THE NOTION OF INTERNATIONAL CONSTITUTIONAL LAW

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Available at: https://works.bepress.com/prasanna_mahat/1/
INTRODUCTION

Presently, the notion of international constitutional law has garnered a lot of endorsement among international legal scholars. Even fifteen years ago, this notion was treated to be a rather delusional concept. But now, the reference to international constitutional law is rather common and occupies the place of a legal doctrine.¹

International constitutional law, as a concept, entails many meanings. A recent study reveals that a concept of constitution that appreciates the current trends in international law and does not dismiss the persisting actualities of international relations must not be too forceful. Such a concept should also refrain from fictitiously representing an amount of clarity that ceases to exist. In addition to this, when there is a lacking of actual democratic institutions at the international level, such should not be too aspirational insofar as its legitimacy is concerned. But international law on account of being multifaceted does not debar the transferring of the principle of the constitutionality from states to the international sphere.

The constitutions of some states do indeed lack clarity and may purport to be unorganized masses from different sources. However, the chief component of any constitution is to ensure individual and collective autonomy.² For this very reason, it is imperative that international law covers all types of political power. As per Hans Kelsen, individual autonomy is contingent upon the law and insofar as public international law goes, this is also applicable to united independence of individuals that are united under the constitutions of states.³ Therefore, the growth of the notion of international constitutional law need not necessarily entail the mitigation of the state and should further the amelioration in terms of protection of state autonomy and individuals from illegitimate interferences by other states and international organizations.⁴

The purpose of this paper is twofold. Firstly, to look into the genesis of the notion or idea of international constitutional law as a concept and to see from where this idea emanated from.

³ Hans Kelsen, Reine Rechtslehre (1st ed. 1934), 43 et seq.
Secondly, the indications of world constitutional process have been looked into. Thirdly, international constitutional law, more specifically in the case of the United Nations has been looked into.

CONSTRUAL AND GENESIS OF INTERNATIONAL CONSTITUTIONAL LAW

The concept of international constitutional law can be construed from international organizations. Inter-governmental organizations are quintessentially groups of sovereign states united as states to make, under a constitutive international accord, governed by international law quintessentially known as “charter” or “constitution,” a device that is charged with the quest for accomplishing certain mutual goals. International law in the 20th century developed in varying ways. At the commencement of the century, there were endeavours on part of states to agree on rules of peaceful statement of disputes and codification. Post World War I, states formed the League of Nations. But owing to the composition and restricted competence of the states, the objectives of the League of Nations did not materialize. After the devastating effects of World War II, in particular, on the international relations front among states, putting an end to war as a means of politics was made necessary.

Post World War II, the United Nations was formed. 150 years after Immanuel Kant’s popular publication *Zum ewigen Frieden* in 1795, the interdiction upon coercion usage in Article 2 Para 4 of the UN Charter in tandem with the introduction of a collective system in Chapter VII marked the establishment of the Friedensbund – or confederation of peace in the sense of Kant and it was after this that states opined that use of force by states should not be legitimate. However, it was only after

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7 Id.
1990 that the system established in 1945 could be tested. The veto system of the United Nations served as an impediment in its functioning during the cold war. Post 1990, the number of Security Council Resolutions that laid down the mandatory enforcement measures on the basis of chapter VII increased by a great deal and Security measures were made available as and where there existed a threat to peace.  

The genesis of the United Nations post 1990 reveals that the Security Council can become a directorate for the group of nations that have wider powers. Also, where the permanent members are unanimous and a majority of the 15 states of the Council are available, interventions that have serve long term objectives can be lawfully brought about. It is pertinent to note here that to jump to conclusions that there are no restrictions would be a rather hasty one in consideration of the fact that the procedure of decision making in decisions in republican form of governments likened to that of Kant would serve as a very effective tool of control. Another change necessary would be to the defending of resolutions based on general principles before the community of states, specifically the General Assembly of the United Nations. Apart from setting up a confederation of peace on the lines of Kantian principles, the biggest modification in the character of public international law towards the end of the 20th century is the universal recognition of human rights.

In the aftermath of dictatorships and the atrocities of World War II and the Holocaust, the United Nations adopted the Declaration of Human Rights in 1948. The European Convention on Human Rights on the lines of this declaration also serves as an important device as a means of control. A perusal of the international law at the end of this century is incomplete if no reference is made to global systems of regulation for significant areas that are set up by multilateral treaties. The UN Convention is an epitome of this in that it is a codification that has straightaway applies to regions that comprise two-thirds of the world. International law in the end of the 20th century, has with a great deal of success, marks a shift from the legal coordination amongst

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8 Supra note 6.
9 Supra note 6.
10 Supra note 6.
11 Supra note 6.
states. \(^{12}\)Public law structures recognized as continental European thinking has now been recognized by public international law.\(^{13}\)

International law seeks to establish structures that aim at safeguarding the common interests and solving problems of global and regional significance that go beyond the notion that the sovereignty of each state should be protected, a notion now considered to be inappropriate.\(^{14}\) Such principles find their place specifically in regional structures as in the European Union. The European Union as such is not a state and has no state constitution but a Union constitution. This Union constitution exercises jurisdiction over European states via common structures and specific organs established for them.\(^{15}\) A European constitution of sorts with restricted power can be attributed to the Union system operate that are grounded on the principles of law and democracy.

