RULING THE WORLD?

Constitutionalism, International Law, and Global Governance

Ruling the World? Constitutionalism, International Law, and Global Governance provides an interdisciplinary analysis of the major developments and central questions in debates over international constitutionalism at the United Nations, European Union, World Trade Organization, and other sites of global governance. The essays in this volume explore controversial empirical and normative questions, doctrinal and structural issues, and questions of institutional design and positive political theory. *Ruling the World* grows out of a three-year research project that brought leading scholars from around the world together to create a comprehensive and integrated framework for understanding international constitutionalization.

Ruling the World is the first volume to explore in a crosscutting way constitutional discourse across international regimes, constitutional pluralism, and relations among transnational and domestic constitutions. The volume examines the fundamental assumptions and critical challenges in contemporary debates over international constitutionalization.

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Preface: International Institutions: Why Constitutionalize?

THOMAS M. FRANCK

[I]t can feel like a project of the utmost seriousness and urgency to interpret the world in constitutional terms.

–David Kennedy
"The Mystery of Global Governance"

International institutions, with a few minor and ad hoc exceptions, are firmly grounded in treaties that establish their objectives, conditions of membership, and internal and external operational parameters. These treaties are binding on their party members and, perhaps – in the instance of near-universal organizations – also on nonmembers.

It could be argued that it little matters whether such an institution's foundational instrument is regarded as a constitution. Yet leading thinkers, such as the authors of this volume, seem to think the issue is worth serious examination. They express strongly held views as to why the issue is important and argue that how it is answered can have a significant impact on the role and operation of leading international organizations.

An international organization grounded in a constitution, they believe, has a different gravitas from the many purely ad hoc reciprocal arrangements made for the passing convenience of states.

The authors of these chapters do not merely note the phenomenon of greater gravitas but also explore how constitutionalization affects the practice of an institutionalized system of cooperation. For one thing, it determines how the institution absorbs the need for change. Whereas a constitutionally based system accommodates and adapts to its own practice, lesser consensual arrangements tend to insist on strict literal construction of their terms and resist their transformation through interpretative practice.

In other words, the way the institution created by a constitutional treaty is authorized to operate can be affected by the way it actually discharges

its responsibilities in practice. Consistent patterns in institutional practice may affect the ambit of the institution's jurisdiction and its modus operandi. Other more purely functional cooperative arrangements, when based on a treaty, are literally tied to the text that establishes their mandates.

One need but examine the evolving scope of jurisdiction exercised by the UN Security Council to see how the Charter's license, set out in article 2(7), to deal with matters not "essentially within the domestic jurisdiction of any state" has evolved and broadened in practice. Who, in 1945, would have thought that this jurisdictional formula could evolve to authorize collective military intervention in situations such as racism and anarchy occurring solely within a single state? Yet when it came to dealing with apartheid in Southern Rhodesia and South Africa or social anarchy in Somalia, the Charter, in the practice of the principal organs of the United Nations, has been definitely construed to permit intervention. This has been based not on a strict reading of text but rather on a clearly defining, gradually accruing body of institutional practice. Because the UN Charter is widely recognized as constitutional in nature, such adaption in practice is treated as inevitable.

The greater capacity of constitutionalized systems of cooperation to accommodate such operational evolution is the reason why keen observers of global governance insist on the "constitutionalization paradigm." There is, however, another valid reason for such insistence. Constitutions, in contrast to lesser arrangements for ongoing cooperation, contain elements of checks and balances intended to operate autonomously to prevent abuses of power by the institution. This may take the form of resisting the incorporation of new practices that seem to lead in erroneous directions. Precisely because constitution-based systems are understood to be, like a tree, capable of gradual growth, extra care is taken to trim the branches.[1] Constitutionalized systems ensure that the power of organic growth does not go institutionally unchecked and unbalanced.

In practice, this means that constitution-based systems of cooperation are structured to accommodate a form of separation of powers. This hallmark of constitutionalization further distinguishes these foundational instruments from such lesser forms of systematic cooperation as bilateral treaties and memoranda of understanding.

In the instance of the UN Charter, chapters 4, 5, 10, and 14 set out, respectively, the jurisdictional parameters of the General Assembly, Security Council, Economic and Social Council, and International Court of Justice.

[1] The expression "living tree" was first applied to describe the constitutional capacity for organic growth in Edwards v. Attorney-General for Canada, [1930] AC 124 (PC), at 136 (Lord Sankey).

