Book Reviews

Jan Klabbers: An Introduction to International Institutional Law

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Textbooks on international organisations tend to be voluminous, encyclopaedic in their description of individual organisations – sharply in contrast with the scarcity of general principles in that field – and about as stimulating as an organisational chart of the ministry of agriculture. This is probably no coincidence. Rather, such an approach serves to uphold an image of smoothness in the government of international affairs, supporting a functionalist view of international organisations according to which states set them up in order to get something done.

Not so *Jan Klabbers'* textbook on international institutions, which appeared in its second edition in 2009. As in the previous edition, *Klabbers* places the conflicts pervading international institutions at centre stage. And, what is more important, he manages to extract one coherent front line running through all these conflicts: the tug of war between diverging perspectives on international institutions, one of them seeing international institutions as tools of their Member States, the other one as separate entities (p. 3 et seq., 35-37).

As *Klabbers* excavates this leitmotif throughout the Chapters of the book, he ends up deconstructing, rather than describing the law of international institutions. Along with *Klabbers'* usual vivid writing style, this makes his book a fascinating read that frees the field of international institutional law from the dust of functionalism. *Klabbers'* excavation of international institutional law is very thorough. Before reaching the ruins of international institutional law, he digs his way through the political theory aspects of international institutions that illuminate the ratio behind the contending perspectives on international institu-

tions (p. 25 et seq.). Numerous references to national and European case law illustrate the contentions throughout the book.

For purists of European law it might come close to heresy that *Klabbers* puts the European Union largely on a par with international institutions. However, as the same tension between diverging perspectives can be detected in the European Union as well, its inclusion in the book appears largely justified. In some respects, for example in matters of competencies, the European Union is even like a greenhouse where ideas grow faster and can be observed *in vivo* before implanting them into the law of international institutions. As this review addresses only a second, revised edition, it should suffice to refer to some Chapters which concern issues that have seen, or might see some recent development in practice as well as scholarship. This is the case with regard to the competencies, instruments, and treaty-making capacity of international institutions, as well as the highly contentious issue of their responsibility.

Chapter 4 discusses the powers of international organisations. It is no wonder that it is here, in particular in the debate about implied powers, where the leitmotif is most audible. *Klabbers'* scrutiny of the case law reveals that there is presently no convincing legal doctrine guiding the repartition of powers between an organisation and its Member States. The functionalist appeal of the doctrine of implied powers ends up in a question-begging circularity, as the function of international institutions to serve states' needs is eventually used as an argument against state sovereignty (cf. p. 63). However, *Klabbers'* proposal to limit the scope of application of the implied powers doctrine to cases where it complements explicit powers (p. 65) might just shift the contestation to the delimitation of those explicit powers. The hope that the issue might lose its relevance over time seems in vain, too. Even though the European Court of Justice has preferred working with the concept of *Gemeinschaftstreue* instead of competencies in some cases (p. 71-72), recent case law relating to external competencies, such as the ECOWAS Judgment from 2008 (C-91/05), demonstrates that the issue of power and competencies is still very much alive. Instead, relief might come across if we just accept the eternal contestations in the law laid open by *Klabbers'* piercing analysis. This would open up our minds for procedural instead of substantive means for solving the power dilemma. This is exactly where *Klabbers'* own analysis points to in the Chapter devoted to decision-making (p. 227-228).

In Chapter 10 on legal instruments, *Klabbers* reveals that the theories explaining the binding character of legal acts of international or-

ganisations resonate the same leitmotif. Either they are seen as acts of delegation that owe their binding force to state consent, or as acts of an international legislative requiring no further justification (p. 184). The conclusion to be drawn from this would probably be that the binding force of the legal acts of international institutions does not rest on an overly stable fundament. Given this insight, I wonder why *Klabbers* maintains his rejection of soft law, which he considers as a tool of naked power (p. 183). While the legitimacy of soft law indeed raises questions, soft law is by no means only a tool for powerful states to pursue their interests. Rather, it can also be used by the great majority of less powerful states to voice their opinion and concerns against a legal situation dominated by powerful states' interests. Thus, the different uses of soft law are just another manifestation of the tensions between sovereign states which see international organisations as tools for increasing their leverage, and an international community which wants to superimpose them over states (on the latter point see p. 207). Applying his own theory more consequently, *Klabbers* might have come to the point to see soft law not so much as an anomaly, but rather as a structural peculiarity of international institutions, resulting from their genetic code. As with the implied powers doctrine, procedural means might be employed in order to attenuate the legitimacy deficits of soft law instruments.

As the author is a specialist on treaty law, Chapter 13 on treaty-making by international institutions is of particular interest. Again, *Klabbers* exhibits the tension between international organisations and their Member States by unravelling the history of the treaty-making capacity of international organisations (p. 251). Most of this Chapter, however, relates to the intricacies of the law of the European Union. As *Klabbers* concedes, the practice of the European Union gains particular significance because of the direct effect of international treaties in the Member States by virtue of EU law (p. 263). At this point, in my opinion, the analogy of the European Union with international institutions reaches its limits. As neither the legal instruments of international organisations, nor the treaties concluded by them have direct effect in their Member States, direct effect seems to be the unique feature of the European Union. It is not to be expected that international organisations develop in the same way.

Finally, Chapter 14 on the responsibility of international organisations embarks on an almost inscrutable field. *Klabbers* does what lawyers can do best: he categorises the various scenarios that must be distinguished in order to develop a meaningful doctrine of responsibility

(p. 276 et seq.). Each of the categories thus developed, be it the subject of responsibility, the wrongful act, or the question of Member States' liability for acts of the organisation, reveals the tension between a holistic view of the organisation as such, and a particularistic view that sees the Member States in the first place. This deconstruction shows two things: first of all, the responsibility of international institutions requires taking into account the particularly public nature of international institutions. As *Klabbers* rightly points out (p. 278), private law analogies such as those that pervade the International Tin Council litigation do not provide a convincing doctrinal fundament for situations where international institutions fulfil public tasks such as peace-keeping.

Second, the issue of responsibility shows that the underlying tension which provides the leitmotif to the book might eventually have three poles instead of only two: states, institutions, and the individual. The more international institutions exercise power over individuals, and not just over states which mediate (and occasionally mitigate) their impact on individuals, the more the individual needs to be taken into account in the law relating to international institutions. While the trend of the era after World War I has been the move to institutions, the trend of the post-war era, and even more so of the era following the cold war could probably be called the move towards the individual.

And indeed, in his concluding remarks, *Klabbers* performs the move towards the individual by proposing ethical standards for the behaviour of international organisations and their staff as a solution to their legitimacy dilemma (p. 317). Ethical standards presuppose an individualist perspective. However, ethical standards raise just the same questions of application and interpretation as the law on the responsibility of international organisations. Even worse, they give leeway for unfettered subjectivity. A viable alternative for achieving greater accountability of international organisations might be available in the form of public law approaches such as constitutionalism or Global Administrative Law.

Although *Klabbers* is right in pointing out that each of these approaches features certain deficits (p. 314-317), it is perhaps one of the most important lessons of his book that we need to generally lower our expectations of international law as a means for the attainment of justice – just as *Klabbers* advises us to reduce our expectations of the capability of international institutions to cure the myriad of ills of the world (p. 317). Law is only capable of providing some relief in some cases, no matter how much we try to make it perfect. In this respect, law could not be more different from the textbook under discussion that success-

fully strives towards perfection with its second edition, and whose readers' expectations will certainly be exceeded.

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