Revisiting Kumm's Cosmopolitan Constitutionalism[*]

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Abstract

In this paper, I revisit Mattias Kumm's work on a 'cosmopolitan conception of law'. I make two claims: First, I claim that although some criticism can be resisted by Kumm, under closer methodological scrutiny there are flaws in his theory. Second, I claim that these flaws challenge Kumm's approach when reading the Charter of the United Nations (UN Charter) as a 'global constitution'. This also has pertinent practical implications for the functioning of the United Nations. This contribution does not take a stance on the nature of law but focuses on this conception in the context of politics and law. In a first section, I recount Kumm's cosmopolitan conception of law. In a second section, I claim that implicit monism in the relationship between national and international law and theoretical idealization pose serious difficulties to the cosmopolitan approach. In a third section, I claim that these flaws pose a challenge to the United Nations when considering the UN Charter as a 'global constitution'. I sum up my findings in a final section and reflect on a future outlook for research on global constitutionalism in political philosophy.

Keywords: *global constitutionalism, Mattias Kumm, UN Charter, international law, monism*

Introduction

Traditionally, a constitution has been understood as the answer to popular sovereignty.[1] This may be called the liberal-constitutional justification of state legitimacy.[2] It is recognized that the exercise of political power is only justified by license from those over whom is being ruled.

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A consenting political community, by the might of its constituent power as 'we the people', establishes a rule of law which guarantees the right to rule by the people. This is grounded on the fact of free and equal persons who have the right to deliberate about policies that affect themselves. The convergence of claims of popular sovereignty and the establishment of a constitution make the enactment of this political order co-original.[3] The establishment of a constitution subject to a rule of law creates a framework of the right for a political order, establishing checks and balances for politics, a separation of powers between governmental branches and it acts as a third party in a contract between the individual and the state for dispute settlement.[4] Thus, a constitution sets up a formal body of norms and principles for law and politics, incarnating legitimate public authority that gives valuable meaning to the duties and obligations of its citizens. In political philosophy jargon, it is integral to the primary subject of justice: the basic structure of a society is "the political constitution and the principal economic and social arrangements".[5] And in the tradition of sovereignty (Hobbes, Bodin, Locke), popular sovereignty, now based in the 'supreme power'[6] of the people, has the right to rule at the highest level, putting an end to power struggles and monopolizing the coercive power of the state. But when we start thinking about international law, its purpose, and its relation to national constitutions, this narrative becomes increasingly difficult to theorize.

Putting aside criticism of liberal legitimacy for now,[7] the work of Mattias Kumm radically challenges the basic assumptions of the liberal-constitutional justification of state legitimacy from within. A national constitution is only one of many contexts of constitutional authority. There is a plurality of constitutional structures that have become integrated in public international law. And this has important implications for the legitimacy of national constitutions, the purpose of international law, and the practice of constitutionalism in the 'post-national constellation'.[8] In this paper, I revisit Mattias Kumm's work on a cosmopolitan conception of law.[9] I make two claims: First, I claim that although some criticism can be resisted by Kumm, under closer methodological scrutiny there are flaws in his theory. Second, and more substantively, I claim that these flaws challenge Kumm's approach when reading the Charter of the United Nations (UN Charter) as a 'global constitution'. This also has pertinent practical implications for the functioning of the United Nations. This contribution does not take a stance on the nature of law but focuses on this conception in the context of politics and law.

First, I recount Kumm's cosmopolitan conception of law (Section 1).

Next, I claim that implicit monism in the relationship between national and international law and theoretical idealization pose serious difficulties to the cosmopolitan approach (Section 2). Then, I claim that these flaws pose a challenge to the United Nations when considering the UN Charter as a 'global constitution' (Section 3). I sum up my findings (Section 4) and reflect on a future outlook for research on global constitutionalism in political philosophy.

1 Kumm on Cosmopolitan Constitutionalism

In this section, I highlight the key elements of Kumm's conception of 'cosmopolitan law'. His account of international law has led to a field of research in what can be seen as the constitutionalization of international law, familiarly titled 'global constitutionalism'.[10] This understanding disaggregates law in a novel way, separating law from a statist understanding of the constitution. Thus, he offers a justice-oriented vision of cosmopolitan law in the post-national constellation (1.1). His view has important implications for the legitimacy of international law, drawing on four key principles for a constitutional framework (1.2). The relationship between national and international law is vital, as he conceives of a different 'cognitive framework' of reference when evaluating this relationship that transcends the monist/dualist divide (1.3).

