Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law

Markus Kotzur*

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* Prof. Dr. Markus Kotzur, LL.M. (Duke Univ.) is Professor of European and Public International Law at the University of Hamburg and Director of Studies at the Europa-Kolleg Hamburg.

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Abstract

The article discusses the potential of a constitutional matrix to conceptualize public international law. Next to criteria of constitutional quality the very functions of a constitution are analyzed. The constitutional reading of public international law is seen not in contrast to obvious fragmentations but as a means to deal with fragmental legal orders.

A. Introduction: The Constitutional Matrix

The first analytical step of the scientific endeavor at hand is simple: description (presupposing empirical awareness of recent social phenomena). It might be a truism but one proven by experience: before one explains, one has to describe the world, and description may not be mistaken for explanation. The notion of constitutionalism beyond the State could be both: an attempt to describe recent transformations of international law or to explain these transformations by translating constitutional into public international law concepts. Simple translation, however, does not provide for a convincing explanation and thus would be an obvious – semantic and conceptual – shortcoming. In other words: translation, which implies a structural analog where structural differences prevail, would mistake description for explanation and not make the necessary distinction between the “is” and the “ought”. The starting point, thus, has to be an observation: there is an emerging shift from simply globalized international relations to a legal framework triggered by these globalization processes. Globalization also gives the keyword for the next step: description in perspective.


Of course, description is not an aim itself – it has explanation in mind. It tends to facilitate a better understanding of a complex reality; it tends to map an overly complex world. Here, the constitutional matrix comes into play. It is not (at least not yet) an explanation of how international law has been transformed; it is rather an analytical tool to retrace and frame the transformations. The constitutional matrix doubtlessly has its roots in European constitutional thought; conceived in the just described way, it is, however, not bound to Europe, to its legal culture, or to European legal paradigms. It might be – as an analytical tool for legally mapping globalization processes – quite appealing to the old and new global players: the United States, Russia, China, India or Brazil. Nevertheless, this – one might say universal potential – and the very fact that constitutional thinking has already had a rather long life in public international theory, are still not sufficient to justify why among other possible matrices the constitutional one should be preferred. That leads to the third step of this introduction: the need for legitimacy as a necessary consequence of what has been described from the perspective of globalization.

What is a constitution all about? It is all about legitimacy. All public powers being exercised have to be legitimized, limited, and controlled. Legitimization, limitation and control of public powers are, since the very beginnings of modern constitutionalism, the essential functions of a constitution. As long as public powers have exclusively been exercised by the State, the genuine nexus between the concept of constitution and

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5 One might also wish to refer to the idea of a “constitutional mindset” as elaborated by M. Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’, 8 Theoretical Inquiries in Law (2007) 1, 9.
statehood has been beyond doubt. Since (formerly) public powers are nowadays exercised by manifold non-state-actors, not only has the once firmly established nexus become frail but also the legitimacy issue arises in a new transnational dimension – literally beyond the State. If, from a functional perspective, a constitution is conceived of as a matrix to deal with legitimacy, limitation, and control issues, it can very well be applied to transnational polities. This does not mean that public international law already forms a perfectly constitutionalized order, nor does it favor idealistic concepts of unavoidable constitutionalization. The need for legitimacy, limitation, and control must, of course, not be mistaken for the existence thereof. The need however, must not be ignored either. It invites us to test the constitutional matrix on the international plane; it invites us to start a quest for constitutional quality within the changing structures of public international law.

B. The Quest: In Search of Constitutional Quality

The “quest” is – given its historical connotations – a tricky term. One might immediately think of the undoubtedly romantic but, of course, fruitless mythical quest for the Holy Grail – or its persiflage in the famous Monty Python comedy of 1975. More than a few critics would agree that lofty concepts of global constitutionalism and the world of mysterious King Arthur have one thing in common: it is either pure mythology – a well phrased but illusionary narrative of a new world order – or an involuntarily belittling persiflage of “real constitutionalism” – a concept that is still bound

