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ARTICLES

Kelsen, Schmitt, Arendt, and the Possibilities of Constitutionalization in (International) Law: Introduction

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It is tempting to introduce this special section in an apologetic tone. Has not enough been written, in recent years, on constitutionalization, that new phenomenon and term which has recently entered the world of politics and law,[1] closely related to global constitutionalism, to constitutionalism in international law?[2] And is there really a need to publish another three articles on Hans Kelsen, Carl Schmitt, and Hannah Arendt, instead of highlighting new faces and frames of thought in international law and its theory?

But no apologies. *Au contraire.* This special section, bringing together three articles on three modernist thinkers of the twentieth century and a current issue of international legal discourse at the beginning of the twenty-first, offers a fresh perspective on theory of and in international law.[3] Or, more precisely, it brings together a variety of perspectives, of theoretical approaches to one of the greatest practical questions and challenges in today's (international) law: 'the attempt to subject the exercise of all types of public power, whatever the medium of its exercise, to the discipline of constitutional procedures and norms'.[4]

At the core of this inquiry into constitutionalization lies, as so often, a question, or merely a quest: a profound uneasiness regarding the realities of a pragmatic 'muddling through' in international law,[5] and an uneasiness regarding sometimes

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1 For a sceptical reflection on the concept of constitutionalization, see M. Loughlin, 'What is Constitutionalisation?', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (2010), 47.

2 See, most recently, J. L. Dunoff and J. P. Trachtmann (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009); J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009); B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009).

3 The papers in this symposium were originally presented at the workshop 'Kelsen Schmitt Arendt and the Possibilities of (International) Law: Part I, Constitutionalisation', Simon Dubnow Institute for Jewish History and Culture at the University of Leipzig, 11–12 June 2009 – the first part of a trans-European workshop series on (the role of) theory in international law. For a detailed and thoughtful workshop report, critically engaging with the papers published here, see I. Ley, 'Which Role for Theory in International Law?', 11 *German Law Journal* (2010, forthcoming).

4 Loughlin, *supra* note 1, at 47.

5 Examples of such 'muddling through' are to be found in M. Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy', in Koskenniemi, *International Law Aspects of the European Union* (1998), 27. For a critique of new forms of managerialism as current reconfigurations of such indeterminacy, see

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rather non-pragmatic 'critical' attitudes within the discipline, where reflection at times seems to be cultivated at the expense of action.[6] The three contributions in this special section re-engage theory from diverse perspectives, thereby creating a forum for an even broader variety of voices and positions, for Crits and Postcrits, Kelsenians, and Arendtians of various denominations, Schmittians and Schmittists,[7] ironic idealists, idealistic and enlightened pragmatists, formalists, neo-formalists, and reflexive formalists, sincere black-letter lawyers, classical legal philosophers, and even scholars from various domestic public-law traditions. The attempt to include these last should not come as a surprise, given that a 'holistic view towards public law' – including the administrative and international alongside the constitutional – is probably the most fruitful response to the blurring of disciplinary lines currently on offer.[8] Approaching our theme from the perspectives of an international lawyer and theorist of international law engaging Hans Kelsen (Kammerhofer), of a public lawyer and legal philosopher discussing Carl Schmitt (Augsberg), and of a political theorist reconstructing the legal thought of Hannah Arendt (Volk), the articles of this special section provide an intellectual laboratory in which to reflect current questions of (international) law against the backdrop of the thought of three 'classics' of modernity.

But why Kelsen, Schmitt, and Arendt? Hans Kelsen, Carl Schmitt, and Hannah Arendt hold an important place in twentieth-century intellectual history. With their intellectual roots in the closely interconnected and yet so different cultural milieus of Weimar and Vienna in the 1920s, each of them has developed a unique and influential approach to scholarly analysis and critique. As much as their theoretical approaches differ, their role in modern thought continues to be the subject of countless explorations in the history of ideas. Their personal history resonates in their thought. Apparently, as so often in international law, history and theory are closely intertwined,[9] in the biographies of the exiles Kelsen and Arendt as well as in that of Carl Schmitt. Kelsen, Schmitt, and Arendt witnessed the 'disintegration of European civilization itself'[10] as well as the emergence of the new global order

M. Koskenniemi, 'The Politics of International Law – Twenty Years Later', (2009) 20 EJIL 7. Yet a 'muddling through' can also be reflected in a deliberately situational and volatile theoretical approach: 'Wir gleichen Seeleuten auf ununterbrochener Fahrt, und jedes Buch kann nicht mehr als ein Logbuch sein.' C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte* (1941), II, paraphrasing E. Jünger, *Das abenteuerliche Herz* (1929), 201.

