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Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems

JÖRG KAMMERHOFER*

Abstract
While today a significant stream of European scholarship of international law is concerned with the process and consequences of its constitutionalization, criticism of this trend has so far been muted. This article, using elements of the Pure Theory of Law, argues that constitutionalist writings confound methodologies, that scholarship claims competencies which it does not have, and that this confusion diminishes the benefits of the constitutionalist project for international law. The key problem is called a 'methodological circle': scholars call something a constitution and in effect claim that the law is changed by this classification. Thus constitutionalism relies on the natural law concept of practical reason; constitutionalism is, in turn, vulnerable to Kelsen's arguments against practical reason. Constitutionalism, like practical reason before it, contains an impossible admixture of the human faculties of will and cognition. The general critique is followed by a look at Article 2(6) of the UN Charter as a case in point. Here constitutionalism shows how law is purportedly changed by taxonomy. The article concludes by taking a look at an alternative vision of the constitution of international law: the rediscovery of a strictly legal – that is, structural – constitution as the highest echelon of legal regulation.

Keywords
constitutionalism; Hans Kelsen; practical reason; Pure Theory of Law; UN Charter

1. Introduction

It has become popular in international legal scholarship to fight under the banner of the 'constitutionalization' of international law.[1] A significant part of European, particularly German, scholars are following what Jeffrey Dunoff and Joel Trachtman have called 'the constitutional turn in international legal discourse',[2] motivated perhaps by the increasing perception that international law is subject to the forces of globalization and fragmentation and seeing this situation as a historic chance to make international law more relevant and effective in the process. So far, criticism

* Research Fellow at the Hans Kelsen Research Group, University of Erlangen-Nuremberg [Joerg.Kammerhofer@jura.uni-erlangen.de]. All translations of quotations from untranslated sources are by the author.

1 For recent books on the topic see, e.g., J. L. Dunoff and J. P. Trachtman (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).

2 J. L. Dunoff and J. P. Trachtman, 'A Functional Approach to International Constitutionalization', in Dunoff and Trachtman, *supra* note 1, 3, at 30.

of this scholarly trend has been muted.[3] However, the reaction of the 'constitutionalizers' to anticipated criticism can be taken to gauge what its basis could be,[4] yet criticism so far – mostly concerned with the appropriateness of the domestic analogy and the question of the primacy of state sovereignty in international law – sounds less than convincing. Moreover, according to the view espoused in this article, both debates miss an important problem of the constitutionalist approach. Hence a critique from a specific point of view and with a specific argument will be attempted in the following pages.

What, then, is the problem with constitutionalist scholarship? It is submitted that the use of language in this case has a mythological function. Uttering the word 'constitution' in connection with the analysis of legal regulation suffices for many scholars in making assumptions about what this constitution is. Certain content, for example, is now implicitly included or excluded; certain epistemological methods are now required. Those writing on the topic may feel the need for (literally) a 'value-added' concept of constitution. Polemically speaking, this could be identified as a subconscious need to find a deeper meaning behind the patchwork of international legal regulation. It could also be seen as a very potent argument by the cosmopolitan internationalists who form the majority of international legal scholars[5] for making the world a better place through their analysis of law as constitution.

In other words, it will be shown on the basis of a specific methodological trait which constitutionalist writings exhibit that scholarship here claims competencies which it does not have. This article will use elements of the Pure Theory of Law, put forward by Hans Kelsen, because its emphasis on methodological soundness – the commonsensical proposition that legal scholarship relies on legal methodology to find out about the law – shows the limits of the constitutionalist project. It is also potent, because it can escape the constitutionalizers' criticism; for example, it does not rely on a pre-legal notion of state sovereignty, as did Mattias Kumm's 'statist paradigm'.[6]

This methodological confusion which (according to the view espoused here) diminishes the benefits of the constitutionalist project for international law results in the adoption of non-legal methodology by constitutionalist scholars. Constitutionalists are not engaging in legal analysis when they adopt this approach. While this is legitimate as far as it goes (no one will deny the value of political science for the analysis of international legal relations), the heart of the matter lies in the law. The law does not change because of an empirical classification, whether as 'constitution' or as 'tû-tû'.[7] However, the implicit and methodologically confusing claim

3 E.g. M. Wood, '"Constitutionalization" of International Law: A Sceptical Voice', in K. H. Kaikobad and M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009), 85.

