07CONSTITUTIONALISTS@WIKO-BERLIN.DE: ATTEMPTING AN EXOTERIC COMMUNICATION

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No Model Constitution of Europe

The theme of our group was the constitution beyond the nation state. From a lawyer's perspective it can hardly get more exciting. In their routine work, lawyers look to the future only in order to determine what the law has to say about past events. Even to that end they need to explore the relevance of past decisions. The group's theme, by contrast, promised to unchain the legal imagination. It affected the prospective composition of our polities, in particular at a time when it has become common wisdom that nation states are either intrinsically problematic or, at any rate, no longer capable of addressing challenges emerging in a globalised world. A grand opportunity thus presented itself to venture into more or less uncharted territory.

Interestingly, the members of the group – even the participating political scientists – did not conceive of their work in this vein. Indeed, never did it cross their mind that it might be incumbent on them to determine what a transnational constitution should look like. I surmise that, if anyone, then our fellow Fellows from other disciplines – some "harder", others even softer – may have suspected that this is what a group with such a weighty sounding appellation must be up to; nonetheless, not in their wildest dreams did it occur to its members that the group should adopt as its project to produce a "Berlin draft" of, say, the European, or any other transnational constitution. They did not even engage in a debate about what might conceivably go into such constitution, for example, whether it should contain a unitary executive branch, a list of social rights, judicial review of legislation or any other features traditionally associated with modern constitutional law.

The explanation for the group's lack of interest in debating any of these issues is twofold. First, the members found themselves in profound disagreement over whether it makes sense to apply the concept of the constitution to transnational governance arrangements, present or future. Second, even those believing in the possibility of the constitution beyond the nation state readily conceded that a constitution of this type would certainly be different from what we are acquainted with in the national context. Intriguingly, both matters gave rise to an "overlapping consensus", which was never challenged. For all members, it appeared to be more or less self-evident that a constitution beyond the nation state, if it could amount to anything, cannot result from kicking received constitutional models upstairs.

Hence, in lieu of arriving at the "Berlin draft", the group indulged mostly in debating attempts made by others to identify constitutionalisation processes beyond the nation state, always against the background of the most elementary question of whether it makes sense to apply the concept of the constitution to transnational arrangements. The range of scholarship studied was wide. For example, the group covered rational-choice-based approaches to politics (e. g., work by Scharpf's Cologne associates) as well as highly sophisticated specimens of social systems theory (e. g., Ladeur) and radical French thought (e. g., Mouffe) and went from more recent European governance literature (e. g., Sable and Simon) all the way to global administrative law (e. g., Kingsbury and Krisch). Intermittently, the group members indulged in intense debates about their own work. Occasionally, guests were invited to present their ideas. Finally, the group, led by Martin Loughlin, conducted an international workshop at the Wiko, whose proceedings are most likely to appear in print.

The Point of Contention

At first glance, the reluctance to apply the concept of the constitution to transnational governance arrangements may strike one as unnecessarily capricious. Why shouldn't one view the United Nations Charter as the constitution of the community of states? Why shouldn't one concede that modern public international law, not least owing to the growing importance of human rights, has acquired, even if slowly and incrementally, a constitutional dimension? Aren't these merely questions of terminology?

However, more than mere capriciousness is at stake here. Certain descriptive and normative features of modern constitutional law counsel in favour of being watchful before carrying constitution talk to the next level.

At its core, the justification for watchfulness lies in the function of norms themselves. Norms do not merely regulate human conduct. They are also constitutive of cultural meanings. For example, certain utterances, if made under the relevant conditions, count as marriage wows. Formal legal norms governing matrimonial relationships allow for the idealisation of certain facts. They make it possible to make them expressive of a cultural idea, in this case, the institution of marriage.