6 See, e.g., for a critique, F. F. Hoffmann, 'Gentle Civilizer Decayed? Moving (beyond) International Law' (review article on Anthony Carty, *Philosophy of International Law* (2007)), (2009) 72 *Modern Law Review* 1016.

7 On that differentiation see R. Mehring, 'Otto Kirchheimer und der Links-Schmittismus', in R. Voigt (ed.), *Der Staat des Dezisionismus. Carl Schmitt in der internationalen Debatte* (2007), 60, at 60–2.

8 See J. H. H. Weiler, 'Editorial: Passing the Baton – a Manifesto', (2010) 8 *International Journal of Constitutional Law* 1, at 2.

9 A. Kemmerer, 'The Turning Aside: On International Law and Its History', in R. M. Bratspies and R. A. Miller (eds.), *Progress in International Law* (2008), 71; M. Craven, M. Fitzmaurice, and M. Vogiatzi (eds.), *Time, History and International Law* (2007).

10 W. Friedmann, 'The Disintegration of European Civilization and the Future of International Law', (1938) 11 *Modern Law Review* 194. The subsequent years were indeed 'to morality what the supercollider is to physics: extreme moral experiences and observations emerged out of the high-energy clashes'. A. Margalit, *On Compromise and Rotten Compromise* (2009), 96.

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after 1945.[11] They all witnessed the end of the classical nation-state and the early stages of the very reconfigurations of (international) law and politics that prompted current processes of constitutionalization, but responded to that experience in very different ways; Kelsen applied, in his later writings, his Pure Theory of Law as a tool of critique to advance the legal structure of a global order;[12] Schmitt continued, after his entanglement with fascism and the end of his academic career, a sharp antimodernist critique of international law and its institutionalization that set forth his earlier thought; Arendt, describing the failure of the nation-state and the aporias and perplexities of human rights, advanced a revirement of the (national) political community by creating a space for political action. Yet, in addition to their historical relevance and their contributions to the discourse of their times, each has also inspired contemporary debates on the nature and purpose of (international) law. By drawing from these debates, the contributors to this special section successfully avoid biographical short cuts and simplifications. The respective theoretical frameworks of the three protagonists are used as a spectral glass through which to throw new light on practical questions that inform contemporary debates.

For anyone reassessing the relationship between law and politics from an international perspective, Kelsen, Schmitt, and Arendt's oeuvres contain an enormous intellectual potential. Their quest for an answer to the question of the potential and limits of legalism in an antagonistic political environment is at the heart of their individual projects. All three of them are radically modernist thinkers, consciously and unconsciously revealing the inherent limits of legal modernity. As we set out on a critical self-reflection on our professional practices, the ambivalent and stimulating writings of these three classics provide as much the tools as a catalytic surface for a critical reassessment of international law. Their cross-cutting reflections, encompassing and at the same time connecting law and politics, history and theory, unveil the tensions between modern and postmodern, universal and relativist, deconstructivist and constructive approaches.

Not only do the articles by Jörg Kammerhofer, Ino Augsberg, and Christian Volk exploit these tensions, they are such cross-cutting reflections in their own right, each in its own particular way. All three pieces take up the issue of constitutionalization – the phenomenon as well as the concept. Constitutional scholarship has grown and changed substantially in recent years, and there are more transformations, developments, and challenges to come. Between past and future, we find ourselves on new sub-national, transnational, supra-national and international sites of constitutional government. In the rather fragmented debate about a 'constitutionalization of international law', in all its variations, the United Nations and its Charter are often viewed through constitutional lenses.[13] Comparative constitutionalism observes a

11 These origins are now revisited in M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009).
12 See J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in International Law* (2010).
13 For recent literature see *supra* note 2.

