

‘After fragmentation’: Notes from the global South

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Abstract: The contributions in the volume do a fine job of recounting the sites and modes of unravelling meaty issue-area ‘interface conflicts’ and studying their diverse implications. I have sought to consciously read these contestations here from the broader perspective of the global South. My overall plea is for more politics and not less when it comes to studying ‘interface conflicts’ and norm contestations. What this translates into is to embed the technicalities of norm conflicts in the backdrop of more fully fleshed out political currents and contexts. Methodologically speaking, while sympathetic to the process-driven agential micro-constructivist approach to studying these ‘interface conflicts’, I argue that ‘internalist’ accounts of perceptions must ideally tap on insiders to arrive at a richer appreciation of the anxieties and hopes surrounding particular norm contestations in specific issue-areas.

Keywords: International relations; ‘interface conflicts’; norm contestation; TWAIL; global South; international law and politics.

I. Introduction

The intent of my brief intervention here is to reflect on themes that are germane to this Special Issue of *Global Constitutionalism* titled ‘After Fragmentation’. At the outset I would like to commend the guest editors for assembling a fine set of pieces which delve imaginatively into the question of ‘interface conflict’ in the context of assorted norms in global governance. Overall, in terms of the big picture, the contributions are analytically sharp, methodologically innovative, empirically rich and theoretically sophisticated.

Where I think they can potentially build on is to tease out more substantially the broader political ecologies these ‘interface conflicts’ are embedded in, link institutional design and global constitutionalism concerns but again pose these more explicitly in the light of a broader political canvas and perhaps most critically fare better on the global diversity front. With regard to the latter dimension, if we do indeed acknowledge that ‘global’ values

matter as do the internal perceptions that surround them, the study merits further disaggregation of the content, timing, prioritisation, sequencing and variation across different political and cultural milieus with contributors ideally drawn from these contexts. (The latter dimension could warrant a special issue in its own right.)

In terms of a road map, I have the following structure in mind. I identify six themes that in my assessment are worth mulling over as we proceed. My choice of these themes is dictated by an overarching interest in the larger picture and a hope that these arguments have a shelf life that extends beyond the immediacy of responding to these contributions alone. These include thoughts on the methodological accents adopted in this Special Issue, arguments surrounding norm based constitutionalism, how power asymmetries inflect normative contestation, the politics of knowledge, the value of studying intersections of law and politics and why politicising institutional design may not be such a bad thing from the perspective of the global South. What this also implies is that I shall not be offering a catalogue summary of the various contributions. I think each of these pieces deserve to be closely read both individually and in conjunction with others to derive serious analytical purchase on what ‘after fragmentation’ translates into in terms of concrete real-world dilemmas and choices. These encompass global energy governance, climate politics, drug control, internet governance and security governance. Each of these facets must also be viewed both individually and collectively to better appreciate their interconnections, overlaps and tensions.

To be fair to readers, I would like to come clean on where I am coming from. I seek in the course of my intervention to broadly apply the Third World Approaches to International Law (TWAIL) orientation while reading ‘interface conflicts’ and how they appear to pan out in specific issue-areas. At the risk of being reductionist, I list three articles of faith in TWAIL scholarship. First, scholars within TWAIL recognise that there are persisting imperial/colonial continuities in the modern world. Second, TWAILers take global history seriously in order to establish their first premise. Third, they are not nihilists. They do believe that international law holds transformative possibilities to reconfigure the world more equitably eventually contributing to a ‘just international order’ (Mutua 2000; Chimni 2006; Anghie 2007; Eslava et al. 2017; Gathii 2018). I will have occasion to gesture to these elements as we proceed.

II. Some methodological observations

Contributions in this Special Issue straddle myriad dimensions. While there is methodological diversity in the issue as a whole, I shall restrict myself here

to agential constructivism in particular. This is prompted by an explicit preference shown in some contributions for a process-driven agential constructivist approach in contrast to purely structural approaches (for instance, Gholiagha et al., this issue). Second, an emphasis is placed on the micro level of analysis along with an ‘internalist’ perspective on ‘interface conflicts’ (Kreuder-Sonnen and Zürn, this issue). What this translates into is a careful scrutiny of ‘the perceptions and behaviour of actors involved in the respective governance fields to trace the activation of norm collisions and analyse positional differences between actors on the relationship of norms and rules’ (ibid: 243).

