

Thomas Kleinlein, Konstitutionalisierung im Völkerrecht

Summary:

Constitutionalization in International Law

Basically, constitutionalization in public international law suggests that international law and its suborders have reached a degree of 'objectivity' in order to limit state sovereignty like a constitutional order. For proponents of the constitutionalization thesis, public international law recognizes a common interest of humanity transcending state interests, hierarchically supreme 'constitutional principles' set boundaries to the hitherto unlimited will of states, international organizations become relatively independent of their member states, and states are no longer left with a genuine *domaine réservé*. On the basis of these observations, constitutional doctrine in public international law scholarship tries to put public international law on a constitutional foundation.

This thesis analyses the plausibility of this attempt. First of all, it sorts the phenomena to which the constitutionalization thesis refers. The analysis of these phenomena shows a tension between ambitious imaginations of public international law as a constitutional order in the history of ideas and the diverse real deficits of public international law. In the light of the history of the concept and of approaches that systematically link the concept of constitution with the state, the thesis further examines how the concept can be meaningfully transferred to the international realm.

Constitutional thought beyond the state reaches far behind the current debate on constitutionalization. In the history of science, the idea of constitutionalization ties in with idealistic interpretations of public international law that reacted to pivotal moments of change in the 20th century. In particular, the idea follows the tradition of progressive doctrine of the League of Nations era. Obviously, after many decades, their internationalist projects have turned out to be of limited success only. The question arises which elements constitute the new basis for the constitutionalization thesis. Both current scholarship and its forerunners have roots reaching far back to natural law philosophy and to the

philosophy of the Age of Enlightenment. This thesis also addresses these roots in order to identify continuities and ruptures.

If the constitutionalization thesis is meant to be a significant contribution to public international law doctrine, the phenomena to which it refers must express themselves in concepts of public international law that can be understood as attributes of constitutional law. For this reason, the thesis, in a further step, critically examines the 'hierarchization' and the 'objectivation' of public international law as elements of a general doctrine and analyses the doctrinal foundations of a comprehensive obligation of international organizations to adhere to human rights standards. Adherence to human rights is an essential element in a framework for the justification of the exercise of authority in public international law, and this framework is obligatory for a constitutional perspective.

Finally, the thesis reaches a conciliatory conclusion. It does not make strong normative assertions, but leads to burdens of justification that ought to be taken into account in legal discourse. The thesis explains the genesis of constitutional norms in the cooperative discussion of constructivist approaches in international relations theory. According to this account, constitutionalization is, above all, a process of changing identities and of normative self-entrapment in which states and other international actors are involved. The enquiry shows that standards of global governance and norms to the benefit of the global community may allow for both the necessary coherence of law and the plurality of the global society, and may be effectively applied by domestic and the numerous international courts that have come into existence by now.

I. A Reconstruction of the Constitutionalization Thesis as an International Law Perception

The empirical phenomena that the constitutionalization thesis refers to may be reduced to two concepts: the autonomization of public international law vis-à-vis the states and the partial transfer of the functions of domestic constitutions to public international law and their international reinforcement.

On the one hand, the autonomization of the public international law order becomes manifest in the substantive change of public international law from an interstate order to a legal order committed to the global community and the individual. On the other hand, it refers to

the internal constitutionalization taking place in international organizations and sub-systems. Public international law epitomizes community interests and ethic contents, for instance in human-rights law (and in the enhanced legal status of the individual that correlates with it), in the right of nations to self-determination, or in environmental law. They are all evidence of the ideas of interdependence, shared responsibility and solidarity. But some also understand WTO constitutionalization as the orientation of the WTO towards community interests and global issues.

The internal constitutionalization of international organizations means that the member states are involved in the implementation of common interests. These constitutionalized regimes as qualified modes of legalization are characterized by judicial application of the law and issue-oriented implementation schemes. On the basis of the role the ECJ played in the development of the European Union, the literature discusses the initiation of constitutional developments by international courts, in particular for the WTO. Significantly, law-making in public international law is no longer an exclusively inter-state matter, and mechanisms of institutionalized implementation management have been established.

The use of constitutional terminology for certain legal regimes suggests institutional density and legitimacy. At the same time, a constitutional perspective on international organizations and regimes reveals that the concept of constitutionalization lacks precision vis-à-vis the 'institutionalization' by example of the WTO, which is remarkable in itself. The approach of the constitutionalization theory typically oscillates between the dimensions of a perspective on the *lex lata* and a vision of a further developed global legal order. The idea that constitutionalization is a process mediates between these two dimensions.

