PART I: WHAT IS CONSTITUTIONALIZATION BEYOND THE STATE?

Understanding the Demand for International Constitutionalization

1. A Functional Approach to International Constitutionalization

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The problem of international constitutionalism is the central challenge faced by international philosophers in the twenty-first century.[1]

Introduction

This is a book about constitutional practice – and constitutional discourse – at transnational sites of governance. For some readers, this may seem an odd topic. As a historical matter, constitutional discourse has predominantly – but not exclusively – occurred in the domestic legal setting. However, as described in the essays in this volume, recent years have witnessed an intensification of constitutional discourse in many sites of transnational governance. In response, a rapidly growing body of scholarship explores the existence and implications of international constitutions. Drawing on insights from scholarship in international relations, international law, and global governance, the essays in this volume extend earlier efforts and describe, analyze, and advance international constitutional debates. To do so, these chapters examine the conceptual coherence and normative desirability of constitutional orders beyond the state and explore what is at stake in debates over global constitutionalism.

[1] Philip Allot, *The Emerging Universal Legal System*, 3 INT'L L.F. 12, 16 (2001).

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This is a particularly auspicious time to undertake such a project. As discussed below, the enhanced salience of debates over constitutional orders beyond the state reflects, in part, larger trajectories in international relations, including the increased density and reach of international norms, the increasing importance of new legal actors in international legal processes, and the rise of new topics of international legal regulation – along with an increasing sense that some of these developments threaten elements of domestic constitutional structures. Furthermore, debates over constitutionalization occur as the international community continues to adjust to the end of the bipolar era and as questions arise over the role and status of international norms in a rapidly changing international order. More broadly, debates over international constitutionalization are part of broader inquiries into global governance that are occurring in the international legal academy and in the policy sciences more generally, including around the concepts of legal pluralism and new governance. Thus, this volume appears at a time of great ferment in the highly diffuse and pluralistic processes of global governance, and at a scholarly moment consisting, as David Kennedy notes in his contribution, "both of great unknowing and of disciplinary reinvention."

In this brief introduction, we do not attempt a comprehensive survey of these diverse and complex trends. Rather, for current purposes it is sufficient to outline briefly some of the most important developments that have led to the current fascination with global constitutionalization. After situating debates over constitutionalization in this larger context, we argue that a functional approach to questions of global constitutionalization can be particularly fruitful at this time. As explained in more detail below, a functional approach can provide a set of conceptual tools and inquiries that scholars can use to identify and evaluate constitutional developments in various international domains.

We posit that the distinguishing feature of international constitutionalization is the extent to which law-making authority is granted (or denied) to a centralized authority. We thus focus on the extent to which international constitutions enable or constrain the production of international law. We also provide an additional goal of international legal constitutionalization: supplementing domestic constitutions that have been reduced in effect due to globalization. Hence our approach is largely taxonomic, rather than normative, and we take no position in this chapter on the general utility or desirability of international constitutionalization.

After outlining this approach to the functions of constitutionalization, we explain how a number of mechanisms associated with constitutionalization – including fundamental rights, direct effect, supremacy, and others – might

be understood in terms of these functions. We then provide a constitutional matrix that identifies which constitutional mechanisms are found in various international regimes and that is a tool for comparison and analysis of different constitutional settlements. We conclude this chapter with some brief observations regarding the relationship between constitutionalization and constitutional pluralism, constitutional coordination, and constitutional synthesis.

I. The Demand for International Constitutionalization

A number of contemporary developments contribute to the demand for international constitutionalization. For current purposes, we focus on two of these developments: globalization and the fragmentation of international law. Although the two developments are related, and in some ways mutually reinforcing, for ease of exposition we treat them separately in the paragraphs that follow.

A. *Globalization*

Globalization is the umbrella term used to capture the enormous increase in the flow of people, capital, goods, services, and ideas across national borders. Several influential strands of thought suggest that pressures for international constitutionalization are a product of globalization and the accompanying increase in the reach and density of international legal norms. One goal of this volume is to examine this claim critically: to what extent does globalization drive constitutionalization in international law? In his contribution to this volume, Joel Trachtman analyzes the causes and consequences of constitutionalization at the WTO in terms of constitutional economics, focusing on globalization's role.