In terms of the recourse to agential constructivism, three worthwhile clarifications are in order here. First agential constructivism does not privilege only benign norms. It is open to the possibility that ‘a norm can be liberal or illiberal, progressive or regressive’. However, more significantly,

Regardless of the type of change or its pace, a norm can have a transformative effect on global order—which is an insight that agential constructivism shares with other strands of constructivism. (Grant 2018: 261)

Second, it is open to the perspective of those at the receiving end of history. It acknowledges that

actors from the Global South—both state and nonstate—are making headway in terms of obviating the deleterious ties of neocolonialism and charting their own courses within international and intergovernmental organizations, markets, and transnational governance initiatives at the global, regional, national, and local levels. (Grant 2018: 261)

It also recognises opponents to norm change. The term employed here is ‘anti-preneurs’ in contrast to ‘norm entrepreneurs’ with which we are more familiar within this domain (Grant 2018: 262; Finnemore and Sikkink 1998: 887ff).

Third, I want to return here briefly to the question of ‘perceptions’. While it appears increasingly clear that perceptions drive politics in fundamental ways, the more methodologically daunting task is to gain some analytical traction over perceptions and ensure a degree of accuracy in our reading of them. While deciphering state perceptions is one part of the challenge, there remains the task of discerning non-state perceptions in a fluid and dynamic international order. As one agential constructivist argues ‘material factors are perpetually changing—with knock-on effects on norm gestation, tipping point, and internalization’ (Grant 2018: 260). It might be a worthwhile endeavour here to connect perceptions with the ‘heuristics and biases’ scholarship of Daniel Kahnemann and Amos Tversky (1974). It could provide useful insights on how perceptions are shaped in relation to norm contestation and reveal the relative ‘stickiness’ of some perceptions over

others. A particularly worthwhile exploration might be the persistence of old beliefs (the ‘perseverance heuristic’) notwithstanding the presence of new evidence to the contrary about changing power dynamics between the global North and the global South with implications in terms of the lack of ‘internalisation’ of change by established older powers.

III. The grammar of normative constitutionalism

Mattias Kumm, Jonathan Havercroft, Jeffrey Dunoff and Antje Wiener in an earlier editorial in the pages of this journal raised the question of the ‘The end of “the West” and the future of global constitutionalism’ (2017). They identify three ‘anti-constitutionalist ideologies’ that are in direct conflict with Western constitutionalism. This included Islamic fundamentalism, populist nationalist authoritarian movements, and technocratic authoritarianism of the Chinese and Singapore variety (2017). While all these ideologies are clearly opposed to the package of rule of law, human rights and democracy, can we envisage any other contenders on the horizon? Scholars from Critical Legal Studies (CLS) like David Kennedy have argued

... that critically-minded scholars abandon their faith in the emancipatory promise of constitutionalism, and instead focus on the ways in which the interplay between international political economy, law and politics structures contingent patterns of political and socio-economic domination (Kennedy 2008: 827; Oklopcic 2016: 2085).

They have further suggested that CLS scholars have an obligation

to *demask* and to *describe* the larger legal, economic and political structures that frustrate projects of socio-political emancipation, rather than perpetuate a futile hope that political emancipation can be facilitated through a new constitutional imagination, or institutional design (Oklopcic 2016: 2089; emphasis in original).

However, there is a way out of this impasse. Comparative constitutionalism could begin with acknowledging Southern traditions of constitutionalism. Zoran Oklopcic observes in this context that

... the main purpose of constitutionalism of the global South has been to raise sensibility to hegemonic patterns of production and dissemination of legal knowledge, between the developed intellectual cores and their peripheries (Oklopcic 2016: 2084).