A value-based theory of constitutionalization interprets communitarian international law as a 'value order', and tries to define a position between an instrumental and de-formalizing use of international law, on the one hand, and critical norm skepticism, on the other. Both the openness and indeterminacy of values and the increase of at least potential value conflicts are problematic. A tension so far unsolved exists at least between the classical paradigm of the international legal order and new contents. This tension may be exemplified by the conflict between the granting of immunity as an expression of the sovereign equality of states and the aim of putting an end to impunity for the perpetrators in case of grave breaches of human rights. Referring to values allows the

bestowing of legitimacy on an individual decision, while the resolution of value conflicts for the future is left open.

One element of the transfer of the functions of domestic constitutions to public international law and their international reinforcement may be understood as a development of international supplementary constitutions (*völkerrechtliche Nebenverfassungen*). This is particularly obvious with regard to the cutback of the *domaine réservé* by human-rights law. However, some also regard WTO law as a 'second line of constitutional entrenchment'. Further public international law specifications for the legitimacy of state power may be conceived as supplementary international constitutions, despite their lack of institutional basis. Likewise, it is an indication for the transfer of constitutional functions to the international order that states use constitutional standards as guidelines for their foreign policy.

'Compensatory Constitutionalism' and 'Multilevel Constitutionalism' – as normative models of explication – aim at capturing these phenomena as a whole with a theory of medium reach. As paradigmatic perspectives on public international law, they constitute alternatives to concepts of transnational networks. These concepts particularly react to new phenomena of governance, which are not sustained by the state and its institutions, but by societal and private groups, organizations and corporations. Yet, as soon as one asks for a normative concept of networks, constitutional questions of accountability and legal control of networks must be answered.

Further alternative perspectives on public international and transnational law focus on the so-called fragmentation of international law and on the development of a global administrative law. The relationship between constitutionalization and fragmentation – as two typical developments of the public international law order – is ambivalent. In the end, a constitutional approach does not prevent the search for the unity of international law in collision rules. For the idea of a global administrative law, the assumption is crucial that global governance can be understood as regulation and administration. The global administrative law approach disassociates itself from a constitutional approach because it understands constitutional law thinking in public international law as necessarily holistic.

II. The Concept of Constitution, Its History and Its Relation with the State

Analysing the development from the ancient to the modern concept of constitution reveals elements which have also been brought to light in the current discussion on an international constitutional law: giving the community a legal framework and continuity guaranteed by the constitution; the constitution's high authority; its function to maintain freedom; and its supremacy, but also its procedural character. The actual concept of constitution emerges in the modern age only. The emphatic notion of the revolutionary era rather describes a contrast to the contexts beyond the state with regard to which the concept of constitution is now applied.

Parts of German *Staatsrechtslehre* systematically entangle state and constitution beyond the merely historical and empirical dimensions. For an etatist doctrine relying on ideas of unity and representation, the state systematically precedes the constitution. In the history of theories, this view can be traced back to the natural law theory of a double social contract and to diverse post-natural law concepts which regard the constitution as a law of the pre-existent state. In its current shape, given to it in the German *Staatsrechtslehre* and constitutional law scholarship, it can be embedded into the doctrine of prerequisites of the constitution (*Lehre von den Verfassungsvoraussetzungen*). The doctrine of state preceding the constitution is at a loss for an explanation for the systematic coupling of state and constitution and, in particular, far-reaching consequences drawn from the state preceding the constitution. In the face of the nation state's disintegration, it seems inappropriate in terms of scholarly strategy to label comprehensively the conditions for the efficiency of constitutions as 'state'.

Furthermore, some link an ambitious concept of constitution to the state, arguing that only the modern state is an adequate object of constitutional regulation. For this line of thought, legitimacy considerations are crucial. Even if this approach does not refer to the state preceding the constitution, but to the constitution itself as a historic achievement, the same caveat from the viewpoint of scholarly strategy applies. In the end, it is decisive to clarify which concept of constitution one wishes to apply. Then nothing prevents one from applying this concept beyond the nation state also.

III. Precursors of the Constitutionalist Approach in European International Law Scholarship

The constitutionalist approach to public international law, which has developed since the end of the Cold War, has significant precursors in European international lawyers since the League of Nations era. Hans Kelsen, Hersch Lauterpacht and Alfred Verdross, with different accentuations, aim at construing public international law as a closed system with a central role for the judiciary, as it is characteristic also for a constitutionalist approach in modern public international law theory. Georges Scelle, by contrast, regards international law as a direct expression and instrument of solidarity. Accordingly, he offers a point of contact for a constitutionalist approach which explains the normative force of public international law with its social necessity for the functioning of international relations.

