
In a previous book¹ and several articles² Fassbender has developed a comprehensive theory of international constitutionalism which he now presents in consolidated form in this book. Based on the UN Charter, the theory is intended to apply to the international legal order as a whole. In five chapters the book describes and analyses the dogmatic roots and the conceptual elements of international constitutionalism. In a sixth, Fassbender examines some of the consequences which ensue from his constitutional view of the Charter. Most useful is a synopsis at the end of the book (pp. 173-187) which facilitates recourse to detailed arguments in the full text, if one wants to check a particular point.

International constitutionalism endeavours to explain the international system in constitutional terms. Yet constitutionalists find it sometimes difficult to formulate a coherent theory based on the facts of that system and transform them into an idealized version or propose to remodel the system altogether to fit their theory. Fassbender has chosen a different way. He constructs his theory around a minimal normative definition of a constitution as ‘a set of fundamental norms about the organization and performance of governmental functions in a community, and the relationship between the government and those who are governed’ (p. 83). In support of that choice he argues:

To regard the Charter as the constitution of the international community does not mean to equate it with a national constitution, or the constitution of a highly integrated regional body of states like the European Union. The constitutional idea in international law must be understood as an autonomous concept rather than an extrapolation from domestic constitutional law. (p. 170, emphasis added)

That does, however, not explain why the ‘autonomous concept’ must depend on a normative definition. A formal definition may facilitate the formulation of a conclusive theory, but it does not provide substantive parameters for measuring the ‘constitutionalization’ of the community governed by the constitution. Hence, when he needs a reference model for evaluating the constitutional characteristics of the Charter (pp. 86-115; synopsis pp. 178-180), Fassbender imports an ‘ideal type’ of constitution according to the methodology of Max Weber’ (p. 83), but does not elaborate on why and how an external substantive reference model fits in a normative theory. Nor is it made plain why the reference model omits standards to assess the rule of law in the UN. One would have imagined that the lack of institutional safeguards which ensure that the principal political organs of the UN act in conformity with the Charter, and of institutional accountability if they do not, might merit serious consideration. To dismiss, for instance, the absence of judicial control in the UN with only the curt remark that ‘[…] only a minority of states possessing constitutional systems of government has established courts with such sweeping powers of judicial review’ (pp. 99-100), does not justice to the problem, especially by an author who defends an ‘autonomous’ concept.

When comparing the real UN with the parameters of the reference model, Fassbender resorts sometimes to abstract generalities or axiomatic statements concerning conditions in the world organization, like ‘[t]he international community is a community based on an agreement on a limited set of fundamental values. That is all the ‘homogeneity’ which is needed’ (p. 73). This is certainly true in a normative sense, but says nothing about the extent to which the members of the community share not only the notion of the values but have a common understanding of their substance. Apodictic statements of this sort gloss over the controversies which divide the members of the international community when it comes to establishing the meaning of the principles that express the fundamental values on which they are supposedly ‘agreed’. Quite apart from the fact that some of these principles are contradictory, like justice and the prohibition to use force, or territorial integrity and self-determination.

Fassbender sees the purpose of constitutionalism in replacing the old paradigm which grounded international law on the sovereign state with its original, natural, and therefore unlimited legal powers by a new one of a community whose fundamental rules must be honoured by every member of that community (p. 8).

This ‘constitutionalization of international law’ is truly in line with an ‘understanding of international law in which no longer states are the ultimate point of reference, but the international community’. (p. 55).

Although he admits that ‘labeling the Charter a ‘constitution’ alone does not make the world a better place’ (p. 171), he nevertheless continues: