

that it is not public law or public law-oriented diplomacy and international institutions that govern the world but the many private interests that have organized themselves into a global economy and operate outside the halls of diplomacy, treaty-making, and war. It is not an empire of international government we need to fear; instead, we need to be conscious of what I have sometimes called the empire of private law—the informal exercise of global power through the intermediaries of property and contract. These never emerged in the debates around the Holy Roman Empire or international law's traditional agenda; whatever the conceptual relationship in which sovereignty and international institutions are crafted, money will continue to rule us.

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Thomas Kleinlein. *Konstitutionalisierung im Völkerrecht. Konstruktion und Elemente einer idealistischen Völkerrechtslehre*

[Constitutionalization in Public International Law. Construction and Elements of an Idealist International Law]. Springer, 2012. 940 pages.

€149.95. ISBN: 9783642248832.

Christine E. J. Schwöbel. *Global Constitutionalism in International Legal Perspective*. Martinus Nijhoff Publishers, 2011. 205 pages. €99. ISBN: 9789004191150.

For quite a number of years legal scholars—the majority of them Germans—have been debating whether and how the needs of a globalized society are already or could potentially be met through a transformation of public (international) law. The investigation is well justified by the fact that law must follow the migration of power out of the nation

state in order to achieve its objective to regulate the exercise of public authority. From this perspective, international law can no longer be derived from legal arrangements made by nation states alone, but must be constitutional and global by its own means. This rationale promotes a search for sources of legitimacy beyond the state, for example from supranational organizations or the world society, and scopes of legality that justify the exercise of public authority even in cases when states are not directly involved, for instance in global economic agreements (*lex mercatoria*). Thus, the usefulness of the endeavor to inquire into a global constitutional law is largely unquestioned. Yet, the progress which has been made so far must be scrutinized critically. Albeit the participants in the debate have coined their different projects promisingly by advertising the emergence of, for example, “global administrative law,” “constitutionalism (or constitution or constitutionalization) beyond the nation state,” or “global constitutionalism,” among others, and although numerous suggestions have been made as to how to address the problems at hand, concerted results are still missing. It rather seems that the first wave of these scholarly efforts raises more questions than it gives answers.

Neither is there any reason, however, to belittle the exertions which have been made so far, nor should one underestimate problems which are inevitably associated with the enterprise of conceptualizing constitutional law that is ultimately disconnected from its origin, the nation state. How can there be constitutionalism without the nation state? What kind of political body is constituted, if any? Who constitutes it? Do we already see realizations of a constitution beyond the nation state, for example in the UN Charter, or are we rather witnessing a process of constitutionalization? And shall we be pragmatic by conceding that the normative weight of nation-state constitutionalism will necessarily be lost in the process of globalization, or do we need to stand up to the well-reasoned argument that constitutions oblige only those who have consented to them? Many authors who have taken part in the debate so far deliberately took their own

starting points and argued for their views and projects without caring too much about other approaches. The current result of this debate is a broad but fragmentary coverage of the field of global constitutionalism with loose ends and omissions.

Thomas Kleinlein and Christine Schwöbel take a more reflective approach in their doctoral dissertations. Both take the position of observers of the hitherto existing debates and emphasize the need to structure the field. This naturally implies more relativity with respect to the subject and ends in both cases in the plea for a more discursive understanding of constitutional matters. Moreover, they also share the conviction that the history of law is a relevant source for analyzing the future, albeit their excursions into this subject differ substantially in depth.

