionalism is then open to the restricted options of minimal Treaty revisions based on lowest common-denominator bargaining at the IGC only.

Assuming the scenario in which the Convention's contribution fails to facilitate a strong proposal for constitutional consensus which all participating parties at the forthcoming IGC are prepared to validate as preferable and legitimate, I identify four positions derived from different approaches of constitutionalism as bases for Member State preference formation (see Table 1). On a horizontal axis, the potential

¹⁴ See Haltern, U., 'Gestalt und Finalität', in A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge* (Springer, 2003), at 809.

¹⁵ This shift of perspective towards identifying national interest positions has been supported for example by Beate Kohler-Koch's work; Kohler-Koch, B., 'Ziele und Zukunft der Europäischen Union: Eine Frage der Perspektive', (2000) 23: 3 *Integration*, pp. 185–197.

¹⁶ See e.g. Ingolf Pernice's proposal to establish a subsidiarity committee; see Pernice, I., The European Constitution, 16th Sinclair-House Talks in Bad Homburg, 11–12 May 2001, <http://www.h-quandtstiftung.de/english/kolloq/shg.htm>, (2001).

¹⁷ See for the former, Shaw in this issue, for the latter, Tully, J., *Strange multiplicity: constitutionalism in an age of diversity* (Cambridge University Press, 1995).

¹⁸ See on these values and the plea to safeguard them within a constitutional framework, Habermas, J., 'Warum braucht Europa eine Verfassung?' *DIE ZEIT*, 29 June 2001. (English version: available at [http://www.iue.it/RSC/EU/Reform02\(uk\).pdf](http://www.iue.it/RSC/EU/Reform02(uk).pdf))

Table 1. Four Constitutional Choices.

		Political Order	
		Form	Substance
Process type	Legalisation (vertical; legal process)	(II) action: strategic intervention goal: <i>maximising gains</i> (<i>struggle over resources</i>)	(III) action: strategic interaction goal: <i>substantial improvement</i> (<i>top-down</i>)
	Constitutionalisation (horizontal; social and legal practices)	(I) action: strategic institution-building goal: <i>legitimacy; identity</i>	(IV) action: discursive interaction goal: <i>shared frames of reference</i> (<i>evolving norms</i>); <i>contested meanings</i>

constitutional choices depend on preferences for decisions about the ‘form’ or ‘substance’ of the text. They involve the choice about, first, the type of document, for example, as a constitution in a ‘thin’ or in a ‘thick sense’,¹⁹ and, second, it involved choices about substantial constitutional change, i.e. particular constitutional norms and provisions. On the vertical axis the choices are distinguished according to preference for the type of process which induces the revision of the current treaty framework, e.g. either as the more narrowly defined practice of legalisation or the broader process of constitutionalisation. Here, legalisation summarises the legal practices of creating legal arrangements which gain in binding force,²⁰ whereas constitutionalisation involves social as well as legal practices that establish law-like rules, institutions and understandings for a particular community, on the other. In practice, the choice refers to two different types of constitutionalisation which are taken from the public-law approach to European law and a broader sociological approach to international law, respectively. Both express the general meaning of constitutionalisation as involving the ‘transformation of the Community from an international to a constitutional legal order’.²¹ The first choice is labelled ‘legalisation’

¹⁹ As Paul Craig notes, a ‘thin sense of constitution’ as law establishes, defines, and organises the main organs of government, their constitution and powers; in turn, a ‘thick sense of constitution’ includes the seven constitutional features of being constitutive, stable, written, superior law, justiciable, entrenched, and expressing a common ideology. Craig, Paul. ‘Constitutions, Constitutionalism, and the European Union.’ 2001 7 *ELJ*, pp. 125–150, at 126–128, citing J. Raz ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’, in L. Alexander, (ed.) *Constitutionalism* (Cambridge University Press, 1998), pp. 152–153.