This is trivial. It may be an equally trivial point that idealisations can also conceal. Again, we are all familiar with how this works in private law. The wealthy capitalist concludes an agreement with the penniless labourer. Evidently, such a situation is marked by unequal bargaining power. Nonetheless, through the lens of classical private law the situation is presented as though it involved two agents who are both equally free. The economic inequality is immaterial to the application of the norm pursuant to which both actors are to be counted as free and equal persons entering voluntarily into an agreement. The underlying social facts become neutralised and rendered irrelevant, owing to the influence of normative idealisations.

Against this background, the question arises whether the transfer of the language of constitutionalism to a level beyond the nation state might not also obscure the underlying reality.

When one compares the national and the transnational context, one encounters salient differences, of course. For example, many would argue that in the transnational context there is no constituent power, and if there is any it consists of member state governments acting jointly, and not the people acting through constitutional conventions and processes of ratification. Moreover, transnational governance arrangements never amount to comprehensive regulations of the exercise of public authority. They are at best partial. Finally, not only do transnational arrangements offer very few opportunities for democratic control, they have definitely not been designed to facilitate self-government.

Hence, the question arises whether applying the term "constitution" with all that it connotes, normatively understood, to arrangements that do not fulfil certain criteria might give rise to ideological distortions. In other words, the language of constitutionalism may well end up sugarcoating troublesome realities. I mention in passing that much could be said, when it comes to this, about the failed European constitutional project.

Nothing minor is at stake, simply because in a post-metaphysical age the constitution has come to play the role of the core instrument mediating the exercise of legitimate authority. Neither natural law nor exigency, economic or otherwise, can legitimately provide

the basis for one man ruling another, but only an instrument that is both expressive and constitutive of acts of collective self-determination. Not surprisingly, with the demise of this instrument, "ruling" itself falls into disrepute and is substituted by responses to perceived necessities. They are constrained, if at all, by intuitive appeals to the natural law associated with human rights. When the constitution becomes superfluous, the appeal to constitutionalisation increasingly comes to have an ironic ring to it.

Two Views of Transnational Constitutional Law

It makes much sense, then, to approach claims about transnational constitutional law with a healthy *Ideologieverdacht* (suspicion of ideology). This is *not* tantamount to presuming such claims to be ideological. On the contrary, existing claims about transnational constitutional law can be viewed as attempts to rebut the suspicion of being ideologically complicit with either economic liberalism or administrative elitism.

Not by accident, this is how the group came to examine the more alluring accounts of transnational constitutional law. Indeed, I think these accounts can be construed, most fruitfully, as though they were formulated already in reply to the reproach charging them with fostering ideological delusion. I should like to sketch, briefly, what I believe to be two most promising examples of such a reply.

First, it is argued by some – not by members of the group, to be sure – that once the state and its constitution become disempowered, public international law needs to take over and to perform a compensatory role. Some authors attempt to identify emerging "constitutional features" of the international legal order, such as higher-ranking obligations that are owed by states to the international community as such and not merely towards particular members. Some even address this development as a paradigm change, the advent of a second political modernity, which is about to replace the first. The relevant contrast is drawn as follows: while the first modernity was based upon sovereignty and individual freedom, the second modernity revolves around subsidiarity and human dignity.

The second promising view of transnational constitutional law is closely associated with societal constitutionalism. From the outset, this approach has a different story to tell. The function of the modern constitution was not simply to constrain state authority or to facilitate self-government. Rather, it was supposed to stabilise functional differentiation, that is, the articulation of societal rationalities within different problem-solving subsystems, such as the economy, religion, politics, health, education etc. At the time that modern con-

stitutions were emerging, the political system was believed to occupy the position at the centre of society. Politics appeared to be the medium of societal self-determination. Hence, it was expected to play a key role in either disrupting or protecting the integrity of emerging functional differentiation. The regulation of its operation had to address the concerns of functional differentiation vis-à-vis the political system, mostly by guaranteeing basic rights. When politics loses its central role, however, the constraining role of constitutional legality recedes to the level of the differentiated systems themselves. Consequently, all social systems then require the type of self-limitation formerly associated with the political system. Political constitutionalism thus becomes transformed into societal constitutionalism. Since the differentiated subsystems of world society do not recognise a fatherland, societal constitutionalism emerges on a global scale. Still absent are the legal rules that would allow for the resolution of invariable collisions between and among the subsystems' respective rationalities.