On more than 700 pages Thomas Kleinlein's book on "Konstitutionalisierung im Völkerrecht" [Constitutionalisation in Public International Law] unfolds almost encyclopedically the doctrinal and practical history of elements of constitutionalization in public international law. The book is made up of four parts. The introduction aims at reconstructing the fundamental thesis that constitutionalization is indeed an ongoing process in international law. The author finalizes his investigation by stating that, empirically, two phenomena justify the discourse on constitutionalization, namely the autonomization of international law, on the one hand, and the transfer of constitutional functions out of state law into the international realm, on the other (see p. 93). Kleinlein concludes that autonomization leads to an understanding of international public law as a system of values ("Wertordnung"), but argues also that some further enquiry into its meaning is needed. The observation of an increasing adoption of constitutional functions by international law and institutions falls into line with the concepts of "multi-level constitutionalism" and "compensatory constitutionalism", i.e., the idea that constitutional functions are located on different regional levels. In this view, the constitutional character of

international law coexists side by side with nation states' constitutions, and global constitutionalism then is a whole made up of distinct parts. Kleinlein reasons that three aspects need further clarification: the concept of "constitution" and its possible transfer to the international sphere (section 2); a search for justification of the constitutionalization thesis in the dogmatic heritage of international public law (section 3); and an examination of the nature and range that the system of values of international law can possibly have (section 4).

The second part is devoted to presuppositions and predecessors of constitutionalism in the international realm. It starts off with a short investigation of the history of ancient to modern constitutional thinking followed by a critical assessment of the dominantly German postulate that a constitution requires a state. This step is crucial because Kleinlein's whole argumentation ultimately hinges on the proof that constitutionalism can be detached from statehood. It is mainly against Dieter Grimm that Kleinlein argues that a constitution neither needs to be related to a concentrated public power in a given territory since power is also fragmented in federal states (p. 154). Nor should one neglect that the emphasis German constitutional thinking puts on the revolutionary act of constituting a democratic state makes a norm out of an exception (p. 155). Despite all his efforts to battle for the separation of state and constitution, he finally concedes, as rightfully as—considering his previous argument—surprisingly, that the question whether the normative link between state and constitution is dispensable ultimately depends on the particular concept of constitutionalism which is being favored. Similarly relative is Kleinlein's outlook after the following 150 pages in which he reflects on the history of constitutionalism in the European teaching on constitutionalism in international law (he focuses on Kelsen, Lauterpacht, Verdross, and Scelle) and in natural law and enlightenment: "[c]ontinuity and change" (p. 311) according

to the author characterize the ideal-universal conception of international public law. Indeed, history shows that domestic analogies have a long tradition when it comes to asserting the obligatory character of international law. But progress has also been made, especially by Kant. It is his merit to have shifted the focus from the product “constitution” to the process of “constitutionalization” of public law (pp. 304 *et seq.*). Kleinlein follows the path of proceduralism Kant opened up and for which Habermas stands nowadays by his finding that contract can be overcome by discourse and that therefore the deliberative aspects should gain momentum in constitutional reasoning beyond the nation state.

The third part of the book addresses doctrinal elaborations of constitutionalism in international law and confronts those with empirical developments. Three main issues are covered: the question of hierarchy (fundamental norms, *erga omnes* norms, *ius cogens*, UN Charter), the objectivity and universality of international law with respect to the protection of public goods, and the exercise of public authority. The analysis shows that the development of legal doctrine does not keep up with legal practice. Empirically, one finds phenomena towards autonomization of international law; however, the doctrinal evolution does not reflect those tendencies yet. Although Kleinlein finds selective theoretical reflections on international public law norms, he criticizes the lack of their coherent and homogenous categorization. *Ius cogens* and *erga omnes* are “zu beschränkt, um die vielfältigen und komplexen Fragen zu regeln, die sich der internationalen Ordnung stellen” (too limited to regulate the diverse and complex questions the international order is confronted with) (p. 337); the protection of global public goods is neither sufficiently theoretically grounded, nor are general criteria available to extend the validity of existing treaties to the transnational sphere (p. 508); and, in spite of some developments in international public law norms, generally discursive processes have not found a substantive reflection in the doctrinal development so far (p. 615).