4 A. Peters, 'Conclusions', in Klabbers et al. *supra* note 1, at 342; M. Kumm, 'The Cosmopolitan Turn on Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in Dunoff and Trachtman, *supra* note 1, 258.

5 On the forms that cosmopolitan internationalism takes in international law and the consequences of doing so: J. Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship', in M. Happold (ed.), *International Law in a Multipolar World* (2010, forthcoming).

6 Kumm, *supra* note 4, at 265.

7 A. Ross, 'Tû-tû', (1957) 70 *Harvard Law Review* 812.

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is precisely that the constitutionalist paradigm somehow changes the law. Hence, in the following, we shall first look at the methodology that is implicitly espoused by constitutionalism (section 2), which is identified as relying on the concept of *practical reason* and which is then criticized from the perspective of the Pure Theory of Law. This is followed by a brief look at a specific case where constitutionalism shows legal consequences – the purview of Article 2(6) of the UN Charter (section 3). We shall conclude by drawing an alternative, legal, interpretation of the notion 'constitution' as the highest echelon of legal regulation in Kelsen's and Adolf Julius Merkl's pyramid of norm creation (section 4).

2. The methodology of international constitutionalism

2.1. Between international relations and political philosophy

International constitutionalism, although propagated largely by scholars of international law, is not a legal theory. As Michael Wood astutely points out, 'Many international legal theories, including those that may be seen to fall under the heading of "constitutionalism," are essentially policy approaches. As such they may be instructive . . . but they are policy constructs, not law.'[8] Among the scholars writing on constitutionalism we find a few who self-consciously reflect on method, and at one end of the scale we can see a clear descriptive approach. Dunoff and Trachtman, for example, speak of a 'taxonomic, rather than normative [approach]'[9] one; the 'constitutional matrix' they develop is clearly marked as 'an analytical tool and not [as] a normative argument'.[10]

Yet on more than one front the assurances of methodological commitment to empirical science waver. One gets the impression – discussed further below – that scholars seem constrained by any one methodology; syncretism fighting under the banner of 'holism' is already apparent before we look at the constitutionalizers' relationship to the legal method. Mattias Kumm's analysis, for example, ostensibly starts out with an empirical focus. For him, a 'constitutional paradigm provides a cognitive frame that makes intelligible the legal and political world. It establishes a basic conceptual framework for the construction of public authority.'[11] The paradigm, in effect, 'succeeds in reconstructing *actual* legal practice', while adamantly not being 'an institutional proposal for how the world *should* be governed'.[12] However, the very idea of a 'cosmopolitan paradigm' as espoused by Kumm transcends the barrier between empirical and normative[13] modes of analysis, for cosmopolitanism is a

8 Wood, *supra* note 3, at 88.

9 Dunoff and Trachtman, *supra* note 1, at 4; for similar methodological commitments in the same book see A. L. Paulus, 'The International Legal System as a Constitution', ibid., 69, at 88, 107; B. Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order', ibid., 133, at 139–40.

10 Dunoff and Trachtman, *supra* note 1, at 26.

11 Kumm, *supra* note 4, at 266.

12 Ibid., at 316 (emphasis added).

13 *Nota bene*: 'normative' can be used in two senses in connection with methodology. On the one hand, a method can be said to be normative where it creates norms itself; on the other hand, it could also be so called where it *analyses* (cognizes) pre-given norms. In the following, the term 'normative' will be used to denote the first meaning, and 'normativistic' to denote the second meaning.

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political ideology, not a framework for empirical analysis. The connection drawn by Kumm of this paradigm to jurisprudential constructs for founding validity of norms (his paradigm 'provides a thin account for the grounds of what positivists describe as the rule of recognition, or *Grundnorm*'[14]); the notion of 'public reason'[15] to which the phenomena have to conform; the fact that the paradigm of choice 'projects the basic values underlying liberal democracy';[16] and, most clearly, his view that cosmopolitanism 'provides a morally more convincing account of constitutionalism',[17] all point to a strong politico-ethical philosophical or ideological strain of constitutionalist thinking that is not restricted to Mattias Kumm's writings.