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7 J. Delbrück, ‘Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?’, 10 Indiana Journal of Global Legal Studies (2003) 1, 29, 29-30: “In our time, dealing with the problem of the legitimacy of public authority has become additionally complicated because under the impact of globalization – understood as a process of denationalization – public authority is no longer exclusively exercised within clearly defined territorial entities, i.e. within the sovereign states. Rather, the “production of public goods” or the performance of hitherto genuinely state tasks, like external security and economic and social welfare, has been shifted, in part, to international and sometimes supranational non-state entities that are constituted by states, but have their own legal status and capacity to act alongside the states”.

and limited to the nation State.\textsuperscript{9} Both readings, however, do quite miss the point. More neutrally understood, the term “quest” designates an admittedly purposeful but nevertheless open search for something that might turn out to be a constitutive moment in the world of the searcher. Such an understanding describes very well why a constitutional matrix – first of all as a descriptive instrument – can be applied to regulatory schemes beyond the State. It aims to identify elements of constitutional quality within these schemes. The starting point for this process of identification is rather clear.

Given the historical development of modern constitutionalism in the late 18th and 19th century, given the more than diverse forms of government/governance within the international community and last but not least given the tremendous heterogeneity of national constitutional narratives, constitutional thinking – whether or not inspired by the European constitutional debate – does not suggest itself as an obvious paradigm for public international law. Even though historic landmarks such as the end of the Cold War in 1989/1990 or 09/11 have caused significant shifts in the practice as well as in the science of international law, the international community is still missing a single “constitutional moment” (B. Ackermann), but might know multiple moments of contestations (A. Wiener)\textsuperscript{10} – contestations in the sense of constitutional incentives such as the very foundation of the United Nations, the decolonization process, the “annus mirabilis 1989/90” (P. Häberle),\textsuperscript{11} or 09/11. Likewise, the quest for a single foundational document of the international community – notwithstanding the unique character of the United Nation’s Charter\textsuperscript{12} – will be as fruitless as merely using constitutional language without basing it on constitutional quality. It is the very search for plural elements of this constitutional quality on which the success or failure of shaping public international law in constitutional terms depends. Constitutional quality itself is not limited to the substantive aspects of normative orders; it can also be displayed by procedural structures or organizational forms/institutions.

The observation of constitutional quality – and this is most important to note – will neither automatically amount to a fully-fledged global constitution nor is global constitutionalization the observer’s only viable

\begin{footnotesize}
\begin{enumerate}
\item See supra note 6.
\item P. Häberle, Europäische Verfassungslehre, 7th ed. (2011), 5.
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\end{footnotesize}
option. Constitutional quality, nevertheless, is about normative substance established over time and always subject to change. Constitutional quality never describes a status quo but refers to the process of shaping itself – it is always in the becoming: somewhat tangible, somewhat elusive; somewhat driven by other forces and somewhat a driving force. On the national plane, the existence of constitutional quality is well researched by the constitutional lawyer within the framework of her or his familiar given polity. On the international plane, the existence of constitutional quality is a puzzling phenomenon for the international lawyer beyond the framework of what has traditionally been conceived of as a polity. She or he might name this “beyond” global governance;¹³ she or he will rely on transnational law and will search for the cosmopolitan citizen, or structures of a global society. In that regard, the quest for constitutional quality is last but not least an invitation to discussion and contestation of normative structures regarding the very foundations of public international law.

C. Obstacles to the Quest: A World of Dichotomies

Mapping discussion and contestation – that is to say mapping the search – along the lines of all-too-well-known dichotomies would be the first shortcoming. The “either/or” between constitutional unity and legal fragmentations,¹⁴ between a Westphalian and a post-Westphalian system, between a still national and an already post-national order pushes the search in a wrong direction. The reality all those who try to do the mapping are confronted with is a reality of “in-betweens”. In the world of “in-betweens” it does not help to focus only on actors, only on institutions, or only on processes. In this world, government is not the exclusive alternative to


governance or vice versa. And most importantly, in this world universality and cultural relativism (or cultural particularities) are not irreconcilable foes. Just to merely glance on the point:

Universal is neither the intellectualistic product of philosophical abstractionism nor a utopian escape from the real world. If one does not set aside the historical world, the dichotomy between ethical universality and historical/cultural particularity is not as insurmountable as it seems to be at first glance. Platonic moral abstractions may very well be one, but not the only and not even the most decisive momentum of universality. On the contrary, universal principles manifest themselves in particular legal cultures and find significant expression in particular legal texts. Vice versa, especially these texts, most importantly the texts of national constitutions, mark a starting point to concretise new universal legal principles. One could speak of an “inter-constitutional approach” and qualify international law to some extent as “inter-constitutional law”. This is especially true for formulations in preamble texts, human rights standards, rule-of-law orientation, the universal dimension of national policy objectives, and all the constitutional provisions “opening” the (formerly closed) nation States to the global legal order.¹⁵