In the last section of his book, Kleinlein speaks out for a pluralist conception of constitutional law beyond the state. This is a stringent extrapolation of the arguments presented so far. If constitutionalism will not be reduced to mere rhetoric, a synthetic concept of a formal constitution must be abandoned. The doctrinal evolution of constitutional thinking in international law should integrate the diversity of changes which have taken place, and therefore an “open, pluralist and discursive” (p. 686) understanding should be applied. For Kleinlein, the future of international constitutionalism is not the constitutionalization *of*, but *in*, international law.

Christine Schwöbel’s doctoral dissertation on “Global Constitutionalism in International Legal Perspective” is concentrated into a 200-page book on a similar subject. It “critically examines public international law contributions to the debate on global constitutionalism” (p. 1). Schwöbel starts by identifying the main dimensions of global constitutionalism in public international law. She takes the position that neither global constitution nor global constitutionalism is predefined and that global constitutionalism should rather be considered “a terrain of debate” (p. 11). The widespread discussion nevertheless shows some common key themes: limitation and institutionalization of power, idealism, standard-setting, and protection of individual rights (p. 42). Depending on how these questions are answered in the different contributions, four distinct strands can be identified: “Social Constitutionalism (emphasising coexistence); Institutional Constitutionalism (emphasising governance through institutions); Normative Constitutionalism (emphasising specific constitutional norms); and finally Analogical Constitutionalism (emphasising analogies to domestic and regional constitutionalism)” (p. 13).

In Chapter 2, the author presents a historical analysis of key themes of global constitutionalism. In somewhat more than 30 pages she covers legal history from the Greeks up to post-modernity, that is, more than

2400 years. She anticipates self-critically that she could be blamed for over-compression. It remains indeed unclear why she nevertheless chose to take the risk. The yield of the chapter is rather small and a bit puzzling; the key themes, which have been applied in Chapter 1 already, run as a thread through history (cf. p. 85); and moreover there are “three common assumptions of global constitutionalism” which are not “key themes” (p. 86). Those are the ideas: “(1) that constitutions can exist beyond the nation State, (2) that there is minimum unity/homogeneity evident in the international sphere and (3) that the idea of global constitutionalism itself is universal” (p. 86).

What then is the contribution of public international law to the debate on global constitutionalism? Schwöbel investigates the contributions, made by the theoretical approaches of global constitutionalism she had identified, to the key themes named above. Societal constitutionalism brings “concerns about participation, influence, and accountability” (p. 3) to our attention; institutional constitutionalism concentrates on the allocation of power in the international realm; normative constitutionalism focuses on the potential of a common value system; and analogical constitutionalism identifies “constitutional principles of certain legal orders . . . and describe[s] parallel principles in the international sphere” (p. 43). Nevertheless, she concludes that all of them also have distinct shortcomings: social constitutionalism “is susceptible to a concentration of power in a single locus”; institutional constitutionalism “is in the spotlight for not taking fragmentation and hegemonic tendencies in international law into account”; normative constitutionalism shows a “self-legitimation nature”; and analogical constitutionalism “is criticised for being open to the possibility of glossing over the particularities of the international sphere” (p. 131). Should one therefore give up the idea altogether?

The final chapters reject this possibility. Instead, Schwöbel argues for a reorientation of the debate or, more precisely, for the proj-

ect of “organic global constitutionalism.” By applying ideas of Tully, Habermas, Derrida, and Laclau, she proposes to understand constitutionalism as an ongoing process, to politicize the discourse, to see it as a promise for the future, and to take a notion of it as a “negative universal.” The latter transfers Laclau’s thoughts on the relation between universality and particularity to the field of constitutionalism. Laclau argues that if particularity is merely understood as something in relation to universality, both—universality and particularity—are conceptualized as having a common ground. The problem with this is that the shared origins prevent true emancipation, since the common ground cannot be abandoned, and the particular which is seeking emancipation remains tied to the universal it wants to escape. The commonality therefore must be defined as negative—one denies the other, and this “negative universal is forever changing, organic, since the relation between the universal and the particular is defined through the respective antagonism; and the respective social antagonisms are always particular” (p. 160). Transferring this to global constitutionalism means understanding it as an “empty space”: “Global constitutionalism has no content of its own; it has no predetermined values that it is based on and it has no common principles” (p. 160).