Preliminarily, we note as a descriptive matter that globalization has a mutually reinforcing relationship with certain types of international law, including prominently those types that advance market liberalization. The relationship is mutually reinforcing because, on the one hand, the increase in transnational activities associated with globalization induces greater demand for many forms of ordinary international law, including international economic law. On the other hand, international economic law facilitates the international flows of goods, capital, people, and ideas associated with globalization.

Other types of international law, such as human rights law or environmental law, generally do not promote globalization per se. However, these bodies of law may expand to address regulatory concerns that arise only with globalization – such as concerns regarding transnational externalities or regulatory

competition – or with the advance of international law aimed at market liberalization. To the extent that international law of economic integration, international environmental law, and at least some types of human rights law address these types of concerns, perhaps they should be understood as subconstitutional or ordinary international law.

Hence, globalization expands the set of possible beneficial cooperative arrangements. At the same time, the increased transnational interactions that globalization enables give rise to the possibility of various forms of market or political failure. Therefore, increased globalization may make it more valuable for actors to enter into denser legal and institutional relationships, including constitutionalized relationships. Indeed, there may be a dialectical relationship between globalization and constitutionalization along the following lines: Technological and social change yields greater possibilities for beneficial international interactions, including prominently international commerce, but also including international environmental stewardship, international cooperation to combat organized crime, and so on. International legal rules become more valuable to realize the increased benefits of these international interactions. Increasing demand for production of international legal rules gives rise to increasing demand for international constitutional norms and processes that facilitate the production of international legal rules.

B. Fragmentation

Another prominent strand of thought understands international constitutionalization as a response to the fragmentation of the international legal order. International law is the product of highly decentralized processes. Specifically, international norms often develop in specialized functional regimes, such as human rights, environment, trade, or international criminal law. Each functionally differentiated area of law has its own treaties, principles, and institutions. However, the values and interests advanced by any particular regime are not necessarily consistent with those advanced by other specialized regimes. In practice, specialized law making, institution building, and dispute resolution in any particular field tend to be relatively insulated from developments in adjoining fields, risking inconsistent judgments, conflicting jurisprudence, and outcomes that fail to take sufficient account of the full range of relevant values.

Recent practice reveals several ways that conflicts can arise. Perhaps most dramatically, different tribunals can provide conflicting interpretations of a particular legal norm. Thus, for example, in considering whether Serbia and Montenegro was responsible for the acts of irregular forces during the conflict in the former Yugoslavia, the International Criminal Tribunal for

the Former Yugoslavia (ICTY) considered the International Court of Justice's (ICJ) pronouncements regarding state responsibility in the *Nicaragua* case. The ICTY determined that the ICJ's interpretation was not a correct statement of international law on state responsibility and articulated its own test for determining when states are responsible for acts by irregular militias.[2] Thereafter, the ICJ revisited the question of state responsibility and reaffirmed the *Nicaragua* test. The ICJ found the ICTY's interpretation to be "unsuitable" and its arguments in favor of adopting its test "unpersuasive."[3] Furthermore, domestic and international tribunals can interpret the same international norm differently.[4]

Alternatively, conflicts can arise when an international body declines to follow a general rule of international law on the grounds that a *lex specialis* rule applies. A well-known example of this type of conflict occurred in the *Belilos* case, where the European Court of Human Rights (ECHR) declined to apply the general rules concerning treaty reservations and held (1) that a state's purported reservation to a treaty was invalid and (2) that the state was bound by the treaty.[5] Notably, the ECHR has justified its departure from established rules on treaty reservations by invoking the constitutional character of the European Convention on Human Rights.[6]

Moreover, conflicts can arise when disputes are considered by multiple fora in which potentially inconsistent norms from different international legal regimes are applicable. For example, the Chile–European Community swordfish dispute was submitted to World Trade Organization (WTO) dispute settlement and to a special chamber of the International Tribunal for the Law of the Sea. Notably, this form of conflict is not limited to interstate disputes; the proliferation of human rights and investment tribunals has enabled private parties to pursue identical or related claims in multiple fora, either simultaneously or sequentially. Multiple litigations arising out of the same facts raise serious efficiency and finality concerns as well as, of course, the very real possibility of conflicting judgments.[7]

