ПЛАТФОРМА 4
НОВІТНІ ТРЕНДИ ТА ГЛОБАЛЬНІ ВИКЛИКИ У РОЗВИТКУ МІЖНАРОДНИХ ВІДНОСИН ТА МІЖНАРОДНОГО ПРАВА

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CONSTITUTIONALIZATION OF INTERNATIONAL LAW OR FRAGMENTATION OF INTERNATIONAL LAW – DIFFERENT ANSWERS TO THE CHALLENGE OF GLOBALIZATION

I. Introduction

Globalization puts the state and state constitutions under strain. This means that state constitutions can no longer regulate the totality of governance in a comprehensive way, and the state constitutions' original ciaim to form a complete basic order is thereby defeated. The hollowing out of national constitutions affects not only the constitutional principle of democracy, but also the rule of law and the principle of social security.

Scholars argued that in consequence, it should be asked for compensatory constitutionalization on the international plane. This constitutionalization is recognized by some scholars as a constitutionalization of international law, (Habermas, op. cit, p. 7) but it should be detached from the notion of a world republic by others as an emergence of a «Weltinnenrecht» an «internal world law» (J. Delbrück, op. cit.) and the question is dealt with from a sociology concept of constitution which raises constitutional questions not only in the relation between politics and law but also in other fragmented areas of society (G. Teubner, op. cit, p.15).

II. Three concepts for an answer to globalization by international law

1. The philosophic point of view (Habermas)

In an article about «Constitutionalization of international law and the problem of legitimacy of a legally constituted international society» Habermas explores the idea of a political constitution for a world society (J. Habermas, op.cit, p.7).

He starts from the observation of an accelerated growth of international organizations which could be interpreted as an answer to a need for steering and control which follows from a functional differentiation of world society. On the other side sovereignty of the (born) subjects of international law (states) diminished formally (ibid, p. 8). Therefore he links to Kant´s theory of a world citizen´s constitution on a more abstract level but detaches the thought of the constitutionalization of international law from the idea of a world republic. He sketches a three level system in which a) the supranational level is taken by a world organization specialized in peace keeping and the protection of human rights b) a General Assembly in which opinions and will is build over the principles of transnational justice and c) relates to the question who shall enforce the norms which are found by the General Assembly. He proposes that this question should be answered differentiated along different fields of politics. The world organization should take a hierarchical position towards the states and should be entitled to use

force while on a transnational level a need for coordination for conflict resolution arises (ibid, p. 17-18).

After that Habermas asks the question of the democratic legitimization of a world society without a state-character. He formulates that this legitimization couldn´t be thought without the functioning of a world public opinion. On the transnational level a balance of interests should be reached through a system of negotiations which works under the condition that the parameters of justice which are steadily deveioped by the General Assembly are put under regard (ibid, p. 19). The democratic legitimacy is based on two columns and depends firstly on the legitimacy of the negotiation partners who should be elected in a democratic way and secondly on the informed opinion of the national public about the world inner politics (ibid, p. 20). An organizational component is formulated inspired by the UN- Organization which is called world organization and has - as well as the real model - the function to safeguard peace and human rights. A sub-organization of this body would be a General Assembly in which the representatives of the states and directly elected world citizen would reason about questions of world social justice.

2. The concept of international law lawyers

Peters, Delbrück and other international lawyers recognize features of a constitutionalization of international law more concrete in changes in the field of international law: in the broadening of the subjects of international law (i.e. supranational organizations as the EU, individuals in the field of human rights protection or - but the still controversial - the recognition of group rights (indigenous people), new forms of international lawmaking and objectivization of international law (i.e. multilateral international contracts which are in the interests of the community of states - law making treaties - or the *erga omnes* binding force of (some) international law), the change of the forms and procedures and of the enforcement of international law (i.e. WTO dispute settlement mechanisms, monitoring systems, the function of NGO´s in procedures of cooperative law enforcement) (J. Delbrück, op. cit, p. 797).

Scholars have been arguing that the structure of international law has generally evolved from coexistence via cooperation to constitutionalization (A. Peters, op. cit, p. 580). In consequence of globalization as described above Peters asks for compensatory of constitutionalization on the international plane. Only the various levels (international and nation-state level) of governance, taken together, can provide full constitutional protection (ibid). Also along with this theory of constitutionalization is understood as constitution building in the political sphere. A constitution in that sense is defined (in a normative sense) as the sum of basic (materially most important) legal norms which comprehensively regulate the social and political life of a polity (ibid). In this sense constitutionalization in international law means to acknowledge the interests of the community of states and the introduction of mechanisms for their enforcement (J.A. Frowein op.cit, p. 446). The consideration of democratic and rule of law structures in the recognition of states is a development of constitutionalization which is adequate to today´s international law order.