²⁰ See, for example, J. Goldstein, M. Kahler, R. O. Keohane and A.-M. Slaughter, ‘Introduction: Legalization and World Politics’, (2000) 54:3, *International Organization*, pp. 385–399; Abbott, K. W., R. O. Keohane, A. Moravcsik, A.-M. Slaughter and D. Snidal, ‘The Concept of Legalization’, (2000) 54:3, *International Organization*, pp. 401–419; see J. Kuehling, ‘Grundrechte und Grundrechtsdogmatik’, in Bogdandy, A. v. (ed.), *op. cit.* note 14 *supra*.

²¹ Craig, P. 2001, *op. cit.* note 19 *supra*, at 128. For a discussion, I thank T. Börtel, Th. Risse, U. Haltern, and C. Albert, Berlin, 7 February 2002, in particular.

in order to stress the strong formal dimension of the process. It is understood to mean ‘vertical constitutionalisation’, i.e. ‘legal integration from above’.²² This formal approach to constitutionalisation defines the process of an evolving ‘set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law’.²³ The second type refers to ‘constitutionalisation’ as developing horizontally according to an evolving set of practices, rights, and a spirit of community which has been offered within the framework of international law.²⁴

In addition to different positions on constitutional choice, the table demonstrates that approaches which are, for example, presented as process oriented and with a focus on *substance*, often turn out to be working with the underlying stress on a constitution’s *symbolic* role as a fixed point, nonetheless. Such symbolic approaches assign a key role to constitutions as part of the state-building process, assuming that a constitutional treaty either generates debate and hence public awareness before or after the act of passing of a constitution, or that it provides the Europolity with the ‘pathos’ that would fill the void of shared constitutional tradition in the Europolity.²⁵ Both views include the key role of a constitutional moment as mobilising emotions, expectations, and identity. The Charter process in the EU has been considered as a similar emotional trigger. Thus, the significance of a Charter of Fundamental Rights was found to lie primarily in stimulating public debate and thereby creating a positive public identity that is triggered by the symbolism of the charter. Its role can be summarised as follows:

Notwithstanding that it [the Charter] is for now passed as a programmatic declaration only, it will adopt a leading and orientating function with an impact that reaches far beyond previously passed declarations by the European institutions, to be sure.²⁶

In contrast to constitutional doctrines which emphasise symbolism, substance-oriented approaches would argue that the political role of constitutions depends critically on a set of historically contingent practices that vary according to time and place. Further to the formally assigned regulative functions of constitutions, such as democratic institutions and the formal legal provisions of a constitution, a third—historical—dimension entails the accumulated meaning of the constitutional text

²² See Joerges, C., ‘The Law in the Process of Constitutionalizing Europe’, Arena Annual Conference, Oslo, 2002, at 7; see also the ‘integration through law’ approach according to Cappelletti, M., M. Seccombe and J. H. H. Weiler, *Integration Through Law—Europe and the American Federal Experience* (de Gruyter, 1986).

²³ See Haltern in this issue, referring to Alec Stone’s definition of the term; see Stone Sweet, Alec, ‘Constitutional Dialogues in the European Community’, in A. M. Slaughter, A. Stone Sweet and J. H. H. Weiler, (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart Publishing, 1998), at 306.

²⁴ See Cass, D. Z. ‘The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’, (2001) 12:1 *European Journal of International Law* 39–75, at 41, 43.

²⁵ For a more elaborate perspective on the success and failure of constitutional symbolism in modern and postmodern times, see Haltern in this issue, and Wiener, A., ‘The Constitutional Significance of the Charter of Fundamental Rights’, (2001) 15 *German Law Journal*.

²⁶ Weber, A., ‘Grundrechte in den EU-Mitgliedstaaten im Vergleich’, in Bremische Bürgerschaft (ed.), *Charta der Grundrechte der Europäischen Union*, (Bremen, 2000), at 13 [this and all following translations from German original texts by the author].

within a specific historical context.²⁷ This dimension entails the evolving norms of constitutionalism to which Section III will turn in more detail.