This leads us to Oliver Diggelmann's and Tilmann Altwicker's central insight, that

> the world-constitutionalism argument cannot derive its force entirely from its explanatory value ... In our view, the concept cannot be understood appropriately if it is regarded as a purely 'analytical' or 'descriptive' tool. It has a subtext which deserves our attention.[18]

Martti Koskenniemi – while sympathetic to the constitutionalist movement – has equally clearly identified it as 'a programme of moral and political regeneration. This is what I mean by the description of constitutionalism as a "mindset".'[19] An example of how (political–philosophical) normative theories on how best to organize the polity – in the best tradition of political thinkers like Plato, Hobbes, or Kant – operate here is the substantialism (assigning an absolute value to terms) evident when it comes to defining 'constitution'. Where 'a purely formal concept of legitimacy appears insufficient', there also 'exists a substantive standard that needs to be fulfilled'.[20] This may sometimes take the form of cultural transplantation, to be found mainly among German scholars. Traits of German constitutional scholarship and constitutional culture are applied – adamantly not crudely transposing law – to international law. Lip service is paid to the fact that international law is not municipal law,[21] but deep-seated modes of domestic thinking are applied. The German tradition is very strongly one of substantialism, where the concepts of state, constitution, or individual rights tend to be treated as existing on a pre-legal plane which the law only recognizes. Thus the pathos in the language of the *Grundgesetz* and thus the clearly expressed notion of a pre-legal *pouvoir constituant*. This is a constitution written by natural lawyers. Yet one of the disadvantages of a substantialist definition is that one may find that the value and meaning-preferences are

14 Kumm, *supra* note 4 at 267.
15 Ibid., at 268.
16 Ibid., at 316.
17 Ibid., at 266.
18 O. Diggelmann and T. Altwicker, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism', (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 623, at 631.
19 M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9, at 18.
20 Paulus, *supra* note 9, at 87, 88.
21 B.-O. Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', (2003) 42 *Der Staat* 61, at 62.

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not reflected elsewhere. It is in this spirit that Michael Wood argues that '[t]he word "constitution" has no particular meaning in international law.'[22]

Even before we add the legal method into the mix, it becomes clear that constitutionalism is an intermixture of methodologies – a holistic interdisciplinarity – which can be contrasted to Otto Pfersman's recent cry for the adoption of Kelsen's concept of pluridisciplinarity – that is, 'the strict distinction between disciplines while using multiple disciplines contemporaneously (each according to its own object of cognition and within its own canon of method)'.[23] As will be argued when we look at the intermixture of empirical and normativist/legal methods below, the dangers of syncretism outweigh its potential benefits.

2.2. The methodological circle and the problems of a *practical* reason

1. The methodological plurality that marks constitutionalist scholarship is seldom clearly expressed.[24] One could, for example, see the approach as a mix of three elements which allows the proponents to withdraw to the next level when challenged.[25] First, it is asserted that one is merely analysing what is already positive international law. This can be challenged by pointing out the many overly optimistic claims about the reach of positive norms[26] and that the theoretical basis for commonly held doctrines of orthodox scholarship is not questioned. Bardo Fassbender, for example, argues that '[t]oday, the constitutionality of such legislative acts of the [Security] Council is generally accepted'.[27] However one may stand on the issue of 'legislative acts' of the Council, to say that this is 'widely accepted' is too optimistic in the face of the intense debate on this point.

If it is confronted by counter-arguments, the position shifts to the claim that, even if international law has not yet got this far, this is an emerging trend or a proposal *de lege ferenda*.[28] Yet many of these designs are unlikely to be realized. In other words, the analysis is allowed to be undermined by the analyst's personal ideas of the preferred outcome and is unrealistic in its projections. When challenged, the argument morphs again: the trend identified should be realized, some absolute norm makes this the ideal solution, international law has to work for the betterment of mankind, and it therefore has to be consitutionalized.[29] The constitutionalists thus espouse a modern form of natural law theory, hidden under positivist rhetoric. Hence

22 Wood, *supra* note 3 at 94.

23 '[D]as heißt der strikten Unterscheidung und gleichzeitigen Übung mehrerer Disziplinen nach deren jeweils eigener Objektbestimmung und Methodenkanon.' O. Pfersman, 'Hans Kelsens Rolle in der gegenwärtigen Rechtswissenschaft', in R. Walter, W. Ogris, and T. Olechowski (eds.), *Hans Kelsen: Leben–Werk–Wirksamkeit: Ergebnisse einer Internationalen Tagung, veranstaltet von der Kommission für Rechtsgeschichte Österreichs und dem Hans Kelsen-Institut (19.–21. April 2009)* (2009), 367, at 378.

