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The Relationship Between Constitutionalism and Pluralism

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Abstract

International constitutionalism comes in many different forms. A distinction may be made between those claiming that we today have an international constitution and others arguing that what is of importance is to apply constitutional thinking to the international legal system. The article discusses whether we have an international constitution and concludes with a negative answer. This means that we still must operate with different international legal regimes and with the distinction between the international and national legal systems, i.e. aspects of pluralism. However, the challenge is how to secure constitutional guarantees in a pluralist legal order.

A. Introduction

Constitutionalism and pluralism may be seen as two opposite approaches to the understanding of the international legal system and its relationship to national law.[1] Constitutionalism is concerned with whether there exists or should be an international constitution, possibly also incorporating the domestic legal system.[2] On the other hand, pluralism argues that international law consists of different legal regimes, and that national law and international law are – and possibly should remain – different legal systems.[3]

In this article I discuss whether we have an international constitution and conclude with a negative answer. The diversity of international regimes established by treaties would rather indicate a pluralist international system. Furthermore, we must still operate with the distinction between the international legal order (without a constitution), and national legal systems (with constitutions), which is also an aspect of pluralism.

However, I argue that both the international legal system and its interaction with national law are increasingly constitutionalized. Moreover, the international legal system and its relationship to the national legal orders should satisfy certain constitutional requirements. Accordingly, we should apply constitutional thinking in a pluralist legal setting.

1 N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).

2 J. Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 1, 19-31.

3 Krisch, *supra* note 1, 69-109.

B. Do we Have an International Constitution?

International constitutionalism comes in many different forms. A distinction may be made between those claiming that we today have an international constitution – or in the plural: constitution*s* – and others arguing that what is of importance is to apply constitutional thinking to the international legal system.[4]

In my opinion too much energy is spent on whether the international legal system as such – or parts of it, like the UN Charter[5] – represents a constitutional system. Of course one can point to similarities with the national legal order, such as the existence of certain superior norms, especially article 103 UN Charter and *jus cogens* norms, and the increasing importance of human rights. Furthermore, we have what may be called constitutional orders in the form of treaties establishing international organisations, be it the WTO or the EU.

But the international legal system is not based on a formal constitution. We have neither a thick nor a thin constitution, or a constitution with a "capital C" or a "small c" at the international level.[6] International law is still based on treaties and customary international law, not on a constitution.

Let us then turn from form to functions. Constitutions do two things: they establish and give competence to constitutional organs, and they contain limitations, procedures and mechanisms to control the same organs. At the international level we have several treaties attributing power to international organs. Such organs exercise what may be called international public authority.[7] The degree of delegation of power to international organs

4 Klabbers, Peters & Ulfstein, *supra* note 2, 19-31.

5 B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009), 77-116; See also the discussion in D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005), 99-113.

6 See M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State', in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 258, 259-260.

7 A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010), 2, 5 & 11.

may vary between issue areas and functions, with an emerging international judiciary as one of the most prominent features.[8]

As these organs become more powerful, there is a need for more control procedures and mechanisms. This is reflected in the call for accountability in Global Administrative Law[9] and the debate about constitutionalization.[10] Both these approaches are useful – but constitutionalization is the most appropriate framework when it comes to international organs exercising powers that interfere with national constitutional organs. Such interference may occur both in the legislative, executive and judicial powers of domestic organs.

More and more attention is directed towards the – lack of – legitimacy of international institutions. There is a feeling that the international legal system is increasingly characterized by a skewed relationship between attributed constitutional power and lack of control of such powers. Neither the original consent through ratification of the founding treaty of international institutions nor functional legitimacy through the institutions' achievement of the intended purposes is seen as sufficient basis for exercising wide-reaching international power.