While in practice never entirely mutually exclusive, it is argued here that the principal distinction along the major axes of *political order* and *type of process* helps to assess the potential offered by the respective approaches as regards the accommodation of the constitutional norms from diverging constitutional traditions in the European states that will have to agree with the validity of the forthcoming constitutional compromise. It thus ultimately offers a framework from which the political implications of constitutional choice can be assessed. The main distinctive feature among constitutional doctrines is derived from their respective focus on four factors, including the importance they attach to social or legal practices and the formal or substantive changes expected from the Treaty revision. Essentially, some approaches stress the role of the constitutional moment, creating new political power through the constitutional act (I) or considering the act of signing the constitutional contract with the purpose of either limiting political power through legalisation (II). Whereas approach II pursues strategic institution-building, e.g. with a view to creating or enhancing a distinctive European identity, risking path-dependent unintended consequences in the process, approach I is mainly interested in limiting the Treaty's powers with the forthcoming IGC in one act of decision-making. For example, supporters of approach I would point out that a constitution is defined as 'not static and bound to the state, but dynamic . . . as a process of step-by-step constitution of legitimate . . . sovereign power'.²⁸ It follows that constitutional policy is considered as having a role in bringing such a process about and enhancing its dynamics towards the eventual constitutional moment. In turn, supporters of approach II favour the model of a 'constitutional treaty, that is an agreement between the constituent powers within the state . . . the purpose [is] more the delivery of the constitution, its definition and the potential changes of its contents than establishing its legal character after it has entered into force'.²⁹ Or, as the British Foreign Secretary Jack Straw told the Edinburgh chamber of commerce:

[T]he 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.³⁰

Other approaches, in turn, focus on the constitutional substance either with an interest in legalising new issues, such as for example rights on a constitutional basis (III),³¹ or

²⁷ For this approach, see among others Castiglione, D., 'The Political Theory of the Constitution', R. Bellamy and D. Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell Publishers, 1996), pp. 6–23.

²⁸ Pernice, I. and F. C. Mayer, 'De la constitution composée de l'Europe', (2000) 36:4, RTD eur, pp. 623–647; and Pernice, Ingolf 'Die Notwendigkeit institutioneller Reformen. Aussichten für die Regierungskonferenz', (2000) 55(8), *Internationale Politik*, pp. 11–20, at 15.

²⁹ See Boeckenfoerde 1992, pp. 36–37 [translation from German original text, AW]

³⁰ See *The Guardian*, 27 August 2002 at <http://politics.guardian.co.uk/eu/story/0,9061,781293,00.html> [emphasis added].

³¹ See for example, normative approaches to rights policy such as Bellamy, R., 'The 'Right to Have Rights': Citizenship Practice and the Political Constitution of the EU, in R. Bellamy, R. and A. Warleigh (eds),

with an interest in establishing shared frames of reference, rules or procedures through social practices (IV). While approaches I and IV thus both stress the crucial impact of social practices in the constitutional process, they differ on the expected formal versus substantive outcome. Thus, approach I ultimately aspires a constitutional text as the outcome of the IGC in the meaning of a ‘deliberate act of political foundation which not only aims at the creation of a legal order but which is itself already a legal act—the exercise of the constituent power’,³² thus endorsing the constructive force of the constitutional moment. In turn, approach IV focuses on constitutionalisation as an ongoing process which is not necessarily intended to stem from, or lead towards a constitutional moment, nor is it linked with a specific legal doctrine. While these four choices, let alone the final one, will certainly cause a headache for European public law black-letter lawyers and students of comparative government alike, I argue that approach IV opens a window of opportunity both conceptually and in terms of constitutional politics in emergent transnational orders. It offers an important opening towards social science, international law, and interdisciplinary approaches that focus on the social practices underlying any legal or political process of institution building. The contributions to this issue sustain the point, even though it is conceded that not all contributors would situate themselves readily in one constitutionalism box only.