It emerges clearly, I think, that both positions can be cast in a manner in which they already reply to *Ideologieverdacht*, for they embed their conception of transnational constitutionalism in an account of the disintegration of its national predecessor. Therefore, it would be unfair to claim that they are guilty of masquerading new realities with venerable normative language, for they do in fact try to account for what they perceive to be profound alterations of constitutionalism's basic context of operation and how the constitutional project might nonetheless be continued.

If there is still anything wrong with these positions, it comes to the fore in two fallacies that stem from misapprehensions of what is desirable about traditional constitutional law, namely its emancipatory thrust.

The first position, compensatory or public international law constitutionalism, is disposed to commit what might be called the *fallacy of informality*. The latter amounts to dissolving the normativity of constitutional norms into the flow of open-ended legal expert discourses that exhibit a remarkably casual attitude towards legal sources. Making a long story short, public international law – adjurations of *ius cogens* and *erga omnes* obligations notwithstanding – is constitutionally deficient. This is the case, as has been long observed by H. L. A. Hart, because the secondary "rules" governing the creation of customary law are highly indeterminate. If anything, only a few principles indicate the conditions under which various patterns of state conduct are said to coalesce into a rule of law. The constitutional deficiency is even more aggravated in the case of those norms that are taken to be of prime constitutional significance. The scope and precise normative import of allegedly

"higher" public international law is very much in flux. By contrast, it has been one of the great achievements of modern constitutional law to clarify – or even formalise – the conditions under which not merely laws, but also constitutional law can be created. As a consequence, citizens can rely on the norm's pedigree in order to determine what claims to have legitimate authority over them. This has a liberating effect, in particular vis-à-vis the judiciary and the pretension inherent in any common law that the law's artificial reason invests judges with superior insight into which laws are deemed to be truly fundamental. This disciplining effect of a written constitution on the artificial reason of the law now threatens to become a casualty, as a result of which the purported constitutionalisation of international law may effectively arrive at a "public-international-law-ised" version of constitutional law. The assimilation of the latter to the constitutional deficiency of the former leads to a deformalised constitutional law. This, in turn, creates confidence that bold assertions of law will indeed be recognised as law provided they are made by someone who is believed to have either the requisite political power or sufficient epistemic authority to do so.

Societal constitutionalism, on the other hand, may be susceptible to the *fallacy of mapping*. Owing to its sociological candour, it remains closely tied to actual processes of social self-regulation. But, again, addressing these processes in terms of constitutionalisation may strip the idea of constitutional law of its emancipatory thrust. Constitutionalisation is a normative process. Instead of mapping existing structures and investing them with the authority of higher law, it constitutes structures of agency. Ironically, owing to its commitment to mapping, societal constitutionalism inherits from the statist tradition a most elementary naïveté. A constitution takes the state as it is and submits it to the discipline of law. However, this is an inaccurate account of what a constitution does. A constitution takes a king and constrains his power by confirming the rights of parliament. A constitution bestows upon parliament the right of legislative override in order to contain an overconfident constitutional tribunal. In a word, constitutions establish countervailing forces in order to constrain agents and processes that already exist or whose presumptive predominance needs to be contained. By contrast, transmuting the constitution into a mapping exercise robs it of its normative edge. In the case of societal constitutionalism, constitutional theory may end up endorsing more or less free-floating system self-reproduction. Clearly, this is only a small step away from romanticising administrative realities.

More generally, the mapping fallacy is manifest in the belief that constitutions attempt merely to render more transparent or even more accessible already existing realities. Rath-

er, what constitutions do – beyond introducing transparency, accountability and responsiveness (which are virtues of modern *administrative* law) – is to *create* responsibility for matters that people would experience as being beyond their control, were it not for constructions of agency. They introduce visibility not by illuminating machinations with a flashlight but by pushing responsible agents into the limelight of the political realm.