1.1 Constitutionalism in the Post-national Constellation

Mattias Kumm challenges the narrative of liberal-constitutional legitimacy in a novel and innovative way. For him there are two paradigms of constitutionalism, a democratic statist conception and a practice conception of constitutionalism.[11] In the democratic statist paradigm, constitutionalism has three formal criteria for constitutional authority: a formal constitutional text, a particular institution (e.g. a constitutional court), and a source (i.e. 'constituent power').[12] These are the core conceptual commitments of the democratic statist paradigm. For obvious reasons, it is thus impossible to think about constitutionalism in international and transnational law: there is no central constitutional text, there is no main constitutional court, and a constituent power legitimating international law based on a global community seems bleak and utopian. But on a different understanding of the language of constitutionalism, Kumm offers a practice conception of cosmopolitanism. On this interpretation, constitutionalism in the international sphere is

rooted not in these formal elements but in claims to authority that cannot be "plausibly legitimated by reference to the procedure that was used to enact it."[13] As Kumm argues,

> "It is the point and purpose of international law to authoritatively resolve these concerns [justice-relevant negative externalities] by way of a procedure that involves the fair participation of relevantly effected stakeholders, and it is the duty of states to support and sustain the development of an international law that is able to effectively fulfill such a function."[14]

Thus, the purpose of international law is to correct for 'justice-relevant negative externalities.'[15] An externality is an effect that arises between two or more parties that effects an uninvolved third party, either costing them or benefitting them. At the international level, for example, when C02 emissions arise that pollute other states' air, an extra cost for these states is created (negative externality). But when states require their citizens to be vaccinated for particular diseases, other countries that do not require this vaccination benefit from not having to service their health needs when they visit (positive externality). More specifically, Kumm is interested in *justice-relevant* negative externalities. Negative externalities become sensitive to justice when they affect the status of free and equal persons in the affected nation. This, in turn, undermines claims to legitimate national constitutional authority.[16] He posits, that "[f]or a state's policies to be just, they need to adequately take into account the legitimate interests of effected outsiders."[17] But why should states care whether they produce these externalities? Kumm argues that the claim to legitimate authority by a "we the people" can only claim jurisdiction over a domain where there are no negative externalities.[18] Because the modern world is shaped by the play of negative externalities, international law is the only means of resolving these justice sensitive issues and also reaffirming the legitimate authority of nations.

Kumm's understanding of justice-relevant negative externalities, echoing Mill's harm principle,[19] requires two elements: a third-party state to be harmed (where outside interests affect domestic interests and the harm of subjects can be accounted for); and a constraint on the reasonableness of a state's jurisdiction, i.e. one state cannot reasonably have jurisdiction over harms that affect third parties, which in turn delegitimizes the harm-inflicting state. Thus, a justice-relevant negative externality is based on the following formula:

Third-party harm + Reasonable state jurisdiction constraint
= justice-relevant negative externality

This can be tested by an example of carbon pollution, similar to the one used by Kumm. In 2017, United States (US) carbon dioxide emissions made up 15% of the global carbon pollution.[20] In the same year, President Donald Trump announced its withdrawal from the Paris Agreement, which was ratified in 2016 and was subject to the United Nations Framework Convention on Climate Change (UNFCCC). On the grounds that the US is disadvantaged and that it would undermine the US economy, the President withdrew from the international treaty. To determine whether this is a case of justice-relevant negative externalities, the cosmopolitan would look at who is affected by global warming. For example, if the US government were to do a cost-benefit analysis[21] and weigh the positive and negative effects for its citizens when leaving the Paris Agreement, they might come to the conclusion that there are legitimate claims to be made by Americans that are severely disadvantaged by adhering to this international law. They might argue that although the devastating changes in the atmosphere might pose immediate dangers to their citizens, the economic advantages might outweigh these dangers. They might be able to finance conclusive safety and health programs to outweigh the negative effects. The economic advantages of leaving the Paris Agreement would be able to finance these.