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'migration of constitutional ideas'[14] as well as phenomena of 'constitutional borrowing'[15] or 'constitutional absorption'.[16] Since the early 1980s, the European constitutional narrative slowly paved the way for the institutionalization of its vision of the *grand projet* of European integration. And even after the pragmatic repackaging into the Lisbon Treaty of the Treaty Establishing a Constitution for Europe, European constitutionalism will remain more than just an ambition.[17]

But what kind of constitutionalization(s), what kind of constitutionalism(s) are we actually talking about?[18] Constitutionalization can be a rupture, a new beginning, the politicization of law. But it can also limit government power by a juridification of politics.[19] The ambiguity of the term 'constitution' is notorious. Is it a norm, a document, a function? a political condition? It is all of these, and more. While constitutionalism does operate in areas beyond the state, classical (federal) state constitutionalism often remains the conceptual blueprint and the normative yardstick for all comparisons. However, there seems to be a remarkable incoherence: Europe's (as international law's) constitutional principles are rooted in a contextual framework that is altogether different. As a pluralist system of constitutional heterarchy,[20] the EU inspires (and requires) from all its legal and political actors, on all levels, the virtue of constitutional tolerance.[21] In a constellation of polities transcending the nation-state,[22] at the core of all constitutionalisms still lies the paradox of the relation between constituent power and constitutional form, politics and law.[23] There remains the old and ever more salient question of how to balance democracy and rights. A rethinking of the building blocks of democracy is required,[24] as is institutional creativity, as the debate's centre of gravitation has shifted from

14 S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2006).

15 Symposium issue on 'constitutional borrowing', (2003) 1 *International Journal of Constitutional Law* 177; S. Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law', in Choudhry, *supra* note 14, 1, at 20–1; N. Tebbe and R. L. Tsai, 'Constitutional Borrowing', (2010) 108 *Michigan Law Review* 459.

16 D. Halberstam and E. Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', (2009) 46 *Common Market Law Review* 13, at 24.

17 N. Walker, 'Reframing EU Constitutionalism', in Dunoff and Trachtmann, *supra* note 2, 149; I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', (2009) 15 *Columbia Journal of European Law* 349.

18 M. Avbelj, 'Questioning EU Constitutionalisms', (2008) 9 *German Law Journal* 1; I. Ley, Kant *versus* Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich', (2009) 69 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 317; D. Halberstam, 'Local, Global, and Plural Constitutionalism: Europe Meets the World', in G. de Búrca and J. H. H. Weiler (eds.), *The Worlds of European Constitutionalism* (forthcoming).

19 See, on these two constitutional traditions and drawing substantially from the thought of Hannah Arendt, C. Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation', in A. v. Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (2009), 169.

20 D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in Dunoff and Trachtmann, *supra* note 2, 326; M. Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in Dunoff and Trachtmann, *supra* note 2, 356.

21 J. H. H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in J. H. H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (2003), 7; see also J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (1999).

22 Some authors would simply label that constellation as 'postnational', bypassing the lasting presence and importance of the 'national', as stressed in S. Sassen, *Territory – Authority – Rights* (2006).

23 M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007).

24 J. H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547; E. Stein, 'International Integration and Democracy: No Love at First Sight', (2001) 95 AJIL 489.

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how constitutions ought to be interpreted to which institutions ought to take the lead in such interpretation. Courts have become focal institutions for constitutional designers.[25]

'The process of constitutionalization is born of the reconfiguration of the values of constitutionalism, an extension of their reach, and a loosening of the connection between constitutionalism and the nation state.'[26] In this field and movement of reconfiguration, rethinking our concepts against the backdrop of modernist thought offers a space of distance that allows for a new and ever more active immersion. As we reassess constitutionalization from normative, conceptual, and empirical perspectives, Hans Kelsen, Carl Schmitt, and Hannah Arendt are important interlocutors. Their thoughts are an essential source for reflections on constitutionalism and its reconfigurations in times of transition.