On the other hand, leaving decision-making to national constitutional organs does not solve the problems since these bodies cannot provide desirable effects in, for example, solving environmental problems or protecting against terrorism, i.e. domestic organs suffer from an 'output' deficit. They may also suffer from a legitimacy deficit to the extent that decisions from national constitutional organs have effects beyond territorial borders ('externalities') – which are increasingly the case. Thus, the challenge is to design constitutional control that addresses legitimacy

8 Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *European Journal of International Law* (2009) 1, 73.

9 B. Kingsbury *et al*., 'Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 3/4, 1; B. Kingsbury *et al.*, 'The Emergence of Global Administrative Law', *id*., 15; N. Krisch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' 17 *European Journal of International Law (*2006) 1, 1.

10 J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World: Constitutionalism, International Law, and Global Governance* (2009); Klabbers, *supra* note 2, 11-14; G. Ulfstein, 'Institutions and Competences', in Klabbers, Peters & Ulfstein, *supra* note 2, 45.

deficits both at the international and national level, and in their mutual relationship.

Three elements should be satisfied in the constitutionalization of international law: democracy, the rule of law, and the protection of human rights.[11] And, I would argue, the mindset of constitutionalization is better suited than asking for each of the constitutional guarantees separately: There is, as in national constitutional law, a connection between democratic control, the rule of law, and protection of human rights.

But, we do not, for example, need the same degree and form of democracy at the international and the national level. The international organs will usually not exercise as far-reaching powers over individuals as national constitutional organs. And the national organs will act as a 'filter' in implementing international decisions.

Furthermore, the 'mix' of the different constitutional guarantees may be different for different international organs. For example, international courts shall enjoy independence – at the expense of democratic control over individual decisions.

Finally, the constitutional guarantees at the international level would be different from those at the national level – it is a bad idea to copy and paste, the more so because such guarantees also shall fulfil the relationship between the international and the national legal system.

To this list may be added the principle of subsidiarity. This means a presumption that problems are best resolved at the local, i.e. the national level.[12] This takes also into account that democracy is primarily a national phenomenon.

C. International Law as a System of Pluralism

While States' constitutions establish legislative, executive, and judicial organs, and define their respective competences within a common legal order, the relationship between international institutions is

11 *Id.*, 55-67 & 77-80.

12 I. Feichtner, 'Subsidiarity', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. IX, 652; A. Føllesdal, 'Survey article: Subsidiarity', 6 *The Journal of Political Philosophy* (1998) 2, 190; P. G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *American Journal of International Law* (2003) 1, 38; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 908, 920-924.

characterized by legal autonomy and functional differentiation. This may rather be seen as an aspect of pluralism than of constitutionalization of international law.[13]

The Study Group of the International Law Commission on the Fragmentation of International Law dealt extensively with the difficulties created by fragmentation in substantive international law, but it decided to leave the institutional issues aside. It was stated that 'the issue of institutional competence is best dealt with by the institutions themselves'.[14] Should the pluralistic character of international institutions be overcome by increased constitutionalization to improve finality in international legislative, executive and judicial decision-making?

The most ambitious way of constitutionalizing international governance would be to integrate existing institutions to the extent they overlap or compete. One could also imagine a less grand programme by retaining the institutions, but establishing a hierarchy between them.

However, States show no inclination to move towards a comprehensive international institutional system. It is furthermore not obvious that such an institutional framework would be more effective in solving international problems, and its creation would be fraught with difficulties.

A less ambitious strategy to avoid the difficulties involved in a fragmented international institutional framework is to establish arrangements of complementarity. While a principle of complementarity is well-advised, it will not solve the problems entirely, since it is usually impossible to establish clear-cut demarcations of competences, and because cooperation is necessary in closely related subject matters. This leaves us with the more modest strategy of ensuring coordination between the institutions.