Historically, universality has been a principle of European Constitutionalism. Today, universality might be seen as “humankind-based”. Universal legal principles are the outcome of legal reflections about human action, about human needs, about the most existential threats and dangers the individual human being is facing all over the world (the endangerment of life, liberty, to some extent property etc.) and last but not least about the ever-so-present danger to abuse power.¹⁶ Insofar, the positive Lockean and the negative Hobbesian “image of man” have equally universal implications. The human being herself/himself is the point of reference for any legal order and thus human action as well as human needs mark the benchmark of global law with respect to universality. Universality

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¹⁵ In German constitutional theory the topos of “offene Staatlichkeit” (open statehood) has been introduced by K. Vogel, Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit (1964).

requires an anthropological understanding. The anthropological element of the law is neither limited to statehood as such, nor to the particularities of single nation States. However, it is based upon human dignity and therefore universal in nature. Based upon such an understanding of universality, a global constitutional matrix is at least not proven false by either neglecting or over-emphasizing the obvious: a world of cultural particularities.

D. How the Quest Might Work: a Functional Approach

The crucial aspect inviting public international law scholarship to consider the adequacy of a constitutional matrix for the transnational legal architecture has already been addressed above: More and more “public” power is exercised beyond the boundaries of the traditional nation State and by non-state actors. The exercise of power – whether within or beyond the State – has to be legitimized, limited, and controlled. And moreover, some kind of participation in this process has to be ensured. These, however, are the key functions of a constitution. Particularly, legitimization and participation in the process of legitimization appear to be two closely linked questions. This holds true for the constitutional State and all the more for the international community where – as opposed to the constitutional State – no single constituent power (“We, the people”) and no single global lawmaker (a World Parliament or something similar) do exist. Transnational law is created by multiple actors and through multiple processes. Given this complex plurality, the mere consent of States – as argued in classical consent-based public international law theory – does not

18 Kleinlein, supra note 3, 511.
sufficiently provide for legitimacy – let alone the asymmetrical power structure of the consenting States. What becomes inevitable is a regulatory framework to structure the diversified forms of participation by States, international organizations and also private non-state entities (NGOs, transnational enterprises etc.). Since the treaty-based creation of international/transnational law is more and more entrusted to international organizations, their power to enact secondary law forms a core element of the regulatory framework and refers to a core function of a constitution: to grant law making-power and to enable law-making bodies. J. L. Dunoff and J. P. Trachtman very descriptively speak of “enabling constitutionalism”. The constitutional matrix might not yet be a perfect framework for control and empowerment, but is a starting point “to frame the framework” – a framework that first and foremost has to comprise procedural structures and institutional arrangements (in particular institutional checks and balances – “constraining constitutionalism” in the words again of J. L. Dunoff and J. P. Trachtman).

Framing the framework also marks a crucial step away from the formerly sharp distinction between the domestic and the international sphere. Semantically, such a shift is made explicit by speaking of “global” instead of “public international law” – others refer to “world law”, “transnational law” or, more emphatically, a “common law of all mankind” respectively as a “law of humanity”. The ongoing globalization of life conditions does not find a sufficient normative infrastructure in either traditional State law or traditional international law. Given this context, the constitutional matrix refers to what – once more – J. L. Dunoff and J. P. Trachtman qualify as “supplemental constitutionalism”. Complementary to the limited powers of the States, a constitutionalized

21 See, e.g., A. Buchanan, Justice, Legitimacy, and Self-Determination (2004), 301.
global legal architecture functions to compensate for the loss of formerly autochthonous State power as well as for the lack of accountability in the environment of international organizations.27