Jörg Kammerhofer examines in his article, 'Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems', current scholarship on the constitutionalization of international law through the sharp lens of Hans Kelsen's Pure Theory of Law. Taking further Kelsen's arguments against practical reason, Kammerhofer criticizes a 'methodological circle' where the 'constitutional matrix' developed by scholars of international law transcends the boundaries between the empirical and the normative. Rigorously arguing for a clear distinction between the law and its context(s), he employs the Pure Theory as an analytical tool for a forceful critique of the 'constitutionalist mindset'.

Ino Augsberg's article, 'Carl Schmitt's Fear: Nomos–Norm–Network', analyses the character of Schmitt's insights into law and politics, astonishingly present in current legal discourse on the international level. Augsberg argues that the ambivalent lesson to be learned from Schmitt can be found in the motivation behind his theory, in the suppressed, in the object of his fear. In Augsberg's close Freudian reading of *Politische Romantik* and *Der Nomos der Erde*, Schmitt's fear appears to be a network phenomenon of striking actuality, a form of heterarchical connectivity with various facets: societal disintegration, occasionalism, the disappearance of the political. Addressing Schmitt's fear, Augsberg argues, we need to think beyond Schmitt's thought.

Christian Volk illuminates in his article, 'From *Nomos* to *Lex*: Hannah Arendt on Law, Politics, and Order', Arendt's passionate concern with the triad of law, politics, and order – the magic triad at the core of constitutionalism which we also find in other nuances in Kelsen's and Schmitt's writings. While her engagement with law seems not to be systematic, questions on the essence, function, and meaning of law are, as Volk argues, continuously present throughout her work. Interpreting Arendt's legal thought as a shift from the Greek *nomos* to the Roman *lex*, Volk highlights the relational character of her concept of law that is always closely interconnected with politics. This is, as Augsberg demonstrates, also a position held by Schmitt, while

25 See, regarding the supranational EU plane, K. J. Alter, *The European Court's Political Power* (2009); Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2001); A. Stone Sweet, *The Judicial Construction of Europe* (2004); and, of course, the groundbreaking E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', (1981) 75 AJIL 1.

26 Loughlin, *supra* note 1, at 68.

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Kelsen aims at a strict delineation between both fields, in order to make the political forces behind the law visible and to allow for a critical engagement with both law and politics.

As I have tried to indicate in this short introduction, the articles of this special section open a space for new dialogues in the never-ending discourse of international law and for inter- and intradisciplinary translations,[27] a sphere of communication that allows and enables us to act jointly and make things happen in a synchronic movement of distance and immersion, action and reflection.[28] The authors create a space that facilitates what one might call, in a creative Arendtian twist, 'acting in concert *and conflict*'.[29] In all their diversity, their contributions do yet allow a reassessment of current phenomena of constitutionalization and of the concept as such that is not narrowed by their (and their protagonists') sometimes contradictory positions, but inspired and enhanced. Hence they create a space not only for isolated reflection, but also for action – a place to reflect on the law and to do it, a place to make the law and its theory happen.

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27 G. Steiner, *After Babel: Aspects of Language and Translation* (1998); F. Ost, *Le droit comme traduction* (2009); see also Ost, *Traduire. Defense et illustration du multilinguisme* (2009).

28 'Mitteilung ist die erste und darum entscheidende Realitätsgewinnung des rein Gedachten. Mitteilung steht in der Mitte zwischen Denken und Handeln, weil beides ohne sie nicht wäre. Sie weist sofort nach beiden Seiten.' H. Arendt, *Denktagebuch. 1950 bis 1973. Erster Band*, ed. Ursula Ludz and Ingeborg Nordmann (2002), 67.

29 (Emphasis in original.) I borrow this notion from Hauke Brunkhorst's pluralist reading of Arendt's reference to Burke in H. Arendt, 'Truth and Politics', in Arendt, *Between Past and Future: Eight Exercises in Political Thought* (2006 [1954]), 223.

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