CAN INTERNATIONAL LAW BE ‘CONSTITUTIONALIZED’?

Karl Zemanek

Introduction

In his entry on the methodology of international law in the Encyclopaedia of Public International Law Christian Dominicé stated that ‘empirical observation and logical reasoning are the two methods which, when coordinated, allow us to analyse the international legal order and to explain its characteristics’.\(^1\) And of the empirical observation he wrote that ‘…there is a sort of collective opinio iuris, a conviction that international law exists and that States could not do without it. There is no need to seek a theoretical foundation to justify this assertion, which results from a mere observation of reality and is expressed by the maxim ubi societas ibi ius’.\(^2\) I agree with that and I cannot think of a better way to honour Christian than by contributing an enquiry into the newest academic trend to found international law on a constitution, more precisely on the Charter of the United Nations as constitution of the international community.

The academic discourse on the fundamentals of international law has its fashions and since some years ‘constitutionalizing’ the United Nations or, more recently, the international community as such, is all the rage. Last year no less than three books addressing the subject were published, or more correctly, have come to my knowledge. Two are collective works: J. Klabbers, A. Peters, G. Ulfstein, The Constitutionalization of International Law; J.L. Dunoff & J.P. Trachtman (eds), Ruling the World? Constitutionalism, International Law and Global Governance; and one is a monograph by B. Fassbender, The United Nations Charter as the Constitution of the International Community.

Fassbender invokes Alfred Verdross as one of the fathers of the concept.\(^3\) This is in his case true, as will be shown later. But as a general

---

\(^2\) Ibid.
proposition it stretches the implied affinity too far. Compared with what some contemporary international constitutional theories postulate,⁴ the similarity ends in most cases at the use of the term. Verdross intended to demonstrate in Die Verfassung der Völkerrechtsgemeinschaft (The Constitution of the International Legal Community), published in 1926, that international law was not a random accumulation of unconnected rules of international conduct but was integrated in one basic order which had evolved through custom. Although Verdross called this a constitution in the material sense,⁵ Suy has rightly observed⁶ that Verdross actually used Kelsen’s definition of a constitution as being the body of rules concerning the functions of law creation and law enforcement. The second conceptual root was Verdross’ monism which he had developed in Die Einheit des rechtlichen Weltbildes (The unified universal conception of law) in 1923. In explaining why international law was binding on States, he defended the universalistic conception of international law as law of the international community, in contrast to the view that States, while the may consent to international rules of conduct, remained the masters of these rules.

But Verdross did not, as most modern constitutionalists do, propose that regarding international law in a constitutional perspective had special consequences for its interpretation or application. In a headnote to the programmatic foreword of the Verfassung he stated: ‘Je ne propose rien, j’expose.’

In the 1930s the question of whether the international legal community had a constitution did not arouse much academic interest, though there were also a few others who used the term.⁷ It was only after the Charter of the United Nations came into being and the organization achieved quasi-universality that academics began suggesting that the Charter had become the constitution of the international community. Verdross was again in the forefront,⁸ though he cautiously referred to it as a ‘tendency’.⁹

---

⁴ See infra, next section.
⁵ Part of the relevant German text has been translated by Fassbender (supra note 3), p. 29.
⁷ Suy, ibid. mentions G. Scelle, G. Schwarzenberger, C.W. Jenks and M. Hauriou, though they gave the term their own meaning.
⁸ In the 5th edition of his Völkerrecht, 136 (1964).
⁹ See the English translation of the relevant passage in Fassbender (note 3), 30.