After theoretically elaborating these ideas, the final chapter takes a short “practical approach” (pp. 167 *et seq.*) and looks at applications of the different approaches to selected cases. The idea of societal constitutionalism, for example, is tested on the case of democratization in Iraq (p. 177), and ideas of institutional constitutionalism are confronted with practices of the UN (pp. 181 *et seq.*). Schwöbel comes to the conclusion that “[t]he limitations of the contemporary debate are manifested in the fact that it leaves the aspects of process, politics, and flexibility in the dark; in suggesting an organic approach, I would like to cast some light on these neglected aspects.” (p. 167)

All in all, the debate on global constitutionalism enters a new round with

the two books reviewed here. Both are worthwhile reading and, despite considerable differences in their methodology and courses of argumentation, they also share some shortcomings and achievements. While Kleinlein's approach is driven by the motive to cover every single subject in detail, which makes the book somewhat lengthy, Schwöbel is short and concise, yet at the price of some oversimplification. More importantly, however, both authors deserve credit for their sharp arguments, intellectual approach, and their courage to take a more reflexive point of view on the process of global constitutionalization.

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David Armitage, *Foundations of Modern International Thought*. Cambridge: Cambridge University Press, 2013. Pp. xii + 300. £17.99. ISBN: 9780521001694.

With *Foundations of Modern International Thought* Harvard historian David Armitage presents the main outcomes of his research in “international intellectual history” he has undertaken since the acclaimed *The Ideological Origins of the British Empire*, published in 2000. *Foundations* consists of a collection of essays principally dealing, from the perspective of contextual history, with the international law and relations theories of classical political writers such as Thomas Hobbes, John Locke, Edmund Burke and Jeremy Bentham. While these authors are mostly remembered for their work on domestic law and politics, Armitage focuses on demonstrating their importance for the history of international thought, thereby rejecting any neat separation between internal and international affairs.

The book does not entirely meet the expectations of readers accustomed to the brilliant and coordinated historical narrative of Armitage's previous writings. While it is a piece of well-argued scholarship and reasserts powerful claims, notably the call for internationalizing and globalizing history, it does not represent a newly designed, sweeping, provoking or methodologically engaging history of the international. Rather, as Armitage himself states in the opening lines, *Foundations* stands “as a partial record” of the recent developments of international intellectual history and as “an inspiration for international intellectual historians in the future” (p. 1).

The word *Foundations* that stands out in the title should not mislead the reader into comparing Armitage's book with Quentin Skinner's wide-ranging work on the history of political thought.¹ Armitage himself warns against any such comparison and makes “no implicit claim exhaustively or comprehensively to excavate all the basic elements which went into the making of modern international thought” (p. 8). In the same vein he states that his book “does not attempt to replace earlier narratives with any one point of origin or single continuous, unfolding tradition of discussion” (p. 13). Rather, Armitage submits, without further elaborating, that his central aim is to “question conventional narratives” by means of a “critical” examination of canonical early-modern scholarship (ibid.). That he is not searching for the “beginning” of the international is confirmed by the fact that his exposition of early-modern international thought does not go as far as to make a case for Hobbes, Locke, Burke and Bentham as providers of founding principles of modern international thought. Armitage only proves that some of those writers' reflections have been relevant, some more some less, for the history of the international. If this is the case, though, it is not clear why the term *Foundations* had to appear in the title, especially in times in which it is undergoing critical scrutiny by its former users themselves. Talking about *Foundations*

¹ Quentin Skinner, *The Foundations of Modern Political Thought* (2 vols, 1978).