Persistent Vocabularies

The most wonderful thing about academic discourse is that it allows the cultivation of disagreement and the bringing of contending views into sharp relief. The group's weekly procession of disagreement was reinforced by the shared perception that it has become difficult to imagine profound alterations to the world we inhabit. Under the condition of political demobilisation, disagreement over the political world can be treated as though it were a matter of "mere theory".

The debates were not conducted in a vacuum. On the contrary, they were frontloaded with already existing vocabulary and dominated by established paradigms. The predominance of state theory, on the one hand, and systems theory, on the other, made it difficult to grasp the larger transformation from which these established vocabularies themselves cannot claim an exemption. It takes a while to pin down why the antagonism between political modernity and systems theory may even obscure the intermingled manifestation of both continuity and change.

The protagonists of political modernity – state theory, for that matter – insist on the relevance of sovereignty for the political realm. Undeniably, they have a point. But the focus on sovereignty serves as a detractor with regard to the point that should be made by those taking modernity seriously. It is revealed in the abiding relevance of administrative processes. From the European Union to the OECD and the WTO, we see administrators at work co-ordinating their efforts on the international level. Regardless of how one would like to capture transnational governance in a more elaborate theoretical format, it definitely lends itself to description in terms of bureaucratic rationality. In a sense, what one encounters is the continuation of the modern state beyond the nation state. Unfortunately, as of yet this has been only very little understood.

The continuity with political modernity should not blind us to a striking discontinuity, too. It affects mediatisation of the constitutional project vis-à-vis those administrative processes. What we encounter in the field of market integration and risk-regulation is inter-

national co-operation that avails itself of its own procedures and maybe even avenues of judicial appeal (with the practice of relevant tribunals notoriously reflecting the overall bias that inheres in the regime). Most remarkably, in still rare instances, the administrative rationality of such regime becomes superimposed on constitutional traditions. As a consequence, these become, again, more informal, softer, more flexible or, euphemistically speaking, more experimental.

The Elephant in the Room and the *Methodenstreit*

And what happens to democracy? Nobody seems to know, and, even worse, not too many seem to care. While it is quite clear, on the one hand, that it is hopeless to expect the emergence of something resembling global parliamentary democracy, it is, on the other hand, highly doubtful whether the establishment of more deliberative engagement with civil society actors would suffice to recreate democratic structures within the disembedded arenas of international organisations, let alone networks.

When people speak openly about "post-democracy", we are still inclined to react with indignation. The point is moot, however, whether we have already adjusted to the imperatives of a post-political world where everyone focuses on personal success and is more than happy to delegate the regulation of risks to experts, at any rate so long as one can be reasonably confident of seeing fundamental rights protected.

The vision of a post-democratic world is not substantively neutral. It is congruent with a world where the distribution of goods and services is the business of markets. Maybe the dream of a constitution beyond the nation state is merely the neo-liberal dream pushed to another level? It may well be the case that, dialectically speaking, a partial ideology is about to come to itself in what purports to be the constitution beyond the nation state.

The work of the group ended with the realisation that its debate may have been in large part refraction, on a descriptive level, of a tacit *Methodenstreit*. Whether you see constitutionalism in demise or in transformation depends, ultimately, on what it takes to describe emerging legal realities accurately. This much can be learned from the Weimar debates.

I surmise that future progress depends on clarifying the normative presuppositions that are invariably involved in describing social realities. In this respect, the question of law and ideology persists. It is intertwined, to be sure, with the deeper question whether society needs to be described on the basis of the assumption that humans have the power to change it. This is not a theoretical issue. It affects the question whether or not, as Kant and Fichte

believed, practical reason takes precedence over theory and whether or not our social world is to be described in a manner that does not render it impossible for us to appear in this world as reasonable, and reasonably powerful, actors.