3. Fragmentation of international law and fragmentation of constitutions

From a certain sociological angle the theme of constitutionalization is not only related to the sphere of politics and law but the question of constitutionalization is raised for many areas of society (G. Teubner, op. cit, p. 15).

On the international level therefore the question of constitutionalization is relevant for different autonomous parts of world society such as global economy, science and technology, new media, medicine and others.

The answer to the question whether international law constitutionalizes can therefore not be found in a primate of a political/ legal constitution: the conflicts between the different fragmented spheres of international law have to be resolved by strictly hierarchic conflict resolution between legally fragmented parts of international law (self-contained regimes) which have developed a set of norms that can be described as constitutional though not in the legal definition (G. Teubner op.cit, p. 228).

This can occur in two forms: by internalizing the conflicts into the decision making processes in the colliding law-regimes or by externalizing them into inter-regime-negotiations. Either the conflicts are relocated into the own constitutions of the regime or they are dealt with in a forum in between the regimes (ibid, p. 229). Both cases have to be institutionally backed either by existing courts (or arbitrational tribunals) in the regime or by cooperation-procedures between the regimes. In the latter case a (future) law will become necessary to structure the procedures of cooperation (ibid, p. 230).

III. Concluding remarks

A point of critic to the first theory seems to be that despite the detachment of this theory from a world-state, it seems to relate very much on the nation-state concept. Still this is justified by the idea to bring in democratic legitimacy and the rule of law principle into the concept of the «world organization». Analogies are made to EU law making but the concept itself is very skeptic when it comes to the possibilities to form a world-public opinion.

Regardless of whether or not one accepts the notion of functional constitutions, as it is put forward from the sociologists the observation and analysis of the fragmented systems of international law/ self-contained-regimes (i.e. WTO) gives way to an interesting proposition for a more uniform interpretation of international law in conflicting self-contained-regimes.

This theory doesn´t ask the question of democratic legitimacy of institutions of international law but leaves it to the self regulation of the functional systems and their cooperation in conflict resolution. Still the concept of an order public transnational implies a dominant orientation along norms which go beyond the affected functional regimes. These norms - though today not yet formulated - would be interpreted from the perspectives of different functional systems and aim at the common interest of world society (G. Teubner, op.cit, p.236). Limitations are only given in the sense that another (functional) constitutional order should be denied acceptance if this order doesn´t comply with the transnational order public.

The third «international lawyers theory» (Peters, Delbrück et. al.) argues from a normative perspective and observes by the analyses of international law a trend towards constitutionalization of international law in a political sense. This concept finds in some areas of international law (although rudimentary) sources of public international law which prevail over other norms and form a higher legal level and could therefore be regarded as a nucleus of international constitutional law. The scholars who are in favor of this concept admit that the constitutionalist reading of current international law is to some extent an academic artefact and that it has a creative moment, simply because it lays emphasis on certain characteristics of international law (A. Peters, op.cit, p. 605).

There are of course objections to the concept: The constitutionalist perspective could be instrumentalized by international-law nihilists (A. Peters, op.cit, p. 607). US law doctrine criticize «global constitutionalism» which appears to be associated with the fact that the entire international legal order has the (traditionally constitutional) function of containment (ibid). In this perspective, international law makes a kind of constitutional claim when claiming precedence over conflicting domestic law. This claim is currently more or less openly rejected by some scholars who doubt that states (concretely, the United States) should obey international law (as a whole) (ibid. citing J. Rubenfeld, 'The Two World Orders', (2003) 27 Wilson Quarterly 28 et seq.). Still this objection seems to be hazardous in a world that faces globalization and evident challenges to human rights and social justice.

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WYZWANIA MIGRACYJNE WSPÓLCZESNEJ EUROPY GLOBALNE MIGRACJE

Przemieszczanie się ludnoścl poza granice własnego państwa, niekiedy do innych stref geograficznych towarzyszyły ludzkości od zawsze. Przemieszczenia te związane były z ważnymi zdarzeniami społeczno – gospodarczymi czy politycznymi. W zależności od danego okresu historycznego przyczyną migracji ludnoścl była konieczność zdobywania pożywienia, grabieżcze najazdy wroga, prześladowania religijne, odkrycla geograficzne i towarzyszące im ekspansje terytorialne, aż po uchodźstwo polityczne. Migracje w dobie globalizacji przybrały