Most crucially in terms of the blind spots of comparative constitutionalism, Oklopcic is critical of the ‘systematic neglect’ of ‘issues such as poverty, imperialism, or socioeconomic emancipation which have otherwise been

high on TWAIL's agenda' (Oklopcic 2016: 2082). He makes a fervent plea for not throwing out the baby with the bathwater but to rehabilitate the neglect of non-Western traditions of constitutionalism through recognising that 'Southern constitutionalism is a project whose aspiration is to contribute to a wider study of *comparative constitutional emancipation*' (Oklopcic 2016: 2093; emphasis in original). This brings us back to the question of 'interface conflicts' around norms and institutional design questions.

I think considerations surrounding norm collisions and interface conflicts are often enacted in the backdrop of premises surrounding global constitutionalism. While there is a richness to be derived from the empirical attention to these sites and discourses of contestation, it is perhaps worthwhile to ask if TWAIL or for that matter Southern constitutionalism provides yet another vantage point 'towards understanding it as a particular form of gazing at constitutional phenomena' (Oklopcic 2016: 2086). Going ahead, what this might entail is to flesh out these assumptions about global constitutionalism upfront while examining 'interface conflicts' and relate them to how institutional design may or may not have a bearing on the kind of global constitutionalism that it ultimately seeks to promote and why that might be a worthwhile political project, quite apart from its legal value.

IV. Power asymmetries and norm contestation

If we treat norms as suggested by some of the contributors to this Special Issue 'as *value-based* collective expectations for the appropriate behaviour of governments and states in *specific types of situations*' (emphasis in original), it opens up the realm of values for further discussion (Gholiagha et al., this issue: 294). This conceptualisation of norms when read together with the idea that 'it is not far-fetched to claim that interface conflicts often serve as instruments to contest (overly) liberal aspects of order and/or undermine the preponderance of established (Western) powers in international institutions' perforce warrants a discussion of how power mediates this universe (Kreuder-Sonnen and Zürn, this issue: 260). Or consider the claim that 'The move from dormant to open norm collision – the moment of activation – requires agency. Open norm collisions may evolve into interface conflicts when at least one norm is associated with an international authority.' (Gholiagha et al., this issue: 312).

It might be worthwhile considering some questions in this context. First in the realm of values, it might be interesting to ask if there is a tension between the rising powers and established powers when it comes to values. Would the decline of the United States lead to other value systems being privileged? Some of the challenges are internal to the West. As the United States under

the current Trump administration turns its back on liberal ideals it once fervently espoused, it poses an immediate challenge from within the liberal order. The growing rise of insular populist forms of authoritarianism (in Europe) again considerably undermines the liberal international order.

Then there are serious external contenders too. China could serve as one telling illustration here. Daniel Bell for instance suggests that ‘Harmony is central to China’s political culture, and individual freedom is celebrated in Western societies’ (Bell 2017: 104). Are these values at odds with each other? Bell goes on to suggest that ‘Far from assuming a uniformity of goods, the Confucian ideal of harmony celebrates a diversity of goods brought together in ways that open new possibilities for humans to flourish.’ In the Chinese rendition ‘Harmony then refers not simply to the absence of conflict, hatred, and resentment but also something more positive, namely a feeling of commonality and commitment among the diverse parts of the relationship’ (*ibid*: 105). If it is true that ‘the United States loses its sole position as the world’s ideological hegemon, harmony as a universal moral ideal may reassert itself in the global discourse about what constitutes human well-being’ (*ibid*: 106).

A more concrete manifestation of revisionist power contestation here is the creation of institutions like the AIIB (Faude and Fuß: this issue). This represents another instance where China is signalling in unambiguous terms that in the absence of deeper accommodation within existing governance structures, it will create its own strong alternatives to the existing order. Inevitably, we need to ask ‘to what extent is there a set of *common values* that might be considered higher norms that trumps other values, that penetrate through the whole system, that inform other law?’ (Ambrus 2013: 36; emphasis in original). To what extent then is the ‘vener of liberalism’ peeling off? (Kreuder-Sonnen and Zürn, this issue; Ikenberry 2011.) The tensions between liberal order claims as opposed to ‘sovereignists’ based arguments are best exemplified here in the realm of internet governance (Flonk et al., this issue). However, this is neither the first nor the last issue-area where these tensions are likely to be more palpable in the future.