III Ontology: Norms and Social Practices

Whether or not (constitutional, legal or social) norms ‘work’ and, if so, how, depends on their respective embeddedness in the wider societal context.³³ To assess whether or not constitutions resonate well within their respective polities, it is necessary to relate constitutional substance (norms, rules, provisions) to the respective societal institutions (rules, norms, routinised practices). It follows that in addition to identifying constitutional norms, the relation between the sociocultural environment and constitutional text needs to be understood. As an ‘academic artefact’,³⁴ constitutionalism provides a code for doing that. It allows for normative, descriptive and/or analytical discussion of a constitution’s role within a particular—however bounded—environment and offers a systematic approach to understand, frame, and conceptualise the two stories that lie at the core of constitutional development. They include first, the

Citizenship and Governance in the European Union (Continuum International Publishing, 2001), pp. 41–70; Kostakopoulou, T., ‘Towards a Theory of Constructive Citizenship in Europe’, (1996) 4(4), *The Journal of Political Philosophy*, pp. 337–358.

³² See Preuss, U. K., *Constitutional Revolution. The Link Between Constitutionalism and Progress* (Humanities Press, 1995 (German edition 1990)), at 3.

³³ Weber, M., ‘Die “Objektivität” sozialwissenschaftlicher und sozialpolitischer Erkenntnis’, in M. Weber (ed.), *Gesammelte Aufsätze zur Wissenschaftslehre*, (J.C.B. Mohr, 1988) pp. 146–214; F. V. Kratochwil, *Rules, Norms, and Decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs* (Cambridge University Press, 1989); D. Curtin and I. Dekker, ‘The EU as a “Layered” International Organization: Institutional Unity in Disguise’, in Craig, P. and G. de Burca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), pp. 83–136; M. Finnemore and S. J. Toope, ‘Alternatives to ‘Legalization’: Richer Views of Law and Politics’, (2001) 55(3) *International Organization*, pp. 743–758.

³⁴ As Weiler writes, ‘[C]onstitutionalism is . . . but a prism through which one can observe a landscape in a certain way, an academic artefact with which one can organize the milestones and landmarks within the landscape . . . an intellectual construct by which one can assign meaning to, or even constitute, that which is observed’, J. H. H. Weiler, *The Constitution of Europe. ‘Do the new clothes have an emperor?’ and other essays on European integration* (Cambridge University Press, 1999) at 223.

constitution-building process (e.g. all negotiation, bargaining, deliberation over constitutional substance) and, second the story about societal institutions (e.g. social institutions, norms, ideas, routinised practices) and the sociocultural environment that embeds both constitutional and social norms and their addressees. The meaning of *constitutional norms* in the narrow sense and *social norms* in the wider sense is hence linked through social practices. The resonance of constitutional norms with the respective social norms is an indicator for the evolving norms of constitutionalism within any polity. European constitutionalism is challenged by the well-known and much debated facts that first, different from the relatively stable type and substance of constitutional norms in Nation State polities, the European Union's constitutional norms are in continuous process of development, and second, they are embedded in not one unified political community but in a pluralist set of multiple supranationally and nationally defined communities. In addition, the Member State communities are both subject to deconstruction as the myth of national imagination loses its modern convincing clout³⁵ on the one hand, and subject to change through boundary crossing e.g. through migration,³⁶ on the other. All these different types of polities with their respective constitutional and societal institutions are contributing to and competing with emerging types of transnational order in world politics.³⁷ It is therefore important to find ways of assessing the newly emergent legal structures, of understanding their political role, and of studying their potential for resonance in the communities to which they apply.

