ELUSIVE COHERENCE IN INTERNATIONAL LAW AND INSTITUTIONS: THE LABOUR – TRADE DEBATE

Friedl Weiss*

1. INTRODUCTION

In his most recent and monumentally learned tome on “International Economic Law in the 21st Century”, Petersmann, the honoree of this global Festschrift, takes a professional lifetime’s expert look at International Economic Law (IEL). His comprehensive health check begins with the diagnosis of crisis, in fact serial “constitutional failures”. But it ends, refreshingly upbeat, with a number of questions and remedial recommendations – European multilevel constitutionalism as a globally exportable public good – as well as with suggestions for further research.1

Petersmann’s streetcar named “constitutionalism” elegantly circumnavigates all debris on the road strewn about with fragments of multilevel regulatory boulders. In reality though, humanity’s systems and orders – socio-economic, political, legal – are not “naturally” coherent. They rather reflect crafted differentiation, resulting from the diversification of human interests.2 Inevitably, therefore, conflicts between them arise from time to time. But who can be trusted to sweep the road, as it were, or build the bridges? Pallas Athenian-like symbolically blindfolded yet enlightened adjudicators?

What is essentially at stake may be gleaned from the following anecdotal partial rerun of the trade-labour tale.

1.1. The Issue

The labour–trade debate is not new.3 It was already embedded in the dense web of trade and investment relations following the industrial revolution, but vanished with them when they were torn up by wars and protectionism between 1914 and

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* University of Vienna.
1945. In the wake of the Russian revolution acute concerns about appalling labour conditions prompted multilateral institutional responses. The Covenant of the League of Nations aimed “to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend”. More particularly, the Constitution of the International Labour Organization (ILO) was devoted to peace through social justice.

After World War II the debate resurfaced first amongst contracting parties to the General Agreement on Tariffs and Trade (GATT) and was continued, on and off, by some Members of the World Trade Organization (WTO), who favoured sanctioning breaches of core international labour standards by invoking them as a defence to their otherwise illegal trade restrictions.

1.2. The Context

Amidst all the gloom and doom, the talk of crisis or collapse of this or that human edifice, system or socio-economic construct, including most recently the much debated fragmentation of international law and of its sub-systems, we are also witnessing countervailing tendencies and discourses: on “constitutionalism”, on common values, mechanisms of solidarity, on public goods, including strategies for connecting the apparently disparate epistemic communities of trade and labour.

1.2.1. Metaphorical “Universals”

From time to time metaphorical notions are emerging in the discourses of international law and relations which have an evocative, visionary or programmatic, even mobilizing appeal, but may lack normative quality. Thus, astronauts became “envoys of mankind”, resources of the deep seabed floor beyond national jurisdiction the “common heritage of mankind”, at any rate during the period of the so-called New International Economic Order (NIEO), proclaimed in the 1970s. Previously though yet others, such as pirates considered “hostes generis humani”, were destined to acquire normative characteristics, guiding the conduct of states.

More recently, governance discourse has become riddled with integrative principles such as “sustainable development” integrating the public values of human

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4 Article 23 (a) Covenant of the League of Nations.