This may seem as a very modest ambition on the part of international constitutionalization. But, first, the pluralist international institutional architecture does not contradict international constitutionalization. The different legal regimes with their institutional machinery are in themselves expressions of such constitutionalization. Moreover, these legal regimes should be welcomed as expressions of a willingness to address international challenges. Finally, the pluralist character may be celebrated as an asset

13 Ulfstein, *supra* note 10, 67-74.

14 M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006, 13.

rather than a threat to international governance. It presumably means that the different regimes are specially designed to resolve the pertinent problems. But a long-term goal should be a more consistent – constitutionalized – international institutional framework.

D. The Relationship Between International Law and National Legal Systems

The pluralist character of the relationship between international and national law is of a different kind than the relationship between different international regimes. While international law forms one legal system, international and national law are separate legal orders.

In this sense, the relationship between international and national law may be better characterized by dualism. But dualism does not give an accurate account of how the relationship between the international and national legal order works, since the two legal systems to a great extent are integrated through national constitutional provisions, legislation and through the practice of national courts.[15] This means that national constitutional organs must take international law into account in exercising their powers. In this sense, the relationship between international and national law is increasingly constitutionalized.

The close interaction between international institutions and national constitutional organs is most obvious in regional human rights systems – and the EU legal regime. While there has been much focus on democracy and human rights deficits of the EU system, less attention has been paid to comparable problems in the reform of the European Court of Human Rights – where the focus primarily has been placed on how to resolve the overload of the Court's cases.

True, the principle of subsidiarity has received increased attention in the reform conferences: Interlaken, Izmir and most recently Brighton.[16] The principle of subsidiarity is of relevance both for the exhaustion of local remedies; the interpretation of substantive obligations, including the margin of appreciation; and the design of remedies in cases where the Court has

15 A. Nollkaemper & J. E. Nijman, 'Introduction', in A. Nollkaemper & J. E. Nijman (eds), *New Perspectives on the Divide Between National and International Law* (2007), 11.

16 L. R. Helfer, 'The Burdens and Benefits of Brighton', 1 *European Society of International Law Reflections* (2012) 1, 1.

found violation of the European Convention. But the focus under the UK chairmanship – especially in the aftermath of the *Hirst* case[17] –has been entirely on how the principle of subsidiarity should be used to increase the power of the national legislature and courts at the expense of the European Court.

An alternative approach based on international constitutionalization would recognize the appropriate roles both of the European Court of Human Rights (ECtHR) as a guarantor of the effective protection of human rights – while acknowledging the value of national democracy and the need for resolving cases at the lowest possible geographical level. Such an approach would bring the attention to a constructive co-operation between the national and the European level, instead of the one-sided struggle for increased national control. In this connection it is of interest that the President of the European Court has welcomed the dialogue between national courts and the ECtHR, including that national courts express their disagreement with the ECtHR.[18]

E. Conclusions

It may be concluded that we have no international constitution. International law is based on treaties and customary international law. But treaties are increasingly used to establish international institutions with legislative, executive and judicial powers. This is an aspect of international constitutionalization.

International law is divided into different specialized regimes. These regimes represent both aspects of international constitutionalization and pluralism. This institutional framework has both its advantages and its problems. But it is not obvious that the fragmentation should be overcome in the short term in the name of increased constitutionalization. Also the relationship between the international legal order and national legal systems is characterized by constitutionalization and pluralism. The national systems are increasingly integrated into the international legal system and a constructive interaction must be developed based on constitutional considerations.

17 *Case of Hirst v. The United Kingdom (No. 2)*, ECHR 2005, No. 74025/01.

18 N. Bratza, 'The Relationship between the UK Courts and Strasbourg', 16 *European Human Rights Law Review* (2011) 5, 505, 507, 509 & 510.

There is a false dichotomy between pluralism and constitutionalization. We will in the foreseeable future continue to have such a pluralist international legal system and pluralism in the relationship between international and national law. The challenge is how to secure constitutional guarantees in a pluralist legal order. It may be added that neither a pluralist nor a constitutional system are inherently good or bad. The important question is how such systems are designed and how they work.