V. The politics of knowledge

The politics of knowledge refers to the asymmetries linked to knowledge production, consumption and dissemination. It also draws attention to the significance of framing that often determines the manner in which we come to view a particular issue. The language of norms compels us to be aware of their conceptual genealogies and subsequent global trajectories of categories we often employ to characterise the political landscape. From a TWAIL perspective the reference to decolonisation assumes significance. It appears

in the Special Issue in a piece entitled 'From liberal interventionism to stabilisation: A new consensus on norm-downsizing in interventions in Africa'. While drawing attention to an alternative political imaginary of an 'African International Society' the authors note that this was largely a reaction to the forces of Western imperialism (Moe and Geis, this issue). What is also of relevance here is that categories like 'failed states' appear to have a play in the international system often eviscerating the contexts in which they initially surfaced. While there are a whole range of sharp critiques available of the 'failed states' usage, what is significant in their account is the whittling down of 'core human rights' in the aftermath of 9/11 (Moe and Geis, this issue: 400). In this context, perhaps somewhat intriguing is that claim that 'the reframing of intervention as stabilisation appears to have all but "solved" the previously prevalent interface conflicts and normative frictions characterising post-Cold War liberal interventionism (and in particular the use of force in "humanitarian interventions")' (Moe and Geis, this issue: 409). This merits greater elaboration. The problem appears 'solved' but from whose perspective? Is this really the case? Is there a consensus about this within the most impacted actors affected by it in world politics? Is this a temporary lull before the storm breaks out again? All these questions demand further examination.

What is also interesting from a politics of knowledge perspective is the tension clearly articulated in a contribution entitled 'Activating Norm Collisions: Interface Conflicts in International Drug Control' between the rights of indigenous communities and drug control regimes that aim at outlawing coca in Bolivia. An initially 'dormant norm collision' morphs into an 'open norm collision' with a resort to different norms, one aimed at outlawing drug use and the other premised on the rights of indigenous communities (Gholiagha et al., this issue). The case raises a host of significant issues when we are approaching the question of how divergent claims are arbitrated in the international sphere, the relative strengths of actors, and the extent to which prior histories and lived experiences are woven into a matrix of norm resolution. What is also quite evident is the broader claim that the authors advance that 'dormant norm collisions are a common phenomenon in international relations, while open ones are much less frequent'. (Gholiagha et al., this issue: 311). This brings us back to the imperative of foregrounding the politics of knowledge. How do some normative claims carry greater weight and international authority than others and why do some local claims successfully present them as universal while others just remain local? Even our provisional responses to questions such as these must factor in differentials of what we treat as 'proper knowledge' in relation to specific issue-area domains and the life of categories/labels in erecting a pecking order and slotting actors discussing these norms to begin with.

VI. When law meets politics

To what extent is the law autonomous? How do international law and politics intersect when it comes to normative contests? There are at least two pieces in the Special Issue that dwell specifically on different legal dimensions that emerge as a consequence of ‘interface conflicts’. The first really concerns a larger set of claims relating to ‘International Law as a Common Language across Spheres of Authority’ and the second more specifically considers the temporal dimensions related to ‘interface conflicts’ spread over time (Birkenkötter, this issue; Krisch et al., this issue).

Scholars have argued that the language of law represents a ‘specialized rhetoric’ (White 1985). Earlier work on the ICJ Advisory Opinion on the legality of the threat or use of nuclear weapons has demonstrated that even major nuclear powers notwithstanding their best efforts found it hard ‘to micro-manage legal discourse’ in a realm of conventional high politics with more stakes involved (Boisson de Chazournes and Sands 1999; Mallavarapu 2007, 2019). The Court’s eventual Majority Opinion used the language of ‘general illegality’ that was not the ideal outcome desired by the major nuclear powers who had begun by arguing that this was not a subject worthy of the Court’s attention (Mallavarapu 2007). However, it is interesting to note that the recourse to law assumes a special valence or ‘augmented authority’ when it comes to legal claim making (Birkenkötter, this issue). A question which the piece on International Law addresses relates to the value of law as a ‘conflict management tool’ (*ibid*). Again here, TWAIL scholars have argued that law could prove to be a ‘double edged sword’ (Chimni 1997, 2010). It could cement relations of privilege between powerful actors and it could also serve as an instrument of the weak in the absence of any other statutory mechanism to address their collective needs. Here again, we need to examine the many contexts in which law might find itself being invoked as a ‘conflict management tool’ (Birkenkötter, this issue). Established powers and rising powers are likely to find international law another arena for contestation and influence.

