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

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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.[1] 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[2] also gives the keyword for the next step: *description in perspective*.

1 See A. Segura-Serrano, 'The Transformation of International Law', Jean Monnet Working Paper 12/09 (1 December 2009) available at http://centers.law.nyu.edu/jeanmonnet/papers/09/091201.pdf (last visited 4 August 2012). The author refers on page 3 to a parallel phenomenon of "transformations" – transformations within the European Communities, later in the European Union – which require a new "conceptual apparatus", see J. H. H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 8, 2403.

2 A. Giddens, *Consequences of Modernity* (1990); J. E. Stiglitz, *Globalization and its Discontents* (2002); *id*., *Making Globalization Work* (2006); A. v. Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 *European Journal of International Law* (2004) 5, 885; M. Albert, '"Globalization Theory": Yesterday's Fad or More Lively than Ever?', 1

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,[3] 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.[4] 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.[5] As long as public powers have exclusively been exercised by the State, the *genuine nexus* between the concept of constitution and

International Political Sociology (2007) 2, 165; A. Leander, '"Globalisation Theory": Feeble... and Highjacked', 3 *International Political Sociology* (2009) 1, 109.

3 For all these debates see the following volumes: M. Avbelj & J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012); T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012); J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009); B. Fassbender, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005).

4 See M. Kumm, 'The Legitimacy of International Law: A Constitutional Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 907; R. Wolfrum, 'Legitimacy in International Law', in A. Reinisch & U. Kriechbaum (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (2007), 471.

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.[6] Since (formerly) public powers are nowadays exercised by manifold non-state-actors,[7] 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.[8]

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

6 J. Isensee, 'Staat und Verfassung', in J. Isensee & P. Kirchhof (eds), *Handbuch des Staatsrechts*, Vol. II: Verfassungsstaat, 3rd ed. (2004), § 15 para 1; T. Kleinlein, *supra* note 3, 119.

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".

8 See already W. Friedmann, *The Changing Structure of International Law* (1964).

and limited to the nation State.[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*)[10] – contestations in the sense of constitutional incentives such as the very foundation of the United Nations, the decolonialization process, the "*annus mirabilis* 1989/90" (*P. Häberle*),[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[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

9 See *supra* note 6.

10 A. Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics', 10 *European Journal of International Relations* (2004) 2, 189.

11 P. Häberle, *Europäische Verfassungslehre*, 7th ed. (2011), 5.

12 P.-M. Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook of United Nations Law* (1997), 1.

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

13 D. Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance', in M. Avbelj & J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012), 85; also available at http://ssrn.com/abstract=1758907 (November 2011) (last visited 4 August 2012).

14 ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission', UN Doc A/CN.4/L.682, 13 April 2006; M. Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 3, 553; A. L. Paulus, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts', 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 695.

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:

Universality 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

[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).

[16] H. Bielefeldt, 'Menschenrechte und Menschenrechtsverständnis im Islam', 17 *Europäische Grundrechte-Zeitschrift* (1990) 21/22, 489, 491; W. Brugger, 'Stufen der Begründung von Menschenrechten', 31 *Der Staat* (1992) 1, 19, 21; W. Huber, *Die tägliche Gewalt: Gegen den Ausverkauf der Menschenwürde* (1993), 7-11; H. Hofmann, 'Geschichtlichkeit und Universalitätsanspruch des Rechtsstaates', 34 *Der Staat* (1995) 1, 1, 27.

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.[17] 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*.[18] And moreover, some kind of *participation* in this process[19] 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.[20] 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

17 E. Denninger, Das Verhältnis von Menschenrechten zum positiven Recht, 37 *Juristenzeitung* (1982) 7, 225, 227; W. v. Simson, 'Überstaatliche Menschenrechte: Prinzip und Wirklichkeit', in J. Jekewitz *et al.* (eds), *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Joseph Partsch zum 75. Geburtstag* (1989), 47, 65; R. Higgins, *Problems and Process: International Law an How We Use it* (1994), 96-97.

18 Kleinlein, *supra* note 3, 511.

19 C. Walter, 'International Law in a Process of Constitutionalization', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 191.

20 B. Fassbender, '"We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law', in M. Loughlin & N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007), 269.

sufficiently provide for legitimacy – let alone the asymmetrical power structure of the consenting States.[21] 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[22] and institutional arrangements (in particular institutional checks and balances – "constraining constitutionalism" in the words again of *J. L. Dunoff* and *J. P. Trachtman*[23]).