Therefore, it would be better to take the economic factors seriously: if they stay in, they would lack the necessary funds to finance this project (either in the case that climate change alters the living conditions despite emissions reduction, or alternatively if another country, like China, defects from the agreement or fails to meet its requirements). But what about the claims of citizens in other countries? As we will see in the following subsection, the legitimacy of the national constitution is co-dependently constituted by both national and international law,[22] and it seriously undermines the national constitution's legitimacy to disregard the well-being and status as free and equal persons of individuals in other communities, outside the US. Assume that the same cost-benefit analysis was undertaken by the UN to assess the impact of the US leaving the Paris agreement on all individuals globally (US citizens included). The Security Council would come to the conclusion that it would cost less for everyone to engage in aggressive measures to prevent global warming[23] that would benefit all persons equally. The analysis would show that it would be far more resource efficient to prevent global warming than neglect it for the sake of everyone. Recall that the argument required

that third party state interests are affected, and citizens are harmed by another state– *Third-party harm*– and that the state responsible for harm cannot reasonably decide (and is thus delegitimized)– *Reasonable state jurisdiction constraint.* This is a case of a *justice-relevant negative externality.*

This is truly at the heart of Kumm's constitutionalism in the post-national constellation. In a nutshell, Kumm offers a compelling account of authority in the post-national constellation that answers to a classical problem in political philosophy, what Hobbes called the problem of 'infinite regress.'[24] The claim to legitimate authority of the state requires the establishment of a highest power, in Hobbes' case the leviathan, to put an end to struggle for supreme hierarchy. This translates well to the democratic statist view, which understands a constitutional order as having a supreme power at the top of a hierarchy, wielding a monopoly on power. The practice conception of constitutionalism allows for various contexts of constitutionalism in light of the absence of a highest authority. As I will touch on later (1.3), Kumm's cosmopolitan conception uses the global community as the reference point for claims of justice-relevant negative externalities, putting an end to the requirement of a highest authority and the problem of infinite regress. But whether this is truly the case remains to be seen in my critique. And the existence of justice-relevant negative externalities leads to considerable theoretical difficulties, as well. This is especially pertinent in grasping the legitimacy of international law (when are the corrections legitimate?) but also in understanding the nature of national constitutional legitimacy (the role of constituent power). In the next subsections, I will discuss these issues in more depth and turn to the absence of a highest authority later on (Section 2).

1.2 Legitimacy of International Law

Kumm locates four sources of constitutional legitimacy in international law that may only be explained by his conception, the integrated conception of public law.[25] First, he argues for the *principle of international legality.* Because international law establishes a framework to deal with authoritative questions that go beyond the scope of national law, there is a prima facie duty to obey it, "simply by virtue of it being the law of the international community".[26] His argument is two-pronged: on the one hand, he draws on Rawls, arguing that citizens of the international community have a *duty of civility* to comply with international law.

This means that citizens ought not take advantage of faulty social arrangements as a reason to not comply with a just constitution.[27] On the other hand, there are sufficient benefits of international law that justify the principle. He thinks that an effective international legal system benefits the international community as a whole, as law is an effective tool to bring about "welfare-enhancing cooperative endeavours between various actors" and "internalize externalities, prevent prisoner-dilemma-based misallocation of resources, realize efficiency gains".[28] Furthermore, this complements national law by contributing to checks and balances, beneficial to all by stabilizing liberal constitutional democracies domestically.[29] Third, it creates a rule of law that enhances individual freedom and makes choices for individuals predictable on both the national and international level. And finally, it curtails abuses of power by holding states accountable, protecting against power asymmetries, and furthering "the right of a people to govern itself without inappropriate impositions by other states".[30] But he also argues that citizens may override compliance, if they have sufficiently good reasons and the effects do not travel beyond their own nation state.[31]

Second, Kumm argues for a *principle of jurisdictional legitimacy or subsidiarity*. Subsidiarity is a principle largely developed in the context of the European Union, which guides the interpretation of law when the tasks at hand cannot be performed at the national level. This means that when collection action problems arise, legal solutions to the problem are bumped up to the European level. To do this, first, a collection action problem[32] must be identified that cannot be solved on the lower level without violating another jurisdiction. And second, the reasons for leveling-up are assessed by means of a "'proportionality test' or 'cost-benefit analysis' that is focused on the advantages and disadvantages for ratcheting up the level of decision-making".[33] Here, the point of reference for a decision is the global community, and thus enforces both national law in making correct legal decisions and international law by giving it superior jurisdiction in these problems. This results in a highly context-dependent practice of law on both the national and international level, but Kumm argues strengthens rather than weakens transnational legal practice and the legitimacy of international law.