[2] Prosecutor v. Tadic, Case No. IT-94–1-A, Judgment, para. 145 (July 15, 1999).
[3] *See* Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) 2007 I.C.J. 91 (Feb. 26), at para. 404 ("unpersuasive"); *id.* at para. 406 ("unsuitable").
[4] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 356 (2006).
[5] Belilos v. Switzerland, 132 Eur. Ct. H.R. (ser. A) (1988).
[6] *See* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A), at para. 75 (1995) (preliminary objections).
[7] For a particularly notorious example of inconsistent judgments, *compare* Lauder v. Czech Republic, UNCITRAL, Final Award (Sept. 3, 2001) (London arbitral tribunal finds that state action did not constitute expropriation, did not violate obligation to provide fair and equitable treatment, and did not breach duty to provide investor with full protection

Finally, conflicts can arise when bodies "located" in one specialized area of international law are asked to interpret or apply norms generated in other specialized areas. For example, in the *Beef-Hormones* dispute, the European Community asked the WTO's Appellate Body (AB) to apply the precautionary principle in the context of the European Community's ban on beef from cattle treated with certain hormones. The AB suggested that the precautionary principle might be part of international environmental law but not general international law, and in any event was not applicable to the dispute. Similarly, in the *GMO* dispute, a WTO panel declined the invitation to refer to an international environmental treaty, and in the *Soft Drinks* dispute between the United States and Mexico, the AB declined to determine rights and duties under the North American Free Trade Agreement. These disputes suggest that the same case might be resolved differently in different tribunals, depending, inter alia, on the law that they apply.

Many claim that fragmentation raises questions about "[international law's] stability as well as the consistency of international law and its comprehensive nature"[8] – a view that finds expression in this volume in essays by Andreas Paulus and Mattias Kumm. To the extent that fragmentation arises because of the lack of centralized legislative and adjudicative institutions, constitutionalization can respond by providing centralized institutions or by specifying a hierarchy among rules or adjudicators. That is, constitutionalization can be seen as a way of introducing hierarchy and order, or at least a set of coordinating mechanisms, into an otherwise chaotic system marked by proliferating institutions and norms. Hierarchically superior norms and coordinating mechanisms can manage or resolve legal conflicts and thereby produce greater predictability and certainty for actors subject to the rules.

On the other hand, the claim that constitutionalization can bring order to an otherwise highly fragmented legal domain is highly controversial. Some claim that this argument presupposes a broad global agreement around core values that simply does not exist. Others view efforts to understand constitutionalization along these lines as thinly veiled political efforts by one specialized legal order or, more precisely, by specific international actors, to claim normative priority for one set of international legal norms over alternative norms. Indeed, some go as far as characterizing the quest for legal unity

and security) *with* CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award (Mar. 14, 2003) (Stockholm tribunal, considering the same fact pattern, finds state action to constitute expropriation, to violate fair and equitable treatment, and to deny investor full protection and security).

[8] *See, e.g.*, International Law Commission, *Report of the International Law Commission on Long-term Programme of Work*, ILC (LII)/WG/LT/L.1Add. 1 (July 25, 2000) at 26.

through constitutional norms as "a hegemonic project."[9] Others counter that the search for ways to mediate among different values is simply recognition – common in the domestic sphere – of the inescapable need to make trade-offs between different values. Thus, one of the issues explored throughout this volume is whether and in what circumstances constitutionalization is a normatively desirable response to the challenges posed by fragmentation.

Although we have discussed globalization and fragmentation separately, the phenomena are related. Increased globalization generates pressures for greater numbers of international rules in more areas of international life. And a greater density of international norms in greater numbers of functionally separate international regimes heightens the dangers associated with the fragmentation of international law. Hence, two of the most important developments contributing to pressures for international constitutionalization are deeply connected.

II. The Functional Dimensions of International Constitutionalization: Enabling, Constraining, and Supplemental Constitutionalization

Just as the relations among globalization, fragmentation, and constitutionalization are complex, so, too, is the phenomenon of international constitutionalization itself. Hence, many of the essays in this volume devote considerable energies to the descriptive task of explaining the roles and functions of constitutional norms on the international plane. In this section, we begin to develop a functionalist approach to identifying and analyzing international constitutionalization.

Our functional methodology permits us to avoid the definitional conundrums that mark so much of the literature on constitutionalism beyond the state. A functionalist approach permits conceptual analysis that is not premised upon a definition setting forth a group of necessary and sufficient conditions which determine whether a given order is constitutional or not. This "check list" approach to constitutionalization tends to push discourse towards terminological disputes, and thereby divert attention from substantive analysis. The definitional approach can also mistakenly suggest that international constitutionalism is a binary, "all or nothing" affair. As this chapter suggests, constitutionalism consists of a type – rather than a quantum – of rules.