The temporal dimensions of how law works also raise pertinent questions in relation to ‘interface conflicts’. The contributors who suggest that law has two lives – short- and long-term – argue that short-term tensions could in the long term pave the way for more fundamental change. The claim that ‘... many interface conflicts involve a variety of actors with different orientations’ conveys a sense of the inherent possibilities in this sphere (Krisch et al., this issue: 344). This is again where politics resides especially in the instance of norm-based ‘interface conflicts’. TWAILers would be particularly alive to the historical conjunctures that make possible some inflections towards notions of equity, justice and order privileged by those at the

receiving end of the power structure. While legality may be weighed in favour of the dominant interests, it also given its peculiar autonomy holds the possibility of being a vehicle to secure ‘the adaptation of international law to a changed moral landscape’ (Krisch et al., this issue: 348). For rising powers and established powers, law provides both an opportunity for challenge and consolidation depending on where actors position themselves internationally.

VII. Politicising institutional design

An insight worth gleaning from the institutional design literature is that ‘the design of institutions is deeply political, and so are the challenges to institutions’. As a consequence, it is well worth drawing ‘attention in the literature to domestic and international distributive politics’ (Voeten 2019: 159) We also now know for a fact that ‘international institutions often perform quite differently than their architects intended’ (*ibid*: 157).

From the perspective of the global South when it comes to norm creation as well as norm contestation, institutional design might be the real stuff of politics, the crucible or template worth pondering over. Is there something in current institutional designs that reproduce democratic deficits in the manner in which international authority is constituted and subsequently dispenses its tasks? Does this have implications for how norms are produced, contested, consolidated and disseminated? What do theorists of institutional design have to offer in this connection? While there is an array of theories (rational choice, historical institutionalism, distributive theories, structural theories, process based approaches, world society/polity theories) each with their distinct slants of emphases, it might be worth considering what might best explain the asymmetries both in process and outcome when it comes to norm-based contestation. What appears evident to begin with are the conspicuous absences. For instance, ‘functionalism often wrings (power) politics out of the analysis and is not well equipped to analyze how domestic or isomorphic processes produce dysfunctional institutional designs’ (Voeten 2019: 149). Both distributive and historical institutionalist approaches while useful in many respects are viewed as heuristically weak specifically given their incapacity ‘to produce generalizable propositions from theories in which neither actors nor interests are fixed’ (*ibid*: 149).

The other big elephant in the room is populism. Erik Voeten offers useful cautionary counsel in this regard. He observes that

Many theorists now assume that publics value what international law and cooperation have to offer, such as a great commitment to human rights. What if publics move in the opposite direction? We may well see that

legally binding institutions that advance liberal values become less attractive to democracies. On the other hand, it is not always clear that populism provides a good basis to form international coalitions. So can populists successfully reform institutions or design new ones? Or is populism mostly going to lead to exit from existing institutions? (Voeten 2019: 158)

There are no easy answers here. However, from the perspective of rising powers, the questions distributive theorists raise are perhaps the most relevant. They are curious about ‘who would benefit from institutional rules, and what means do these actors have to get what they want?’ (Voeten 2019: 152). They are also well placed to explain ‘why institutions are so often skewed toward more powerful states’ (*ibid*: 158). Mimetic isomorphism may not be the answer any longer.

