

■ BOOK REVIEW

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Nicholas Tsagourias (ed.), *Transnational Constitutionalism – International and European Perspectives*, Cambridge University Press, 2007, ISBN 978-0-521-87204-1, xii +377 pp.

'I'm fixing a hole...' – the difficulties of backing findings of real phenomena with a comprehensive theory of constitutionalism

Using the terms 'constitution', 'constitutionalism' and 'constitutionalisation' and identifying related phenomena has become extremely fashionable over the last decade in European and international law – partly related to a scepticism towards the continuing existence of the classical sovereign state, partly claiming a 'new world order' established through international organisations and their founding documents, particularly the UN and its Charter¹, or at least a European constitution within the EU context formed by the EC and the EU treaties.² The problem, which this multi-contributory book, a result of the seventh EU/International Law Forum hosted by the School of Law at Bristol University, strives to tackle, is not only to find a workable definition of 'constitution', especially in an international context, and to find a common denominator of all the phenomena labelled 'constitution-building'³, but also not to jump on the train of 'constitutionalisation' too early and too easily⁴. The contributions assess, in a comprehensive manner, the elementary questions: whether a constitution is simply a document providing a certain structural order and institutional setting for a given society; whether it is the foundational norm setting up the requirements for the creation of further norms in a given legal system; whether it lays down values of importance for a community; or whether it is all of the above?⁵

The aim of the book is to contribute to a more analytical and less pathos-laden understanding of international constitutionalism,⁶ and to search 'for a sub-

1 B. Fassbender, 'The meaning of international constitutional law', *ibid.*, p. 321-328.

2 N. Tsagourias, 'Introduction – Constitutionalism: a theoretical roadmap', *ibid.*, p. 8; P. Eleftheriadis, 'The standing of states in the European Union', *ibid.*, p. 44 and 57 and R.A. Wessel, 'The multilevel constitution of European foreign relations', *ibid.*, p. 204.

3 W. Werner alludes to this problem in his contribution: 'The never-ending closure: constitutionalism and international law', *ibid.*, pp. 329-330.

4 This is rightly lamented by B. Fassbender, (n. 1), p. 310.

5 See e.g. R.A. Wessel, (n. 2), pp. 161-162 and B. Fassbender, (n. 1), pp. 307-321.

6 N. Tsagourias (n. 2), p. 7. See also B. Fassbender, (n. 1), p. 309: 'a certain demystification of the institution of the (etaist) constitution'.

discipline of public international law, namely *the constitutional law of the international community*'.⁷ The contributions choose various ways and add different perspectives to a blurry picture of constitutionalism. This is at the same time the appeal and the drawback of this book. It shows how opalescent the terms and phenomena of a constitution are, how difficult it is to pinpoint the exact meaning and draw the line between interesting developments in international law in general and developments which are interesting in particular because they hint towards a process of constitutionalisation, however defined. Already the introductory contribution, laying out a theoretical roadmap, falls sometimes in the trap of using malleable, flowery notions of 'thin' and 'thick' constitutionalism⁸ and a 'constitution-hardening process',⁹ instead of giving clear criteria for a 'constitution'. Also, some of the contributions, such as River's chapter on proportionality and discretion¹⁰ and Novitz's chapter on challenges to corporatism,¹¹ although interesting on their own account, have only a few references on the overall topic and hardly put their findings into the context of constitutionalism.

In a transnational context it is not obvious who has formed or should have formed the constituted community.¹² Several contributors address this question from a traditional state-centred approach in international law associated with the problem of the existence of a '*volonté générale*',¹³ using a rather formal understanding of constitution as a system for the allocation of powers, to an increasingly value-based system including citizens mainly in the European context.¹⁴

The authors of this book are not the first to approach constitutional questions, therefore all contributions are forced to revisit prior theories¹⁵ in order to build their analyses on a firm theoretical ground. At this stage it becomes clear that you can look at the picture through more than one constitutional lens. Presented on the transnational stage, depending on which lens the observer uses, the picture will look quite different. The book laudably attempts to not restrain itself to a narrow perspective; it encloses legal and socio-political accounts, scholars from the European as well as the international level, promoters and sceptics, and voices from different theoretical backgrounds such as Kelsenian, system theories, and Habermas. This is intended¹⁶ and is owed to the many facets of the topic;

7 B. Fassbender, (n. 1), p. 308.

8 N. Tsagourias (n. 2), p. 4.

9 N. Tsagourias (n. 2), p. 1.

10 J. Rivers, 'Proportionality and discretion in international and European law', *ibid.*, pp. 107-131.

11 T. Novitz, 'Challenges to international and European corporatism presented by deliberative trends in governance', *ibid.*, pp. 269-303.

12 N. Tsagourias, (n. 2), p. 6: 'lack of a demos in the international context'.

13 P. Capps, 'The rejection of the universal state', *ibid.*, p. 17-43.

14 R.A. Wessel, (n. 2), p. 161.

15 Grotius (pp. 26-27); Oppenheim (pp. 22-23); Kelsen (see pp. 157, 175 and 307); Verdross (p.161, pp. 315-316); Luhmann (p. 311-312, p. 365-366); Habermas (p. 272 et seq.); Allott (pp. 204, 309 and 330-331).