24 S. Gardbaum, 'Human Rights and International Constitutionalism', in Dunoff and Trachtman, *supra* note 1, 233, at 234.

25 Similarly framed in Diggelmann and Altwicker, *supra* note 18, at 640–1.

26 E.g.: Fassbender, *supra* note 1 at 86–115; Erika de Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) 51–76 at 69.

27 Fassbender, *supra* note 1, at 96.

28 Ibid., at 158.

29 Bryde, *supra* note 21, at 62; J. A. Frowein, 'Konstitutionalisierung des Völkerrechts', in *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System. Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (2000), 427, at 430–1.

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we find normativist analysis of a given legal order, a social scientist analysis of what is likely to happen or to be accepted, and an imposition of politico-moral personal values as overarching for all in a happy syncretistic admixture.

2. However, a slightly different aspect – or interpretation – of the methodological basis for constitutionalism will be discussed at length in this article. At quite a number of points in the writings that were used for this article, one can assert that the admixture of empirical, moral, political, and legal analyses is 'falsifying' the results from a legal point of view. This is what the present author would like to call the *methodological circle* in constitutionalism. Implicitly, impliedly, subcutaneously, *somehow*, constitutionalizers create an additional legal function from their prima facie taxonomic classification of legal orders or parts thereof as a 'constitution' or as 'in the process of constitutionalization'. This additional function means that through scholarly analysis – by scholars calling something a constitution – the law is changed. In effect, some scholars derive elements, norms, or functions from their classification which cannot be found in positive law. Before we move on to the legal-theoretical classification and critique of this phenomenon, a few examples may show how the circle manifests itself.

i. Framing the cosmopolitan constitutionalism mentioned above, Kumm argues that the 'argument presented here is a legal argument: . . . the basic conceptual framework [is] to be used for the *interpretative reconstruction* of an existing public law practice'.[30] While constitutional paradigms 'do not determine specific outcomes', the 'cosmopolitan paradigm [nonetheless] *reconceives* public international law in light of constitutional principles'.[31] This could still be interpreted as concerned with legal epistemology, but it does raise the issue of whether 'reconstruction' of the law does not in effect purport to change the law in force. Recently, Alexander Somek has drawn our attention to the arguments on the borderline epistemology and legal change within constitutionalist scholarship. For him, 'constitutionalization, as a legal process, happens *somehow* . . . Constitutionalization is a matter of reason and not of will'; it is 'a result of a reasoning process that is conducted in an institutional [one is tempted to add: and scholarly] setting where reason matters and gives rise to real effects'.[32] The connection to 'reason' is indicative and will be discussed below.

ii. In his recent book Bardo Fassbender, finding that 'in the work of Verdross and Simma[33] the designation of the [UN] Charter as a "constitution" does not have consequences',[34] argues more openly than Kumm that 'a perception of a legal instrument as a constitution not only gives it a certain shape and contour but also a claim to a normative importance which *will produce certain results*'.[35] He cites Josef Isensee as an authority, who, however, discusses a categorically different phenomenon: Isensee

30 Kumm, *supra* note 4, at 311 (emphasis added).
31 Ibid., at 271 (emphasis added).
32 Alexander Somek, 'Constitutionalization and the Common Good', unpublished manuscript, 2009, 3 (emphasis in original).
33 Referring to A. Verdross and B. Simma, *Universelles Völkerrecht. Theorie und Praxis* (1984).
34 Fassbender, *supra* note 1, at 78.
35 Ibid., at 129 (emphasis added).

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speaks of the constitution *itself* (i.e. the text of the law) naming the *Länder* as 'states',[36] whereas for Fassbender it is scholars – not the law – who are naming the Charter a 'constitution. Thus are 'the legal consequences of a constitutional perception of the Charter'[37] constructed.

iii. In another important recent paper, the same author commits equally clearly to the normative significance of empirical classification. 'Taking the constitutional character of the Charter seriously', Fassbender argues, can be 'a starting point for moving toward conditions in which the values pronounced in the Charter . . . are better and more evenly realized'.[38] This is followed by a quote from a 1972 article by Herman Belz which expresses the methodological circle most clearly: 'The use of the term "constitutional" in a descriptive way . . . will have a normative connotation.'[39]