Characteristically, the authors affiliated to the Vienna School understand public international law as a system. Like modern constitutionalists, these authors of the inter-war period tend to regard single states no longer as the most important reference point for public international law. For them, the reference point of international law is rather the international community, which is committed to the common interest of all members. The importance which Kelsen, Lauterpacht and Scelle ascribe to human rights and to the individual's status as a subject of international law is to be seen in this context. The constitution of public international law is thereby a symbol both for the unity of the system and for its autonomy vis-à-vis state sovereignty. Modern constitutionalists, by contrast, focus on strengthening the community orientation of this system and on the constitutional foundations for the exercise of authority beyond the state. With different accentuations in detail, Kelsen, Lauterpacht, Verdross and Scelle understand constitution beyond the state as a fundamental order for the community based on cooperation, but not – unlike some modern constitutionalists – as an expression of a pivotal order of values in the tradition of European constitutionalism. In the absence of an organizational-institutional-political unity, an 'objective' universal order is based on the unity of cognition (Kelsen), on the unity of values in the Christian natural law tradition (Verdross), on solidarity (Scelle), or is entrusted in the international judge's care (Kelsen, Lauterpacht).

IV. Roots of the Idea of Constitutionalization in Natural Law and Enlightenment

Amongst the roots of the idea of constitutionalization in classic natural law, a Christian and a rationalistic foundation can be distinguished. For the universalist implications of Christian natural law – which are more or less directly based on Christian revelation – the Spaniards Francisco Vitoria and Francisco Suárez are fundamental. Both Spanish late scholastics stand for a holistic cosmopolitanism, the basic idea of which is the view that natural law norms are to be applied globally in a state-dominated world. In their construction of the global community and in some particularities of their theory of international law, one can see a value-based public international law order, which is detached from state will and aims at mediating between unequal's in the age of America's colonization by Spain.

Christian Wolff's *civitas maxima* counts as a significant attempt to design a universal order beyond the state on the basis of rational natural law. Wolff's teachings are influenced by Leibniz. Leibniz' *Civitas dei* is a starting point for a tradition of metaphysically founding the global state, including Wolff and Kant. With the claim that 'the civil constitution of every state should be republican', which Kant maps out in his writings on perpetual peace, he offers a point of contact for an important strand of the debate on constitutionalization, which refers to the increasing public international law specifications for the design of domestic orders of states. Kant's league of nations (*Völkerbund*) replaces a global state as a 'negative surrogate'. This apparent inconclusiveness may best be interpreted as a consequence of including the historical existence of states and as an expression of a consequent logic of peace and of respect for self-determination. With the law of world citizenship (*Weltbürgerrecht*), Kant hints at the possibility of abrogating the complete mediatisation of the individual in her state. Kant's epistemology-based destruction of a naïve natural-law public international law thinking is followed by a philosophically founded political program for the development of the law. Kant's essay on perpetual peace is not an institutional plan to realize an 'end in itself', but a normative political methodology for the realization of pure reason in the historical world.

V. Hierarchization in Public International Law

Hierarchization of public international law is regarded as a crucial element of constitutionalization. To begin with, hierarchization describes the phenomenon of a relative normativity with different graduations of normative weight. The thesis of constitutionalization, however, refers to the emergence of a fundamental order, supreme to other norms of inter-state public international law. Constitutional public international law as supreme law of a particular stability is deemed to be endowed with primacy like domestic constitutional law and the legal force to nullify other public international law norms. However, it becomes clear that the thesis of hierarchization is unable to petrify certain humanitarian values. Empirically, the assumption of an elementary supremacy of community values vis-à-vis inter-state law is untenable and legal doctrine can compensate for the lack of common institutions to a limited extent only. For this reason, the assertion of supreme community interests potentially offers the opportunity to camouflage the interests of strong powers. In public international law, the supremacy of norms with the fundamental status of constitutional law is not so much a collision rule with the effect of ruling out competing rules, but a basis for argumentation in an open, balancing legal reasoning.

Still, in public international law, *ius cogens* and obligations *erga omnes* possibly are supreme constitutional norms. Some ground the qualification of these fundamental norms as a category of international constitutional law primarily on their quality as constitutional law *ratione materiae*. However, the problem with this approach is that the contents both of *ius cogens* and obligations *erga omnes* are controversial apart from certain core elements. Furthermore, these contents are too limited and too disparate to be qualified as 'constitutional' in a meaningful sense.