The perspective on the evolving norms of constitutionalism stresses the importance of social practices (including political, legal, and cultural practices) for the meaning and ultimately the resonance of rules, norms and procedures, including the interpretation of written constitutional texts. Following an interactive conceptualisation of structure and agency, the ontological focus is set on the 'dual quality of norms' as structuring and constructed,³⁸ on the one hand, and social practices, on the other, as constitutive towards changing meanings of norms as well as guiding behaviour.³⁹ While constitutional norms in a particular context are an expression of the relation between 'constitutionality' (i.e. the basic structures and mechanisms through which constitutions are formed and identified) and 'constitutionalism' (i.e. the discourse through which constitutions are critically addressed),⁴⁰ they bear an imprint of the context (institutional and socio-cultural) in which they are embedded.⁴¹ A substantive

³⁵ Anderson, B., *Imagined Communities* (Verso Books, 1991); see more in detail on that myth, Haltern in this issue.

³⁶ Soysal, Y. N., *The Limits of Citizenship. Migrants and Postnational Membership in France* (University of Chicago Press, 1994); Cederman, L.-E., 'Nationalism and Bounded Integration: What it Would Take to Construct a European Demos', (2001) 7(2), *European Journal of International Relations*, pp. 139–174.

³⁷ See, e.g. J. H. H. Weiler, and U. R. Haltern, 'The Autonomy of the Community Legal Order—Through the Looking Glass', Jean Monnet Papers, Harvard Law School, 96/10, (1996); J. G. March and J. P. Olsen, 'The Institutional Dynamics of International Political Orders', (1998) 52(4), *International Organization*, pp. 943–996.

³⁸ For this concept, see Wiener, A. *The Dual Quality of Norms: Stability and Flexibility*, Belfast Ms, 2002.

³⁹ See Giddens, A., *Central Problems in Social Theory* (Palgrave, 1979).

⁴⁰ See Walker, N., 'The Idea of Constitutional Pluralism', (2002) 65(3), *The Modern Law Review*, pp. 317–359; Weiler, J. H. H. *op. cit.* On the importance of contingent practices which shape constitutional meaning, see also Bellamy, R. and D. Castiglione (eds) *Constitutionalism in transformation: European and theoretical perspectives* Blackwell Publishers, 1996).

⁴¹ See *inter alia* Castiglione, D., The Political Theory of the Constitution. 1996 XLIV (Special Issue) *Political Studies*, pp. 417–435.

constitutionalist approach is hence aware of the interrelation between law and social practices. Norms are not exclusively perceived as belonging to a hierarchy of norms that sets the boundaries of legal reasoning beyond questioning, and from which jurisprudence and legal practices are deduced. '[C]onstitutions institutionalize the whole even as, they themselves consist of an aggregate of institutions'.⁴² The particular role of a constitution, according to this perspective lies in the fact that '[I]nstitutions also protect rules from changes in society *and* make it possible for rules to change with such changes'.⁴³ 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 organisation 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 substance of a constitution which is thereby established is, however, socially accepted, i.e. whether or not it resonates within a particular societal context, depends on the matching network of social institutions and sociocultural trajectories.⁴⁴ 'In other words, there is a direct relation between legal norms and rules—as objective thoughts—and social reality'.⁴⁵ Or, more broadly speaking, '[T]o be effective, obligation needs to be felt, and not simply imposed through a hierarchy of sources of law'.⁴⁶ 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 oughtness of the constitutional text needs to be matched by a set of social institutions which are conducive towards resonance with the constitution's substance, that is, the rules, norms and procedures it entails.

Different from the constitutional text, social institutions are generated through social practices. They provide a contextualised 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, with the Europolity. That is, in situations where the sociocultural trajectories and social institutions provide little overlap, divergence in associative connotation of constitutional

⁴² See Onuf, N., 'Institutions, intentions and international relations', (2002) 28 *Review of International Studies*, pp. 211–228, at 218; c.f. Lieber, F., *On civil liberty and self-government* (J.B. Lippincott, 1859), at 343–346.

⁴³ See Onuf, *op. cit.* at 222, c.f. Bull, H., *The Anarchical Society: A Study of Order in World Politics* (Palgrave Macmillan, 1977), at 56 [emphasis added].