Besides these black-letter texts, the constitutionally based institutions regularly refer to institutional practice to legitimate the evolving delineation that separates and coordinates the inevitably overlapping jurisdictions of the respective organs.

An example is the practice that has propelled the Security Council into responsibility for administering territories in transition. This used to be an exclusive prerogative of the Trusteeship Council and the 73(e) Committee of the General Assembly. More recently, however, in response to the challenge of an array of civil wars and failed states (Yugoslavia, Somalia, East Timor) the role of intervenor has increasingly devolved to the Security Council.

Practice and text, in a constitutionally based system, are supplemented by jurisprudence. When an institution is constitutionally based, the jurisdictional boundaries are usually policed and supervised by a tribunal. In the instance of the United Nations, this function is performed by the International Court of Justice, which, for example, has rendered opinions as to the respective (and overlapping) powers of the Security Council and General Assembly,[2] and those of the Security Council vis-à-vis the International Court of Justice itself.[3]

Implicit in such a constitutionalized system is the idea of judicial review, which subordinates assumptions of institutional jurisdiction to review for *excès de pouvoir* to prevent those powers given to international institutions from incurring the self-aggrandizement that afflicts all concentrations of power. This notion of judicial review acts as a balance to correct practices that, if left unrestrained, would facilitate excessive jurisdictional imperialism. A constitutionally based international organization is marked by an institutional process for determining, through "second opinions," when a part of the system is threatening to spin out of control.

It is the institutional capacity to limit evolutionary development through judicial review that justifies and legitimates the capacity of constitutionally based institutions to evolve in practice. It thus appears, paradoxically, that the constitutionalization of international systems of ongoing cooperation has the effect both of facilitating reform through the accommodation of institutional practice and of containing that impetus within limits impartially deducible from the tenor of the foundational instrument. The UN Charter is dramatic evidence of the capacity to achieve institutional reform through institutional practice, something richly illustrated by the ensuing chapters of

[2] Certain Expenses of the United Nations (art. 17, para. 2, of the Charter), (Advisory Opinion), 1962 I.C.J. Reports 151.

[3] Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Preliminary Objections, 1998 I.C.J. Reports 115.

this book. But, the same Charter, by institutionalizing judicial review by the International Court of Justice, also creates the opportunity and the means for subjecting practice to scrutiny for conformity to the Charter's foundational parameters.

Of the several indicators of a constitutionalized system of institutionalized cooperation among states, this may be the most functionally significant: that it separates the respective areas of jurisdiction both among the organs of the institution and between the institution and its member states. In making this important move to a separation of powers, the foundational instrument, if it is to operate as a constitution, ensures that the lines separating the various concentrations of jurisdiction among the institution's organs will be patrolled by an independent expert legal body, such as the International Court of Justice. So will be the allocation of powers between the institution and its members. These lines of demarcation are essential to the efficacy of the institution, to its ability to adjust to changing priorities and issues, and to prevent it from growing into a Leviathan.

If a body like the United Nations is to retain its vitality and relevance over many decades of changing agendas, the distribution of functions and powers among its principal organs must be amenable to change through innovative practice and without necessarily invoking the cumbersome process of formal treaty amendment. The system must be capable of spontaneous regeneration through modifications achieved by agreed practice. Yet such regeneration must not go unchecked and unbalanced. To that end, the system must be "constitutional" – capable of organic growth, yet growth controlled by checks and balances deployed by a legitimate institutional umpire. To that end, the UN system is constitutionalized by the inclusion of a legitimate organ authorized to render "second opinions" regarding issues of jurisdiction arising among the principal organs and between the institution and its state members.

Thus, it is apparent that the issue of constitutionalization, which is so thoroughly canvassed in this volume, is far from one purely of theory but rather concerns itself profoundly with institutional efficacy. Is the institution capable of gradual, autochthonous growth, and, paradoxically, is it capable itself of curbing the institutional appetite for unlimited expansion of its powers? If, as in the instance of the United Nations, the answer is "yes," then its architects, almost certainly, have written a constitution. That makes it appropriate, as David Kennedy points out in his chapter, to think of the project of this book "not only as description but also as program." The point of recognizing the UN Charter as a constitution is to unleash the institution's capacity to evolve while subjecting that capacity to independent review for consistency with the institution's stated, essential purposes.

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