Third, Kumm argues for a *principle of procedural legitimacy*. What is at stake here is adequate participation and accountability in the decisions made by international courts. As there are deficient ways of meaningfully establishing accountable electoral institutions, there is reason to believe that the legal process will be deficient, too. He vindicates this

objection by arguing that first, the principle of subsidiarity does most of the work legitimating these problems, as they are subject to the national legal process. Second, he argues that instead of electoral accountability playing a major role in legitimating this facet of international law, the procedural adequacy of the jurisgenerative process is important.[34] And transnational procedural adequacy is legitimated by international agreements, such as the European Commission's White Paper on European Governance or others, e.g. in the ICC.

Finally, Kumm argues for a *principle of substantive reasonableness*. This relates to the outcomes of the international legal process, i.e. output legitimacy. On Kumm's view, output legitimacy is a false measure for international law. It is exactly because of disagreements between states that the international legal process is invoked, thus "legitimacy of a legal act can never plausibly be the exclusive function of achieving a just result, as assessed by the addressee."[35] For the same reason, students do not grade their own tests and journals do not allow the contributors to decide in the review process. Rather, Kumm argues that for every international legal decision, the substantive disagreement must be taken into account during the process.[36]

1.3 Kumm's Interpretation of the Relationship between National and International Law

At this point, two problems remain unsolved. The first is the relation of national and international law. The second is the role that constituent power plays in Kumm's account. These issues are hugely relevant to understand Kumm's account and may be closely related at times. But to begin, allow me to recount two predominant approaches to the relationship between national and international law. The first response conceives of law dualistically. These two spheres of law are disconnected, embodying the internal tension between a national constitution and international law. The basic argument for legal dualism is the principle of legality. It can be reconstructed as follows:[37]

(A) Premise: A national constitution reflects the right to rule based on "we the people" as the supreme "law of the land".

(B) If the national constitution is "supreme" then international law is only important to the extent that the national constitution determines it to be.

(C) Public authority is justified in terms of the national constitution and legality is determined by national constitutional standards.

(D) When faced with the decision to violate national or international law, public authorities must respect the national constitution.

(E) Whether compliance with international law is legal depends on the requirements of national law, adherence is adherence to the national constitution.

(F) Conclusion: Violations of international law compatible with national law are not violations of the principle of legality, because legality is constitutional legality.

Although premises (A)-(D) seem to be sound (relying on the information installed earlier), (E) and thus the conclusion (F) pose a problem. If the legal systems of national and international law are seen dualistically, then violations of international law are violations of national law proper. Isn't this contradictory? If national and international law are seen as two distinct spheres, how can international law become integrated into national law? Why not take international law seriously, just for the sake of the principle of legality, if these laws increasingly guide public authorities in their decisions? This problem is a tension at the center of legal dualism and it leads us to a second response to the relationship between national and international law: legal monism.

Taken from a slightly different angle, monists argue that law can only form a single unified whole, which either traces norms to their hypothetical basis, i.e. the basic norm—[38] upon which other norms are made as valid — or the whole relies on the 'rule of recognition',[39] which gives officials certainty when determining the validity of rules, which in turn rely on social norms. Furthermore, monists would interpret the principle of subsidiarity differently, as discussed earlier (in EU law). As a means not of distinguishing between national and international law in two spheres, monists would argue that the principle should be used to delegate directives efficiently, i.e. if a competency area covered by national law (still part of a unified whole) is more effective in its assigning of responsibility or of determining obligations for those effective than international law, then it becomes more appropriate. But this is also a case where monists would have to answer to the dualist claim of the principle of legality.[40] Nonetheless, for monism, understood in a strong sense, international law is thus the highest legal authority because we can trace norms and rules to the acknowledged source of international law.

In a weaker sense, monists are confronted with a problem of legitimacy of constituent power. In the face of international law being increasingly guided by constitutional norms, public power and state power "are no longer congruent, the constitution ceases to regulate public power coherently" and thus the national constitution, "can no longer secure that any public power taking effect within the state finds its source with the people and is democratically legitimised by the people".[41]

Kumm argues that we ground our understanding of this relationship by using different "cognitive frameworks."[42] The monist/dualist paradigm is part of a statist cognitive framework. This closely relates to what Kumm called the 'democratic statist paradigm'. Using the practice conception of constitutionalism, he argues for an alternative cosmopolitan cognitive framework.[43] This leads to a post-positivist and cosmopolitan understanding of constituent power. It is post-positivist because it assumes that the concept of constituent power is limited to acts that can be "identified as an act of constituent power" and that it must "be geared towards the establishment of legitimate constitutional authority."[44] Thus, constituent power functions as the means of establishing government.[45] But this function expresses itself not just in the formation of constitutions, i.e. in the American or French revolutions, but also in its reformation. Whenever the understanding of the constitution shifts, and a formal change is made to an existing constitution, this happens in a post-positivist way by referencing an already existent pre-legal structure: constituent power.