A constitution does also have a reflexive (or reflective) function. It is reflexive as well as reflective of the polity (more narrowly: the legal space) which it aims to constitutionalize. Accordingly, the constitutional matrix on the global plane is reflexive/reflective of a global legal space – the latter one itself being an emerging pattern of global governance. It is based upon global legal paradigms such as human dignity, universal human rights standards,28 or an international rule of law including effective mechanisms of judicial review.29 It furthermore displays a multi-layered structure of not necessarily state-centered transboundary regulatory schemes30 including global constitutional law, global administrative law,31 a transnational “lex mercatoria”, and last but not least manifold non-binding instruments, e.g., codes of conduct or compliance standards. Consequently, the concept of a global legal space aims to create a common legal scheme, which addresses
the needs of humanity as such. Not only semantically, the context to a Hegelian “Weltgeist”, a Kantian “Weltbürgerum” (cosmopolitan citizenship), to “world politics”, or to “world order” is obvious. As early as the 18th century, E. de Vattel had framed his “humankind-focused” concept of a “société des nations”. Even before that, F. Súarez (1548-1617), a famous representative of the Spanish School, had put an emphasis on the “bonum commune humanitatis”.

From a material point of view, the so-described “bonum commune humanitatis”-orientation ranks among the most important functions of a constitution. The bonum commune itself is not a “given” – it is a “to be created”. Not surprisingly, references to community interests are frequent in up-to-date public international law documents, decisions of international courts and tribunals, as well as scholarly writings. It was, e.g. the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia which, in its Tadić decision (2 October 1995) dismissed the “traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.” Even the International Court of Justice in his jurisprudence after 1950 identified “common interests of all mankind” and referred to “interests of the international community as such”.

The last function of a constitution which shall briefly be introduced – without having the intention to develop a comprehensive catalogue of constitutional functions – is a “bridging-function”. A constitution tries to provide an overall scheme “bridging” the “secluded islands” of legal sub-systems from environment to trade, from human rights to outer space law and also from domestic to international and from regional to transnational law. As bridging instruments, the core principles of international law as, e.g., enshrined in the UN Charter, come into play. Such an approach does neither intend to deny nor to ultimately overcome the ubiquitous fragmentations (or even frictions) of this legal order. On the contrary, it tries

33 Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 96.
to provide for an overall legal framework to govern the exercise of fragmented powers within a fragmented world. In the words of T. Kleinlein:

“The qualification of constitutional norms in public international law as principles and optimization requirements is intended to grasp their functionality in the legal order with due regard to the differences between public international law and domestic law and to limit the otherwise unmanageable reach of reasoning. Legal practice cautiously indicates that principles can work as principles of collision between different regimes of fragmented public international law, and this corresponds to a theoretic desideratum.”35

E. Closing Remarks

The constitutional matrix as briefly introduced in this paper is a “theoretic desideratum”. It cannot give ultimate answers and thus, for good reasons, will be contested in the future.36 As a strategic move, the purpose of a constitutional perspective on the global order is quite clear: It shall enhance the legitimacy of governance and other relevant transnational practices by transnational actors, necessarily acting and being exercised beyond the borders of the nation State. A strategy, however, is not yet a concept. The conceptual requirements still have to be discussed in detail. They have to take into account such different perspectives as constitutional evolutions and revolutions, the impact of national constitutions and national constitutional courts on transnational constitutionalism, the WTO as global economic constitution,37 the system of universal criminal justice, the influence of regional “constitutionalized” actors such as the EU38 on global constitutionalization processes, and the specifics of a global human rights

35 Kleinlein, supra note 3, 715.
“constitutional” architecture. From a conceptual point of view, some will still praise the constitutionalization of the international community as the only adequate reaction to what they describe as a post-Westphalian system in a post-national age (J. Habermas)\(^\text{39}\) – the only way to compensate for the loss of control and policy-making power by the nation States (A. Peters). Others will still regard the indifference of constitutional plurality\(^\text{40}\) as a dangerous utopia; and again others might not emphatically endorse the “constitutional turn” of public international law but accept dramatic changes on the global constitutional landscape that simply require *conceptual adjustment* – *driven by necessity or even threat*, not *by the desire* for the best of all worlds. Maybe, the constitutional reading of international law does “amount to no more than a call for the regular application and the due effectiveness of a legal order”.\(^\text{41}\) Would that, however, not mark a promising beginning?

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\(^\text{41}\) Segura-Serrano, *supra* note 1, 37.