Of great significance is that the idea of constitutional rules acceptable to the international legal system has been widely accepted in the constitutions of many new democracies. Article 55 of the French Constitution of 1958, for instance emphasizes the importance of rules of treaty law over national law and is a widely accepted rule in new democracies as well. Insofar as much as the issues of European laws are concerned, it may be observed that European law is respected as the paramount international legal order.\(^{16}\)

A perusal of Sections 231 and 232 of the South African Constitution calls into question the relationship if international law and municipal law and whether the South African constitution is in consonance with the modern development of international law.\(^{17}\) However, section 233 contains a very important rule of interpretation. It is of pertinence that each court follows reasonable interpretations of the legislation along the lines of international law above a different interpretation

\(^{12}\) Supra note 6.
\(^{13}\) Supra note 6.
\(^{14}\) Supra note 6.
\(^{15}\) Supra note 6.
\(^{16}\) Supra note 6.
\(^{17}\) Section 231 of the South African Constitution pertains to international agreements. Section 232 of the South African Constitution is titled “Customary International Law” and reads thus-“Customary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament.”
that is not along the lines of international law. The existence of such a provision makes it difficult to arrive at harmony between municipal law and international law. It seldom happens that a parliament will not act in consonance to binding international law commitments that the state has entered into. However, in situations where courts do enter into the interpretative rule, they can do a lot with it. This posits a challenge for advocates and it is of essence that they are made known of such cases.

**INDICATIONS OF THE WORLD CONSTITUTIONALISM PROCESS**

Presently, there are three trends in world constitutionalism process in international legal order that serve as indicators of constitutional processes:

1) The first trend lies in the increased “moralization” or “humanization” of international law. The growth in humanitarian intervention, for the most part, serves as principal support for this argument. Insofar as the constitutionalist perspective is concerned, interventions impose fundamental values of the international community against the unacceptable behaviour of its members. As Armin von Bogdandy so puts it, the constitutional approach culminates in the right to intervention. The bombing of Kosovo, for instance, was regarded by many as an important step to be taken in terms of the transition from a world of sovereign states towards a constitutionalized international order based on recognition of human rights.

2) The second trend can be described as the “differentiation” of international law and contains both vertical and horizontal aspects. The horizontal differentiation refers to complex phenomenon of the expansion in international law (i.e. increase of binding rules upon the subjects of international law, the multiplication of actors). This is on account of the phenomenon of globalization that has contributed substantially to the shifting of

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18 See Th. Meron, The Humanization of International Law, 2006. Moralization of international law in the 20th century began after World War I with the partial ban on the use of force and rudimentary attempts to protect human rights.


competencies to the international plane. The vertical aspect of differentiation, on the other hand, entails the issue of hierarchy in international law. Such hierarchy-generating elements in the international legal order are considered to be established *inter alia* as per the concept of *ius cogens*\(^{21}\) recognizing international crimes and by way of norms explicitly creating priority of some legal regimes over others like Article 103 of the United Nations. The hierarchy in international law is central to the world constitutionalism argument as the concept of one legal regime prevailing over another are classical principles of constitutional law.

3) The third trend stresses on the need for “parallel constitutions” that come into existence when individual states are only partly “in control” if the international legal structures they have created—whether they are by way of soft power or by legally obligating rules bound to give effect to decisions taken by international bodies.\(^{22}\) One such illustration for a parallel constitution is the field of international security that is found in the mandate of the Security Council, which takes up the role of a quasi-executive organ within the Charter context.\(^{23}\)

**INTERNATIONAL CONSTITUTIONAL LAW AS EMANATING FROM THE UN CHARTER OBJECTIVES**

The idea of international constitutional law emanated from the League of Nations. This notion of international constitutional law has later been imbibed by the United Nations as becomes obvious upon examination of the structure of the two organizations.\(^{24}\) The General Assembly is

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\(^{22}\) *Supra* note 1.


the League Assembly and the powers of the General Assembly, in comparison to that of the League Assembly have been somewhat restricted. The General Assembly’s powers of discussion under Article 10 of the Charter and succeeding articles are fully as broad and comprehensive as the League Assembly’s powers under Article 3, paragraph 3 of the Covenant. Only in respect of the making of recommendations has the power of the General Assembly been limited and this is in line with the practice that developed under the Covenant according to which the Council ordinarily dealt with disputes and organizations that endangered peace and understanding. The significant difference is that under the Charter the party, by its act can’t transfer the dispute from the Council to the Assembly, as was possible under Article 15, paragraph 9, of the Covenant. The Security Council is also very similar to the League Council with the only difference that the Security Council is a highly specialized organ.