⁴⁴ 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, *op. cit.*, at 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 German original text; AW]; see Weber 1988, *op. cit.* at 349 [emphases in original]

⁴⁵ See Curtin, D. and I. Dekker, 'The EU as a "Layered" International Organization: Institutional Unity in Disguise', Craig, P. and G. de Burca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), pp. 83–136, at 91.

⁴⁶ See Finnemore, M. and S. J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', (2001) 55(3) *International Organization*, pp. 743–758 at 754.

substance prevails. With a view towards enlargement, this divergence is further increased by a number of contextual variables that enhance difference in associative connotations with 'Western' constitutional substance.⁴⁷ As the cases on environmental norms and sex equality norms presented by Yoichiro Usui and Theresa Wobbe, respectively, in this issue will demonstrate, the emerging transnational order of the Europolity does indeed include social institutions that enhance the interpretation and resonance of European transnational law. Furthermore, as Uwe Puetter's contribution suggests, informal institutions such as routinised practices of deliberation can exert central influence on solving the dilemma of more or less constitutionalisation in particular policy areas. Two research propositions follow from the link between the oughtness of legal texts and societal conditions that facilitate understanding and realisation of constitutional rules and norms can be summarised in two propositions. First, the more interrelated constitutional rules and norms are with sociocultural 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.

IV This Issue's Contributions

The first two contributions of this issue raise key conceptual questions about the role of norms and social practices in the constitutionalism debate. More specifically, they explore the emergence and impact of social legitimacy and responsibility in the 'European' constitutional debate. They point out the role of norms and social practices and raise normative questions about their significance and constitutional relevance. The two conceptual contributions take these questions in their turn, starting out with a rather sceptical view on the impact of a 'European constitution' or, for that matter, a constitutional moment and its potential for enhancing social legitimacy by Ulrich Haltern, followed by a slightly more optimistic, if still critical, argument on 'responsible' constitutionalism based on a normative process approach developed by Jo Shaw.

Haltern argues that social legitimacy has been taken too lightly by legal approaches to constitutionalism. Thus, despite having told the story of constitutionalisation many times and from different normative and conceptual angles of the legal discipline, he argues that understanding the lack of European citizens' interest in 'their' constitutional texts requires explanation. Accordingly, he proposes, explanations for the development of social legitimacy, or, as it were, the lack of it, are to be found in the neighbouring social sciences and, in particular, cultural theory. Crucially to this interdisciplinary perspective on—European—constitutionalism is the assumption that 'law is not just a body of rules but also a social practice'. Through social practices, legal rules are made meaningful. To prove the point, Haltern offers a deeper historical insight into the practices that contributed to the 'patina' of national constitutions and which are absent in the EU, despite a series of strategic actions, in particular by the European Commission with a view to establishing European identity. However, instead of concluding in the negative, the argument about practices is taken further into the societal sphere of consumerism, pointing out that, in fact, the daily practices of consumption offers one way of establishing the heretofore lacking sense of

⁴⁷ For details, see Wiener, A. 'Finality vs. Enlargement. Constitutive Practices and Opposing Rationales in the Reconstruction of Europe', Jean Monnet Working Paper 8102, NYU Law School.

belonging to the EU, which no constitutional ‘pathos’ would be able to create in this particular environment.

Shaw argues for a process-oriented approach to constitutionalism based on the ‘principle of constitutional responsibility’ as a potential constitutional norm which guides decision-making, legislating, and constitutional change. The approach builds on James Tully’s work on making the respect for equal rights possible within a pluralist constitutional setting based on the principle of constitutional recognition. At the core of Shaw’s approach to constitutionalism is thus the emphasis on the process perspective that is guided by normative principles which stand to be constitutionally entrenched, such as, for example, access to participation, equal participation, equal recognition, and responsibility. As a preliminary test-case for this approach to constitutionalism the European Convention’s proceedings are studied in depth and assessed critically against the normative yardstick raised in the conceptual section. Crucially, according to this approach the constitution is conceptualised as ‘activity’ and as ‘a vector rather than a point’. Similarly to *Haltern’s* take—and reflecting, in fact, the general thrust of this special issue—on the actual constitutional process in the EU and the forthcoming IGC, then, Shaw’s approach to constitutionalism cautions against too fast or swiftly conclusive a procedure of constitutional settlement in the European Union.