[9] Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought* 5 (2005) (unpublished manuscript, on file with authors).

Undoubtedly, our functional approach to global constitutionalization suffers from the lack of certainty that a check list or other bright line approach would provide. But a functionalist methodology has the virtue of directing attention to the appropriate inquiry: the purposes that international constitutional norms are intended to serve. Thus, we turn to a description of the three key purposes that international constitutional norms serve.

For current purposes, we highlight three important functions that international constitutional norms play: (1) enabling the formation of international law (i.e., enabling constitutionalization), (2) constraining the formation of international law (i.e., constraining constitutionalization), and (3) filling gaps in domestic constitutional law that arise as a result of globalization (i.e., supplemental constitutionalization). In this section, we explain these three functions. We draw a bright line between measures designed to achieve these three functions, on the one hand, and ordinary international law, on the other hand. To the extent that a measure performs these functions, it is a rule of international constitutional law.

After completing our discussion of these three functions, in section III we explain how each of these functions is implemented through seven mechanisms that are commonly associated with constitutionalization: (1) horizontal allocation of authority, (2) vertical allocation of authority, (3) supremacy, (4) stability, (5) fundamental rights, (6) review, and (7) accountability or democracy. Note that we assess these mechanisms with respect to how they implement the enabling, constraining, and supplemental constitutional functions. These mechanisms are distinct ways to achieve these functions, but in this chapter we do not develop a theory of the relationship and choice among these mechanisms.

A. Enabling Constitutionalization

First, some constitutional norms enable the production of ordinary international law (i.e., enabling constitutionalization). Treaty provisions that endow international bodies with the ability to create secondary international law fall into this category. For example, the treaties establishing the European Union set forth complex procedures for the creation of secondary union legislation. Similarly, the United Nations Charter, discussed by Bardo Fassbender and Michael Doyle in their contributions to this volume, empowers the Security Council, under certain circumstances, to establish norms that are binding upon UN member states. These are prominent examples of what we understand as enabling constitutionalization. International tribunals, as well, sometimes engage in enabling constitutionalization. Landmark European Court of Justice (ECJ) decisions, such as *Costa v. ENEL*, *Van Gend en*

Loos, and others discussed in Daniel Halberstam's contribution to this volume, are examples of international bodies effectively reallocating law-making authority both among various international actors and between national and supranational actors.

From the perspective of new institutional economics, including constitutional economics, enabling constitutionalization may be understood as an aggregate allocation of authority, in the sense that it allocates authority over multiple decisions at once, in a general or nonspecific way. Enabling constitutionalization determines allocations of authority rather than the content of the specific exercise of authority. Because of this aggregate nature, and because constitutional mechanisms operate over time, these are also allocations under a veil of uncertainty as to the distributive outcome of the aggregate allocation: the distributive consequences of the specific rules that will be established are not known in advance. The institutionalization associated with this allocation of authority becomes valuable when it enables relevant actors to cooperate more effectively: when it reduces either transaction costs or strategic costs of cooperation, or when it enables these actors to enter into cooperative arrangements that would otherwise have been unavailable.

B. Constraining Constitutionalization

Second, some international constitutional norms constrain the production of ordinary international law (i.e., constraining constitutionalization). Thus, for example, the European Court of Human Rights has consistently held that rules of the European Convention on Human Rights take precedence over other treaty commitments made by member states. The convention has a constitutional dimension insofar as it constrains the making or effect of inconsistent international law. Similarly, any number of foundational international legal norms – we might think of the constitutional commitment to state sovereignty,[10] and international norms of a *jus cogens* character – act as constraints on the production of ordinary international law.

Notably, enabling and constraining constitutionalization often appear together. Thus, for example, article 24(1) of the UN Charter confers certain powers on the Security Council; article 24(2) provides that, in exercising these powers, "the Security Council shall act in accordance with the Purposes and Principles of the United Nations." Thus, as Tom Franck notes in his preface to this volume, constitutionalized systems both authorize the exercise

[10] *See, e.g.*, Ian Brownlie, Principles of Public International Law 287 (Oxford Univ. Press 6th ed. 2003) (characterizing the sovereignty and juridical equality of states the "basic constitutional doctrine of the law of nations").