Like the League of Nations, the United Nations is a “general international organ” in the sense that its functions and actions cover the whole range of matters of international concern. The Charter of the United Nations, in its general arrangement and substantive provisions, divides the major activities of the organization into three categories:

1) The maintenance of international peace and security by the pacific settlement of disputes and the taking of enforcement measures;
2) The promotion of international and economic co-operation;
3) The protection of the interests of the people of self-governing territories.

As is mentioned above, one of the major objectives for the establishment of the UN was the prevention of conflict and as is stated in the Charter of the United Nations, to “save succeeding generations from the scourge of war.” The ideal of the United Nations is to forestall conflict and resolve the tensions that cause and foster it and the United Nations has provided a forum to help avoid the apocalyptic conflicts threatened by the Cold War. The General Assembly also developed some leeway to address conflict when faced with Council deadlock under “Uniting for

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25 Id.
26 Supra note 24.
27 Supra note 24.
28 Supra note 24.
Peace” formula.  

After the end of the Cold War, the Security Council suggested that it would do more to prevent and limit conflicts, particularly those occurring primarily within state borders. The Cold War witnessed crisis particularly between the great powers or their surrogates and strategic ventures were prepared surreptitiously and in stealth. Despite this, the United Nations was able to improvise and develop specific instruments for preventive action.

1. **The Pacific Settlement of Disputes**

The Charter system for the pacific settlement of disputes, while differing from that of the League in many details of substance and phraseology, follows it in accepting two basic principles: 1) that parties to a dispute are in the first instance to seek a peaceful settlement by means of their own choice; 2) that the political organs of international organization are to intervene only when the dispute has become a threat to the peace, and then only in a mediatory or conciliatory capacity. Article 2 paragraph 3 mandates that the parties are to settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered. Under Article 34 paragraph 1, the parties to any dispute “the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all seek a situation, shall, first of all seek a solution by peaceful means of their own choice.” Furthermore, by the terms of Article 36 of the Statute of the Court, members may by declaration accept under certain conditions the compulsory jurisdiction of the Court. Declarations made by the Members of the United Nations accepting the compulsory jurisdiction of the Permanent Court of International Justice and still in force are declared to be accepted under this Article.

2. **International Economic and Social Cooperation**

The most important advancement of the Charter over the Covenant is to be found in its provisions defining the objectives, policy, machinery and procedure of international economic and social obligation. One important organizational difference between the League and United Nations system is that special needs as they arise should be addressed

30 *Supra* note 29, at 238.
31 *Supra* note 29, at 238.
by creation of appropriate autonomous organizations and these organizations subsequently should be brought into a relationship with each other and with the United Nations by organs empowered by it.

THE UNITED NATIONS CHARTER AS A CONSTITUTION FOR THE INTERNATIONAL COMMUNITY

The Charter of the United Nations was brought into existence in the form of an international treaty. All the same, it was felt that to place the Charter on equal footing as a treaty or on the same pedestal as other international accords would not be fair in consideration of the significance that this treaty has in consideration of its contribution especially insofar as postwar international law is concerned.\textsuperscript{32}

There have been a number of arguments that have been put forth to uphold the position that the Charter has had a constitutional quality \textit{ab initio}. For the last fifty years, the “constitutional predisposition” of the UN Charter has been affirmed to such a degree that at present, the can be synonymous to the constitution for international law. The nature of this Charter extends beyond the commonly accepted notion of the Charter as the “constituent treaty: of an international organization that is very distinct from all other treaties in that that is establishes permanent organs and additionally lays down the rules for their functioning.\textsuperscript{33}


\textsuperscript{33} Supra note 32.
CONCLUSION

This paper looks into the in trends in international constitutional law via indications of constitutional processes: first of all, the moralization of international law, for instance, via the ever expanding recognition of humanitarian intervention as a ultimate way by which human rights can be implemented; secondly, via the horizontal and vertical differentiation of international legal order; thirdly, the emergence of partial or parallel constitutions that accompany as well as percolate domestic constitutions.

The end of the 20th century witnessed the convergence of international law and constitutional law and this convergence has greatly helped to overcome the challenges of the century. Albeit there is no assurance as to the future, the success that has ensued post the imbibition of the principles in the liberal constitutions and in the United Nations Charter is very noteworthy.

The notion of international constitutional law, while it very much is contingent upon consent of member nations especially in the context of international organizations from which this concepts seems to emanate, the existence of the broad consensus upon purpose has not and does not necessarily mean that the member states have agreed upon all the issues. This, on the other hand means rather that there is a common willingness to use the instrumentalities of the organizations for accomplishing the mutual objectives or for accommodating the differences of policy.34

While international constitutional law as a concept has not by any means put an end to the dynamic of world politics, these organizations, the United Nations, in particular, have provided for new arenas in which the social and political forces of the world community contend for ascendancy.35 Needless to say, the policies of member states have imposed social and political forces have exerted force on the United Nations but international organizations have, like as in the case of the United Nations has altered the configuration of world politics, by prevailing over

34 Supra note 24, at 30.
35 Supra note 24, at 30.
the municipal law of these member states for accomplishing the objectives imbibed in its Charter.

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