Further, it is impossible to bestow a meaningful definition on fundamental norms on the basis of a common norm structure as a consistent category of international constitutional law, endowed with supremacy in case of conflict. Indeed, a common norm structure underlies *ius cogens* and obligations *erga omnes* because the performance of these obligations cannot be split up into pairs of bilateral interactions. However, this particular pattern of performance is only a necessary, but not a sufficient, prerequisite of both norm categories and needs to be complemented by additional criteria. Furthermore, the consequences of supremacy are different for peremptory norms and for obligations *erga omnes*. Even for *ius cogens*, these consequences functionally differ from

the supremacy of a constitution. *Ius cogens* is traced back to the same sources and modes of formation as *ius dispositivum*. In particular, *ius cogens* is not the source which authorizes the creation of rules of *ius dispositivum*. For this reason, unlike constitutional law, *ius cogens* cannot be defined as supreme law from which a law of lower rank derives its validity. It is well possible to conceive the *ius cogens* principle as a rule of conflict between norms which work on the same level of hierarchy.

Nothing else follows from the debate on the legal consequences of *ius cogens* beyond the nullity of treaties (in the law of state responsibility, with regard to treaty reservations and with regard to state immunity). The constitutionalization thesis can only be circular here. The particular legal consequences are derived from the hierarchical supremacy of *ius cogens* and the (constitutional) postulate of consistency of the legal order. Therefore, they cannot be, on their part, the reason for the constitution-like supremacy of *ius cogens*. Similarly, it is difficult to explain the legality of humanitarian interventions on the basis of such value preferences. The importance of *ius cogens* in this context most notably results from its impact on the interpretation of public international law.

The supremacy of the UN Charter is not to be explained by the constitutionalist argument, but rather by the catalyst effect of the Charter for the further development of public international law. Article 103 of the Charter – which states that members' obligations under the UN Charter override their obligations under any other treaty – is at least not necessarily understood in such a way as to nullify these other treaties in a constitution-like manner. Problems for a constitutionalist reading of the Charter are its fragmentary character, its relationship to *ius cogens* beyond the Charter, to the constitutions of other international organizations, particular of regional range, and to the members' domestic constitutions.

VI. Public International Law as an 'Objective' Universal Order for the Protection of Collective Goods

The development of 'objective' norms in public international law that are independent of consent relates to constitutionalization mainly because constitutions are generally seen as an epitomization of the general interest by contrast to the individual sphere. The use of constitutional

terminology thus symbolizes the strengthening of the global commons vis-à-vis individual state interests.

Legal doctrine distinguishes different kinds of treaties with a third-party effect of treaties in modern public international law: 'objective' regimes, institutional treaties, human-rights treaties in case of state succession, treaties with *erga omnes* effect and so-called world-order treaties. The analysis of classic examples of a third-party effect, however, does not offer a useful starting point for a generalizable theoretical foundation of a third-party effect of treaties that serve a common interest beyond the state. Even in the case of so-called world-order treaties, a global interest alone cannot be the formal foundation of a universally binding treaty. Whether the international community is ready to allow some states to concretize certain obligations to the detriment of third parties is an eminently political question. A universal obligation to respect certain rules seems to be based less on the character of a treaty than on the discursive process preceding the conclusion of the treaty.

Customary international law is also only conditionally apt to cope with global challenges because its efficiency significantly depends on the mechanism of reciprocity. The more recent attempts at displaying universal norms in the interest of the international community cannot ignore that this mechanism of reciprocity is only diffusely developed with regard to norms for the protection of human rights and global public goods and with regard to standards of good governance.

This finding weakens the capacity of the constitutionalization thesis, but describes a desideratum addressed at public international law in the age of globalization; it suggests a verification whether an alternative, more open understanding of constitution, related to argumentation and discourse, might be more convincingly accommodated in legal doctrine.

VII. Justification of the Exercise of Authority in Public International Law

A growing demand for legitimacy in modern public international law results from the fact that the sphere of public international law and international organizations has been substantially enlarged. International organizations and regimes exercise authority vis-à-vis states and individuals at least in a broad sense, which is not restricted to legally binding acts. Since states lose autonomous power to shape their own policies, public international law is confronted with expectations of legiti-

macy to which state consent as the foundation of traditional public international law is not a sufficient answer.

According to a constitutionalist understanding of public international law, the exercise of authority needs to be justified. On the basis of a dual understanding of the legitimacy structures in a multilevel system, improvements of legitimacy may be reached both at the domestic level and by a 'constitutionalization' and democratization of international decision structures. In the domestic domain, the relationship between the different state organs needs to be rebalanced. On the international level, the realistic possibility of improving legitimation depends *inter alia* on the concept of democracy being applied. The most optimistic perspective is opened up by a model of pluralistic legitimation that includes modes of participation other than elections, which may be better realized beyond the state.