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",[24] "transnational law" or, more emphatically, a "common law of all mankind"[25] respectively as a "law of humanity".[26] 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.

22 A classic is N. Luhmann, *Legitimation durch Verfahren*, 3rd ed. (1978).

23 J. L. Dunoff & J. P. Trachtman, 'A Functional Approach to International Constitutionalization', in Dunoff & Trachtman, *supra* note 3, 3, 9-13.

24 A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (2007); M. Schulte, 'Weltrecht in der Weltgesellschaft: Prolegomena zu einer Selbst- und Fremdbeschreibung des Rechtssystems als Weltrechtssystem', 39 *Rechtstheorie* (2008) 5, 143.

25 C. W. Jenks, *The Common Law of Mankind* (1958).

26 P. Häberle, 'Nationales Verfassungsrecht, regionale „Staatenverbünde" und das Völkerrecht als universales Menschheitsrecht: Konvergenzen und Divergenzen', in C. Gaitanides; S. Kadelbach, & G. C. Rodriguez Iglesias (eds): *Europa und seine Verfassung: Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (2005), 80.

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 schemes[30] 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

27 Dunoff & Trachtman, *supra* note 3; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579; *id.*, 'The Merits of Global Constitutionalism', 16 *Indiana Journal of Global Legal Studies* (2009) 2, 397.

28 See, e.g., N. Bobbio, *The Age of Rights* (1996); M. Kotzur, 'Universality – A Principle of European and Global Constitutionalism', 6 *Historia Constitucional* (2005) 1, 201.

29 J. Carter, 'The Rule of Law and the State of Human Rights', 4 *Harvard Human Rights Law Journal*, 4 (1991) 1, 1; A. Watts, 'The International Rule of Law', 36 *German Yearbook of International Law* (1993), 15; D. Thürer, 'Internationales "Rule of Law" – innerstaatliche Demokratie', 5 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (1995) 4, 455; I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998); G. Hafner, 'The Rule of Law and International Organizations', in K. Dicke *et al.* (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück* (2005), 307; M. Wittinger, 'Das Rechtsstaatsprinzip – vom nationalen Verfassungsprinzip zum Rechtsprinzip der europäischen und der internationalen Gemeinschaft?', 57 *Jahrbuch des Öffentlichen Rechts* (2009), 427; S. Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2008) 2, 331; *id.*, 'Rule of Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of International Law* (2012), Vol. VIII, 1014.

30 G. Teubner (ed.), *Global Law without a State* (1997); J. Habermas, *The Postnational Constellation* (2001); A. Griffiths, 'Legal Pluralism', in R. Banakar & M. Travers (eds), *An Introduction to Law and Social Theory* (2002), 289; H. P. Glenn, 'A Transnational Concept of Law', in P. Cane & M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003), 839.

31 B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *European Journal of International Law* (2009) 1, 23.

the needs of humanity as such.[32] Not only semantically, the context to a *Hegelian* "*Weltgeist*", a *Kantian* "*Weltbürgertum*" (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."[33] 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".[34]

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

[32] R. Falk, 'The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions', in D. Archibugi & D. Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (1995), 163.

[33] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 96.

[34] *Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain,* Second Phase, Judgment, ICJ Reports 1970, 3.

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 EU[38] on global constitutionalization processes, and the specifics of a global human rights

35 Kleinlein, *supra* note 3, 715.

36 A. Wiener, 'Demokratischer Konstitutionalismus jenseits des Staates? Perspektiven auf die Umstrittenheit von Normen', in P. Niesen & B. Herborth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (2007), 173.

37 D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005); E.-U. Petersmann, *Constitutional Functions and Constitutional problems of International Economic Law* (1991).

38 E. O. Eriksen (ed.), *Making the European Polity: Reflexive Integration in the E*U (2005).

"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*)[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[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".[41] Would that, however, not mark a promising beginning?

[39] See, e.g., J. Habermas, *Zur Verfassung Europas: Ein Essay* (2011).

[40] N. Walker, 'The Idea of Constitutional Pluralism', 65 *The Modern Law Review* (2002) 3, 317.

[41] Segura-Serrano, *supra* note 1, 37.