Very briefly, I wish to bring up an objection to this reading of constituent power (but for obvious reasons I cannot do justice to that debate here). One may object to the idea of a global constituent power and argue that constituent power is only viable when attached to a nation state. This seems like fair critique from the democratic statist paradigm. Kumm would argue that the cosmopolitan framework is post-positivist, i.e. the legal structure that creates constituent power already exists before the constitution is established. I think that it may be an interesting move for Kumm to give up on constituent power as an integral part of his theory of constitutionalism. On a different reading of the cosmopolitan framework as post-positivist, this would mean that the framework acknowledges that theories and the concepts we use to construct them are influenced by other theories that we cannot plausibly consider. Perhaps constituent power was a key ideological concept for constitutional theory in the 18th and 19th Century but today we can acknowledge that constitutions don't need consent for them to be legitimate. These two

understandings of post-positivist constituent power may be at odds but it would be an interesting avenue for future research in political and democratic theory to investigate the extent to which constituent power suffers from ideological flaws, making it a relic of the past.

2 Methodological Criticism

In this section, I will argue that under methodological scrutiny of his theory Kumm cannot escape grave deficiencies in the implicit monism and the theoretical idealization he commits to. The former critique is rooted in legal theory, and has been expressed before, albeit not in the same explication.[46] The latter critique is indebted to political philosophy.

1. Implicit Monism in Kumm's Theory

As I discussed above (1.3), Kumm offers a conceptual framework for transcending the monist/dualist divide. The analytical tool here is the notion of 'conceptual frameworks', that determine a statist or cosmopolitan direction when grasping the relationship between national and international law. On the face of it, it seemed plausible to accept an open-ended perspective on law that acknowledges the practice conception of constitution but denies the statist framework of law, relying on fixed institutions, a unified legal text, and a single constitutional court. There are various reasons to accept this framing: it can rid us of monist principles like Kelsen's *Grundnorm* or Hart's *rule of recognition*, and it can create legal authority that maintains a principle of international legality and is sensitive to the plurality of constitutional contexts. And, so the argument goes, citizens can still have good reasons in the absence of justice-relevant negative externalities to disobey international law. This is based on the justification of a superior moral principle in accordance with rationality, a Kantian moment of Kumm's theory.[47] But this leads to a serious theoretical implication in assessing the conceptual framework of cognitive frameworks. Are we truly leaving the monist/dualist divide when we rely on such an abstract notion of free and equal persons and a moral principle of Kantian rationality? Meerssche argues that this leads to "different chains of validity" that "universalises legal sovereignty with a unified normative and jurisprudential model for the determination of ultimate legal authority."[48] This is a critical blow to Kumm's cognitive framework approach. Does this implicit monism in the rational principle of reasonableness and the plea of universal moral-

ity truly make for the best way of conceptualizing constitutionalism in practice? If international law is still structured to aim at a higher authority, which is moral law, then this implicit monist critique may even lead to a natural law charge. The presumption of universal morality already precludes a hierarchization of law towards idealized rationality. One may easily respond to an objection to this critique: but what if there just is a universal morality that law should be aimed at? This is widely accepted as a response by many legal scholars,[49] and I have no intention of questioning the existence of universal moral principles for international law, human rights law, or even for politics.[50] But it is still quite difficult for Kumm and others to respond to the structure of this critique: the legal system is aimed at a higher authority. This implicit monism, then, seriously questions the reasoning behind a 'cosmopolitan cognitive framework'. Kumm may reply that this construes the purpose of international law: to correct for justice-relevant negative externalities. I will turn to this in my second critique.