The constitutional parameters of federalism, rule of law and democracy may offer orientation. In positive law, they find expression in different ways. Whilst federalism is primarily an analytical concept for structures in positive law, elements of the rule of law begin to be accepted on the international plane for this level itself. A norm of democratic governance beyond the state, by contrast, depends on the transfer of public international law specifications for state power (which are in themselves limited) to the international level, which is not easy to realize. A legalization of international cooperation that is exclusively based on the rule of law, however, is problematic in terms of legitimacy. It cannot justify the original exercise of authority beyond the state.

For a constitutionalist understanding of public international law, the authority created on the international level must be captured by adequate and preferably concrete human-rights standards. As a basis for the *de lege lata* binding force of human rights for international organizations, the following possibilities are currently being discussed: treaty obligations of international organisations (either directly binding or binding by way of succession), self-imposed rules or general public international law. Like the legal personality of international organizations, adherence to human rights is a prerequisite for an adequate attainment of their ends.

VIII. Substantive Constitutionalization and Constitutional Principles

With regard to sources theory, emerging norms of unwritten public international law on the exercise of authority can be best understood as developing general principles of international law (*allgemeine Rechtsgrundsätze*, Article 38 para. 1 lit. c Statute of the ICJ) with constitutional attributes. The binding force of certain constitutional-type norms for states without their consent may be conceived as normative force of international discourse forums and ascribed to general principles. Their normative force for international organizations can also be explained more convincingly as a commitment to general principles than to customary international law. The significance of a hierarchization in public international law is to be seen less in the formation of an abstract hierarchy of values – from which concrete legal consequences could be derived – but rather in the special impact of certain norms. This impact is relevant in indirect norm collisions and may be conceived in terms of legal theory as the effect of principles (*Prinzipien*). Hence, the constitutional norms to be discussed in this chapter are principles in a double sense, both with regard to sources (general principles, *allgemeine Rechtsgrundsätze*) and to legal theory (principles, *Prinzipien*).

According to Article 38 para. 1 lit. c Statute of the ICJ, substantive constitutional principles in public international law may be taken both from domestic legal orders and from the international plane. The ‘transfer’ of domestic general principles to public international law presupposes that there is a point of contact in international law which allows applying the method of critical legal comparison with normative consequences. Even palpable differences between the structures of international law and domestic legal orders do not exclude the transfer of principles at the outset. The methodological difficulties of constitutional comparison entail a limitation of normative consequences.

The analysis of the genesis of general principles can take into account insights of constructivist international relations theory. On this basis, general principles deploy normative force of an ‘objective’ quality. For the emergence of general principles of a constitutional type, a reflexive concept of norms is particularly fruitful. The creation of norms and compliance induced by processes of argumentative self-entrapment and identity change is fundamental for normativity, where norms concern the identity of actors. This is the case for constitutional norms on human rights, the rule of law and democratic governance. According to their norm structure, they are not of an inter-state character, but – by

specifying the design of the domestic orders of states and of the internal order of international organizations – they affect their identity. Constitutional norms emerging in these processes correspond to a changed self-conception of actors and subject the exercise of authority to limits which follow from the paradigms of human rights, democracy and the rule of law. Admittedly, the conditions for the acceptance of general principles on the international plane are vague and require specification. The discursive paradigm offers guidelines for the advancement of public international law. It will be crucial to change the institutional setting in order to enhance empirically self-entrapment in discourses and simultaneously to take into account the fundamental exigencies of the principle of democracy beyond the state. Insights of international relations theory suggest under which conditions normative expectations and expectations of norm compliance are stabilized in such a way as to allow one to suppose a general principle. Furthermore, the ideal of discourse offers a normative model which is of no relevance only if one denies the possibility of universal reasoning.

The qualification of general principles (*allgemeine Rechtsgrundsätze*) as principles in terms of legal theory (*Prinzipien*) describes how they can be taken into account in the application and interpretation of treaties constituting international organizations, and how they can have a cross-institutional effect. They are principles of collision to manage conflicts of norms in fragmented public international law and their effect spreads to the realm of domestic law. The qualification of constitutional norms in public international law as principles and optimization requirements is intended to grasp their functionality in the legal order with due regard to the differences between public international law and domestic law and to limit the otherwise unmanageable reach of reasoning. Legal practice cautiously indicates that principles can work as principles of collision between different regimes of fragmented public international law, and this corresponds to a theoretic desideratum.