The following two contributions take the ontological focus on norms and practices to the test with reference to two case studies on emerging and changing environmental norms within the EU (Usui), on the one hand, and changing sex equality norms within the broader world societal context (Wobbe), on the other. Leading questions which these two case studies pursue are how do norms evolve in day-to-day political, social, and legal interaction? How can the shift between social, legal and cultural norms, and perceptions of norms as well as the transfer of norms from one level or area in world politics to another be explained and empirically demonstrated? Both contributions not only offer clearly structured case studies but also go into considerable conceptual depth to facilitate insight into the method of explanation. Yoichiro Usui offers a case study on the evolving environmental norms in the EU. Conceptually, this case study draws on social constructivist approaches in European integration and international relations theory based on the concepts of ‘frame’ and ‘régime,’ and focusing on the ontology of discourse. In particular, Usui studies the emerging and interlocking normative discourses and individual law in the area of environmental policy in order to identify their input on the growing density of legal norms, legislation, and provisions within the European ‘universe of political discourse’.⁴⁸ This contribution hence takes a process approach to the organic development of ‘European’ constitutional norms within their social context and within a particular policy area. The second case study presented by Theresa Wobbe reconstructs the case of evolving and changing sex equality norms as evolving constitutional norms in the EU. Based on a sociological investigation of the interlocking organisational dynamics among various institutions in the wider realm of world politics, Wobbe is able to demonstrate that the long trodden path of evolving norms in the field of sex equality in the EU—starting with French labour law and culminating in the current implementation of gender mainstreaming policy—if with arguable success—must be situated within a wider

⁴⁸ On this very helpful concept to discursive analyses, see Jenson, J., ‘The limits of “and the” discourse’, in J. Jenson, E. Hagen and C. Reddy (eds.) *Feminization of the labor force. Paradoxes and promises*. Oxford University Press, 1988.).

context in order to grasp the meaning of this norm and its change within the constitutional process. To sustain the point, Wobbe refers to recent case of *Kreil v Bundesrepublik* in which a German woman claims her right to serve in the German military based on EU sex equality law.

In the final contribution, Uwe Puetter asks whether the EU provides access points—in current political practices—to accommodate the normative insights raised by this issue (i.e. social legitimacy or, for that matter, norm validation; and responsibility). To that end, he applies the conceptual propositions developed by the interdisciplinary open yet ontologically focused perspective promoted by this special issue. He offers a case study on the emergence of informal arenas for deliberation in the area of economic policy as an alternative to the unsolved dilemma of requiring closer coordination without wanting to establish closer cooperation under the treaty. Taking the case of the informal meetings of the Eurogroup as a test, he demonstrates that, here, informal norms offer a powerful alternative and, indeed, a way out of the institutional dilemma created by formal constitutional measures and the related pressures. Building on earlier work on comitology by Joerges and Neyer, Puetter develops the concept of deliberative intergovernmentalism—thus taking the creative task of ‘squaring the analytical circle’ that is pursued by all contributions of this special issue to its possible limits. The question raised by this contribution, is whether or not informal spaces for intergovernmental deliberation should be constitutionally safe-guarded. The approach offers conceptual links with Shaw’s proposal to conceptualise the constitution as activity, not a final point and the constitutional process as ongoing, at the same time, by focusing on the social practices of informal dialogue. This contribution brings in the ontological focus on norms, routinised practices and the role of societal ‘soft’ institutions in the process of constitutional recognition, more generally.