2. Theoretical Idealization

As I discussed above (1.2), Kumm makes a strong argument for the legitimacy of international law, depending on a practice conception of constitutionalism, a desegregation of law from the democratic statist paradigm, and his four key principles of legitimacy in international law. But as we saw, his argument has methodological deficiencies. His method is overtly Kantian (or Dworkian)[51] and relies on a rationalistic conception of free and equal persons and an international rule of law. Although I have no qualms –per se– while remaining in the paradigm of liberal-constitutional theory, the question arises: what kind of theory is this—an ideal or a non-ideal theory. This distinction leads to a methodology in normative political theory, originating in the work of John Rawls, between the ideal conditions of a fully just society (ideal theory) and a theory that accounts for feasibility constraints in the real world (non-ideal theory). Rawls, who almost exclusively did ideal theory, argues that beginning with ideal theory is the best method for a "systematic grasp of these more pressing problems".[52] Only by setting out the conditions and principles of a just society, as laid out in the two principles of justice,[53] can the actual terms of a just society be comprehended. Non-ideal theory begins by taking the real world into account, the limits of compliance, and the feasibility constraints when applying the principles in the real world. Its aim is to transition a society towards a

fully realized just society. While some argue in favor of ideal theory, by correcting for over-idealized elements,[54] others have described "ideal theory as ideology".[55] I do not wish to take a stance on this debate here of whether the ideal/non-ideal theory method is a good one or whether it should be disregarded completely.[56] I claim that Kumm's theory is an ideal-theory. Kumm may object to the distinction, but I maintain that the method is still an important one. Rather we should take the distinction with a grain of salt and filter out false idealizations that can lead to flawed reasoning in the principles we select to guide our theories. This is the ground on which I stand to critique Kumm's theory.

Why is Kumm's theory an ideal theory? To begin with, there are a few assumptions that Kumm makes that idealize reality but do not account for feasibility constraints. First, his view of all people as free and equal persons is an idealization that does not account for grave violations of human rights that happen every day, the limits of access to just institutions that impede on equal participation, gender inequality, and an unequal standing in society. Likewise, it assumes that free and equal persons are reasonable, which also does not account for flawed ideologies, fundamentalism, and illiberal tendencies witnessed throughout Europe (e.g. Hungary, Poland) and in other parts of the world. Now, I do not mean that this is a wrong idealization. Rather, Kumm does not take real world circumstances into account when formulating its principles. This becomes vitally important when considering how international law views individuals and their freedom and equality. If law recognizes this imperfection, it may take action to correct it. In many cases (e.g. human rights) it does, which makes international law effective. But from the beginning of Kumm's theory of legitimacy, the principle of international legality, Kumm's ideal theory skews reality in such a way that makes his justification implausible.

If we recall this principle, it relies on the presumption of international law: because it exists we have a *duty of civility* to comply. Moreover, the justice-relevant negative externalities that arise make international law the only effective means of governing this kind of injustice. But if we take a closer look at the duty of civility to comply with international law (that gives rise to the presumption of international law as being legitimate) we notice a key problem from this theoretical lens. *Kumm's grounding of the presumption of international law involves circular reasoning.* If we take a closer look at where the passage comes from that Kumm adopted from Rawls to justify this core presumption, we see that it is from Rawls' discussion of civil disobedience. Now, it seems to me

that civil disobedience is a subject of non-ideal theory. Is this a problem? Yes and No. Methodologically, this seems to be at ends with an ideal theory because it already assumes that individuals may have reason not to comply. But this quickly lapses back into an ideal theory consideration along the lines of no reasonable person could conceive of a reason not to comply with a just constitution. But the problem here, is that Kumm has not yet established that the constitution he is trying to legitimize is a just order. This is circular reasoning if the principle you use to justify your principle is justified by that same principle. In other words, it seems wrong to justify a presumption that international law is legitimate on the premise that you should comply with it because it is legitimate. I cannot offer a way out of this justificatory problem here –within the liberal-constitutional tradition. One answer may be to look at recent developments in the realist methodology of normative political theory.[57] But it has also been argued that it is a false assumption to evaluate moralist accounts of legitimacy by realist standards.[58] Regardless, in the next section, I pursue an application of Kumm's theory to the context of the United Nations.

3 The Charter of the United Nations: a 'global constitution'?

In this section, I claim that if we apply Kumm's theory in the context of the United Nations, the practice conception of constitutionalism suffers under grave deficiencies. First, I explain what might be meant by a reading of the UN Charter as a 'global constitution'. Second, I argue that my critique of Kumm's theory creates difficulties in theorizing the UN Charter. And finally, I point to how this may create problems in practice.