16 Foreword by M.D. Evans, p. X.

certain contradictions and frictions included. Nevertheless, the emphasis is clearly on the EU and the UN Charter, two systems which are naturally the most obvious in the context of transnational constitutionalism. The intention of encouraging 'cross-fertilisation' between EU lawyers and international lawyers, who have otherwise sometimes lost touch, is appealing. The two examples are well chosen, because constitutional characteristics are more pronounced than in any other international context. Still, deducing a comprehensive theory from a very special setting like the EU might become problematic. Its distinctiveness becomes clear in the comparison with the UN context throughout the book, identified mainly as the ability to exercise legal power, its strong 'subjectivised' character and the constitutionalised interaction and cooperation between Member States and EU.¹⁷ Sometimes, however, it is also too readily assumed that the EU has unique, non-state features (e.g.: a horizontal division of labour in all three branches of government can also be found in federalist nation states).¹⁸ Yet, interestingly, as different as the starting points and perspectives of the contributions are, there are certain common points that they all come back to, leading to the assumption that a common core notion could be conceivable no matter how blurry the edges are.

One of the recurring caveats is not to stick to the origins of constitutionalism in the context of a national state. This is because, as Tsagourias rightly states, many analyses are 'based on an abstract and ideal model of state constitutionalism which is not real, and secondly, they fail to appreciate the different dynamics in post-state spaces'.¹⁹ An international 'constitutional order must be understood as an autonomous concept rather than an extrapolation of national constitutional law. [...] its content depends on the specific tasks and responsibilities of the international community.'²⁰ Nevertheless, it becomes apparent that own national understandings of 'constitution' are not easily left aside. For example, when Eleftheriadis recurs – even if subconsciously – to the English understanding of institutional settings, and constitutional arrangements.²¹ Thus, the reader remains sceptical as to what extent an autonomous theory of 'constitutionalism' can evolve.

The book is divided into three sections ('States, courts and constitutional principles', 'Transnational constitutional interface' and 'Visions of international constitutionalism'), however, this does not add a typology of constitutionalism. The single aspects connected with transnational constitutionalism rather emerge throughout the various contributions as recurring themes. They assemble the picture of the elements of the idiosyncratic definition of 'transnational constitutionalism'. Tsagourias identifies them as the following, even if the contributions do not exactly match this list: '*pouvoir constituant*, normative and

17 See for example N. Tsagourias, 'The constitutional role of general principles of law in international and European jurisprudence', *ibid.*, p. 82-83.

18 Contrarily P. Eleftheriadis, (n. 2), p. 46.

19 N. Tsagourias (n. 2), p. 5.

20 B. Fassbender, (n. 1), p. 325.

21 P. Eleftheriadis, (n. 2), pp. 64 and 66.

constitutional principles, institutional settings, conditions of membership, exercise of political power, and the interface between the centres of power'.²² However, it does not become clear if this is an exhaustive list and why these were chosen. The recurring themes are namely: the question of hierarchy/heterarchy in international law and how a hierarchy created by a supreme body of law (be it *ius cogens*²³, the UN-Charter,²⁴ EU and EG treaties) can be reconciled with the basic idea of sovereign, equal nation states in international law.²⁵ Closely connected is the conceivable development from consensual to collective decision-making as a key to the formation of an 'international community' or 'non-contractual association', which is often seen as the basis for international constitution-building.²⁶ Many people revisit the role of general and fundamental principles (especially *ius cogens*) as substantive and structural premises that 'represent, define and explain the constitution of a polity'.²⁷ Questions of legitimacy and whether it can be secured by certain procedures,²⁸ derived from legitimacy within the member states, or must be self-contained²⁹ are of importance for a constitutional order, as is, the allocation of powers both between organs within a given international organisation³⁰ and between different actors within³¹ or outside³² an organisation. The nine contributions concerning specific topics are wound up by the very analytical and profound last two contributions, uttering visions of future constitutional development in the international sphere.³³

It becomes clear from this book that, although it is difficult to find a ready-cut definition, there exist recurring elements useful in order to identify and demarcate processes of 'constitutionalisation'. Some of them are well-known from national constitutional doctrine, but some of them are genuine in international contexts or claim more attention outside the national state. This book, despite its minor shortcomings, including concerns with clarity and structure, is a clear statement that there is a difference, that it is important to respect and identify this difference in order to further analyse elements and impacts that allow us to obtain a clearer picture. It also shows that it is important to deviate from the standard perception of a constitution as a single mono-level document in favour

22 N. Tsagourias, (n. 2), p. 2 and p. 9. See a bit differently W. Werner, (n. 3), p. 330.

23 W. Werner, (n. 3), p. 333.

24 Namely by Art. 103 and Art. 53 UN-Charter, see N.D. White, 'Hierarchy in organisations: regional bodies and the United Nations' *ibid.*, p. 141.

25 B. Fassbender, (n. 1), p. 317; W. Werner, (n. 3), p. 332; N. White, (n. 24), pp. 136 and 156-157.

26 P. Capps, (n. 13), pp. 17-19; P. Eleftheriadis, (n. 2), p. 45; B. Fassbender, (n. 1), p. 317; W. Werner, (n. 3), p. 333; R.A. Wessel, (n. 2), pp. 168-169.

27 N. Tsagourias, (n. 17), pp. 76-77 and 79.

28 T. Novitz, (n. 11), pp. 269 and 272-273.

29 N. Tsagourias, (n. 17), pp. 84-85 and N. White, (n.24), pp. 152-153.

30 N. Tsagourias, (n. 17), pp. 102-103 ('courts as law-makers').

31 P. Eleftheriadis, (n. 2), p. 46 and the whole chapter by R.A. Wessel, (n. 2).

32 Cf. the chapter by N. White, (n.24).

33 B. Fassbender, (n. 1), pp. 307-328 and W. Werner, (n. 3), pp. 329-367.

of constituting elements assembled from national, regional, and international documents.³⁴ Definitely it is a book that has the potential to kindle further discussions and give an overview of what has been reached so far.

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34 R.A. Wessel, (n. 2), pp.165-166 and N. White, (n. 34), p. 156.