It is from this vantage point that I argue that institutional design cannot be taken for granted and a realisation that procedural rules as well as substantive outcomes are often not an accidental by-product of enlightened leadership but carefully worked out mechanisms to reinforce the power of a few at the expense of disenfranchising many from any real sources of influence. Institutional design has consequently a bearing on how norms are constructed and interpreted once they are in place. As the contributors to the piece titled ‘Order at the Margins: The Legal Constructions of Interface Conflicts over Time’ quite accurately suggest that these conflicts pan out differently depending on ‘phases of tension as well as significant convergence even as actors maintain diverging views on the relationship between competing norms.’ (Krisch et al., this issue: 345).

VIII. Conclusion

A recurring motif in the Special Issue contributions relate to a world ‘after fragmentation’. Where do we stand today in relation to the larger question of norms and their ensuing conflicts? At one plane, an element of normative contestation is part and parcel of the quotidian grime of politics. While there is oftentimes agreement on some basic norms, there is also a degree of latitude and active tinkering when it comes to actor interpretation and application of norms. The contributions in the volume do a fine job of recounting the sites and modes of unravelling more meaty issue-area ‘interface conflicts’ and studying their diverse implications. I have sought to consciously read these contestations here from the broader perspective of the global South. It might be worthwhile here to reiterate some key claims that I advance.

My overall plea is for more politics and not less when it comes to studying ‘interface conflicts’ and norm contestations. What this translates into is to

embed the technicalities of norm conflicts in the backdrop of more fully fleshed out political currents and contexts. Methodologically speaking, while I am sympathetic to the process-driven agential micro-constructivist approach to studying these ‘interface conflicts’, I argue that ‘internalist’ accounts of perceptions must ideally tap on insiders to arrive at a richer appreciation of the specific anxieties and hopes surrounding particular norm contestations in specific issue-areas. It also makes sense to turn the spotlight on ‘antipreneurs’ as much as we have tended to on ‘norm entrepreneurs’ across issue-areas.

Second, I have also made the case to more explicitly make the connections between ‘interface conflicts’, institutional design issues and most significantly the impact (or the lack of it) on global constitutionalism. There are some serious challenges to global constitutionalism but I suggest that these challenges are not insurmountable. A greater curiosity about comparative constitutionalism and the insights it might have to offer when it comes to other traditions of constitutionalism might be a worthwhile intellectual and pragmatic endeavour.

Third, power is still a very important part of the story when we are thinking of ‘interface conflicts’. If we do believe that norms are about shared values, we need to ask whose values frame the *zeitgeist* and how they established themselves as the intangible furniture in the room. China poses an interesting challenge here and it remains to be seen if the vacuum created by the retreat of liberalism results in new claimants to a global value regime with commensurate institutions reflecting these transformations.

Fourth, the politics of knowledge focus reveals oftentimes concealed asymmetries in terms of what counts as ‘knowledge’ across specific issue-areas. It warrants recognition of the weight or residues of history in the manner in which they shape contemporary conversations around norms. It enables a further problematisation of categories like ‘failed states’ when invoked as neutral categories without any allusion to the histories of colonisation in Africa and the culpability of the colonisers in leaving hollowed out political entities.

Fifth, the role of law and the extent of its autonomy are worth pondering over in the context of ‘interface conflicts’. International law at its worst is a hegemonic project that cements relationships between the dominant and the subordinate and at its best carries transformative possibilities when diverse actors take ownership of the law and engender legal pluralism. Law in this incarnation becomes an ally of the weak and becomes another site of mobilisation to achieve a more equitable and ‘just international order’.

Finally, I argue that politicising institutional design may not be such a bad thing from the perspective of the global South. It brings politics back into questions of institutional design and does not merely embrace mimetic

isomorphism. An analogy might help here. Partha Chatterjee, the postcolonial theorist while referring to the postcolony in responding to Benedict Anderson's thesis on 'imagined communities' argued that if 'modular nationalisms' was all 'what do they have left to imagine'? (Anderson 1991; Chatterjee 1993). These questions assume a particular urgency when there are palpable new threats to the old liberal order. It points to uncertainties about the future of institutional design but simultaneously compels us to give further thought to the manner in which the next generation of 'interface conflicts' could potentially manifest.

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