A good litmus test for understanding the practice conception of constitutionalism would be to answer the question: is the UN Charter a 'global constitution'? The analytical point that Kumm is trying to make is that if you have criteria like a *formal constitution*, *a constitutional court*, *or constituent power* then you are readily making yourself captive to the statist paradigm of constitutionalism. In the UN Charter signed in 1945, it declares that its mission is focused on international peace and security, "to take effective collective measures for the prevention and removal of threats to the peace" (Art. 1) and do this "in conformity with the principles of justice and international law".[59] Likewise, the UN Charter[60] asserts this sort of hierarchical, supreme power as the final instance of jurisdiction: "No party to any such treaty or international

agreement [...] may invoke that treaty before any organ of the United Nations" (Art. 102). And as a treaty, the UN Charter invokes other provisions in this same chapter "Miscellaneous Provisions" (Ch. XVI) such as a hierarchy of constitutional norms among competing members (Art. 103) and the enjoyment of the territory of its members to fulfill this legal capacity (Art. 104). This poses obvious difficulties to the practice conception of constitutionalism. The UN Charter emulates a statist constitution, establishing highest authority and constitutional courts, as exemplified, for example, in the International Court of Justice or the International Criminal Court.

If we commit to a reading of the UN Charter from Kumm's perspective of cosmopolitan constitutionalism, the constitutional context of the United Nations becomes just one of many contexts, (WTO, NATO, etc.). How should the aforementioned formal criteria be understood? First, it serves to correct for collective action problems, i.e. those associated with justice-negative externalities. But the context of these externalities remains issues of peace. Thus, carbon pollution problems or rising water levels in South East Asia that affect peace can be understood as justice-relevant negative externalities and should fall under the jurisdiction of the United Nations. Second, this also applies to constitutional courts who deliberate on problems that arise in this context. Other externalities that arise in other contexts should be corrected for elsewhere, like in the WTO when economic negative externalities arise. And third, the kind of constituent power involved in the United Nations should be conceptualized from the perspective of a global community, namely as 'we the peoples' of the United Nations.[61] During the United Nations conference in San Francisco in 1946, the original treaty signed begins with "We the peoples of the United Nations" and ends with "our respective Governments, through representatives assembled in the City of San Francisco [...] have agreed to the present Charter of the United Nations".[62] This points to two important insights. First, the countries at the conference agreed to a treaty which acknowledges the constituent power of the entirety of nations involved. And second, it offers the required democratic legitimation because it was authorized by the governments of these countries, i.e. the representatives of the individual 'we the people' in each state.[63]

From the perspective of a cosmopolitan conception of constitutionalism, this reading thus checks out. The emulation of formal criteria may be criticized as a relic of the past, but in practice this has no effect of the functioning of the United Nations and its abilities to legitimately

adjudicate on issues in international law. But I argue that if we take the methodological criticism I presented into account, there are serious issues with conceptualizing the United Nation's claim to legitimate authority. First, the implicit monism involved in justifying international law catches up to the practice conception of constitutionalism in Kumm's interpretation. If the problem of infinite regress is sidestepped by asserting the hierarchical structure of a universal morality, then the constitutional context of the United Nations logically relies on the existence of this higher authority. In other words, the formal constitutional text that the United Nations presents, stands on a presumption that there is a universal morality. I do not wish to take a stand on whether or not this is the case. Rather, the justificatory strategy involves the monist reasoning of a highest authority that can be referenced by the UN Charter.

Furthermore, a reading of the United Nations as a global constitution also presents a problem in the idealization of the theory of law that legitimizes it. Kumm argues for the presumption of international legality, which we saw suffered from circular reasoning. In the context of the United Nations this means that the duty of civility, which implies a duty to comply with international law, is justified by reference to a just constitution. It is not a good reason to disobey a just constitutional order based on unjust social arrangements. But how do we know that the constitutional context is just in the first place? Kumm cannot *explicitly* argue for universal morality because as we saw this would structurally undermine the claim that the problem of infinite regress is superseded. But implicitly, by justifying the constitutional context in terms of 'reasonableness', he requires a standard of rationality. Another, more worrisome answer, is to rely on the duty to civility argument which already presumes that the UN Charter is legitimate. It seems that the real normative work here is being done by the global constituent power that lends itself to this presumption. But as I argued above, the existence of constituent power –both in theory and in practice– can be questioned. In theory, an alternative reading of post-positivism would contest the existence of constituent power in the real world: it once served as an important tool for justifying the creation of a state but not anymore. Constituent power may be an artifact of the past and it couldn't be the basis of the presumption of legality of international law. This is a statement that democratic theorists may immediately reject, but it may be interesting to further investigate the extent to which constituent power has changed over time in theory. And in practice, it is also questionable to what extent there was a real show of constituent power

when the UN Charter was signed. Representatives of the governments signed the treaty, who allegedly acted in the name of their constituencies. This contradicts the traditional notion of constituent power because how can a government acting in the name of a state claim that it acted as a constituent power? But if universal morality, the presumption of international legality, and constituent power are not reliable justificatory foundations for the UN Charter, then what is? This obviously requires more space than I have here, but a ridiculously short answer that holds on to the practice conception of constitutionalism (if we let go there are obvious other approaches)[64] would be to revive the Hartian *rule of recognition* approach. Others use this approach and it has been widely commented on.[65] But it is not my intention in this paper to argue for a way out of this problem. Rather, I wish to humbly insist that if we think of the UN Charter as a global constitution from Kumm's perspective, we are arguing from a shaky foundation that various parts of the global community will not agree to.

4 Conclusion

To sum up this contribution, I revisited Mattias Kumm's work on a 'cosmopolitan conception of law'. In a first step, I claimed that implicit monism and his theoretical idealization seriously challenge the approach. In a second step, I claimed that if Kumm's approach is applied to the UN Charter as a global constitution, the criticism poses serious problems for this self-understanding of the United Nations.

On a concluding note, I wish to briefly reflect on the merits of this research endeavor and offer an outlook for future political philosophy research on global constitutionalism. First, this contribution demonstrated that the literatures on justice and ideal/non-ideal theorizing converge with constitutional theory. The importance of constitutional theory for understanding the basic structure of society should play a larger role in political philosophy. Second, a future avenue of research in global constitutionalism may involve connecting the theoretical implications of cosmopolitan constitutionalism with theories of justice. This may work to symbiotically enforce constitutional theory by pointing to theoretical deficiencies and improved application in non-ideal circumstances. For example, Kumm's theory could be read as a 'corrective theory of justice as justice-negative externalities', which may serve as a fertile ground to investigate the extent to which international justice can mitigate structural injustices within a practice conception of constitutionalism.

Another avenue may include closer exploration of the methodological pre-commitments of liberal-constitutionalism to moralized principles of justice, reasonableness, and legitimacy. This may serve as a significant asset in a world that more pressingly requires international law to live up to expectations of pluralism, especially for disadvantaged groups. Dealing with moral and political disagreement will be a serious issue in the near future as increasingly diverse groups interact using the medium of international law, demanding retribution for historical and structural acts of injustice. Political and legal theorizing may thus serve to develop conceptions of international law and political theory to bring the world through its current tumultuous, transnational, and globalized manifestation.

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Notes

1 See, for example, [21]–[13]

2 See [25], [29]

3 See Habermas' distinction between public autonomy, i.e. popular sovereignty in the tradition of republicanism, and private autonomy, i.e. the liberal system of rights: [10, pp. 89–122]

4 Cf. [33]

5 [24, p. 6]: "the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."

6 Most specifically in par.149: [21]

7 [35], [27]

8 See [3]–[17]

9 See [16]–[20]

10 [33], [4], [34]

11 See [17]

12 [17]

13 Ibid.

14 [18]

15 See [16], [18], [20]

16 [18]

17 [18]

18 Ibid.

19 See [22]

20 [6]

21 [16]

22 See [19]

23 [19]

24 See the discussion of Hobbes, subjecting sovereigns to their own laws and hierarchical legitimacy: [32, p. 318]

25 [18]

26 [20]

27 Cf. [25], [20]

28 [20]

29 [20]

30 [20]

31 Ibid.

32 An exception is human rights violations. Ibid.

33 Kumm, 921.

34 Kumm, 926.

35 Kumm, 927.

36 Ibid.

37 [19]

38 See Chapter 5 about the validity of a normative order and the "Grundnorm": [14, pp. 193–214].

39 See Chapter 5 about the validity of a normative order and the "Grundnorm": [14, pp. 193–214]

40 Cf. [16]

41 [9, p. 16]

42 [16]

43 [16]

44 [19]

45 [19], [1]

46 Cf. [31]

47 [18]

48 [31]

49 See, among many, [8], [5]

50 See [35]

51 Cf. [31]

52 See [24], [26]
53 Cf. [24]
54 See [26]
55 See [23]
56 See comparative vs. transcendental theories: [28]
57 See [35]
58 See [2]
59 [30]
60 Ibid.
61 Cf. [7]; United Nations, "Charter of the United Nations."
62 United Nations.
63 [7]
64 [35], [27]
65 See, for example, [31], [15]

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