3. The methodological circle is a manifestation of an older problem, and constitutionalism as a scholarly movement must face the problems of natural law. The claim can be made that, adopting the approach of the Pure Theory of Law, constitutionalists are necessarily natural lawyers, because to be what one might consider 'relevant' – in order to go beyond the banality of calling something a constitution without any consequences attached – the classification by the observing legal scholars has to create a legal effect. It is submitted that this scholarship relies on *practical reason* and as such is open to all the problems of the concept. The core problem of constitutionalist scholarship is a form of methodological syncretism. The Pure Theory of Law can help us in uncovering the problem and criticizing this stream of scholarship, because its consistently legal analysis and ethos of science can uncover such hidden inconsistencies.

The rest of this section will consider the Kelsenian interpretation and critique of that core concept of naturalist thought.[40] A word of caution may be appropriate, however, before we proceed to the minutiae. Adopting and applying Kelsen's views may mean that a disinterested intellectual-historical view of the development of the notion of practical reason from Aristotle to Kant and beyond may find that while Kelsen does cite the right pieces by the right authors, he places too little emphasis on the element of practical reason as 'reason for action', which, at least for Kant (as *Bestimmungsgrund des Handelns* or *Willens*),[41] was central vis-à-vis other aspects (discussed below) that Kelsen imputes. Norms as 'reasons for action' still remain a staple of legal theory, particularly in Anglo-Scandinavian traditions,[42] and they still

36 'Wenn die Verfassung die Länder wie den Bund als "Staaten" ausweist, so hat das praktische Relevanz . . . Die Bundesverfassung, die auch den Ländern Staatsqualität zuschreibt, muß sich beim Wort nehmen lassen.' J. Isensee, 'Idee und Gestalt des Föderalismus im Grundgesetz', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (1990), IV, 554–5 (substantially identical to the 3rd edn (2008), VI, 42).

37 Fassbender, *supra* note 1, at 129.

38 Fassbender, *supra* note 9, at 147.

39 Herman Belz, 'Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War', (1972) 59 *Journal of American History* 640, at 669.

40 Hans Kelsen was critical of all forms of natural legal scholarship; many of his writings deal with natural law (see, e.g., references in notes 45 and 51).

41 E.g. I. Kant, *Kritik der praktischen Vernunft* (1788) AA V 57, 62.

42 E.g. M. H. Kramer, 'Legal and Moral Obligation', in M. P. Golding and W. A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005), 179, at 186–9; B. Lahno, 'Norms as Reasons for Action', (2009) 95 *Archiv für Rechts- und Sozialphilosophie* 563.

form a source of misinterpretation of Kelsen's works.[43] Despite this, the symptoms as Kelsen describes them are there, even if they are not central to some of the historical meanings of 'practical reason'. Furthermore, it is submitted that on this issue the Kelsenian critique of this concept of natural legal scholarship is effective as against constitutionalist methodology as well.

In reconstructing practical reason, *νοῦς πρακτικός* (*nous praktikos*) or *ratio practica*, from the writings of Aristotle, St Thomas Aquinas, and Kant,[44] Kelsen locks on to the tension between 'practical' (relating to norms – what one ought to do) on the one hand and 'reason' (as cognitive faculty) on the other hand.[45]

> Reason denotes the cognitive faculty of humans. Norm-creation or legislation, however, is not an act of cognition. When a norm is created it is not the case that a pre-given object is perceived as and to the extent it actually exists, but a claim is made that something ought to be. In this sense norm-creation is a function of will, not of cognition.[46]

Regarding Kant, Kelsen highlights that Kant identifies will and practical reason[47] and that only because practical reason is will can it be seen as norm-creating.[48] Hence will and reason are identified by the theorists of practical reason – a categorical mistake, thinks Kelsen.

> The term 'practical reason' is thus the result of an illicit admixture of two categorically different . . . faculties of human beings. Kant admits 'that at the end it can only be one and the same mode of reason . . .'.[49] If there is only *one* reason, it will cognize in both its modes of usage; hence the modes can only be different in relation to the object . . . of cognition. If [it] is one and the same mode of reason, it cannot at the same time cognize as theoretical [reason] and perform a completely different function as practical [reason], i.e. will (in this case: create norms).[50]

This argument is adopted to 'justify the subjective value judgments which emerge from the emotional element of his consciousness; man tries to present them as

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43 See the centrality of reasons for action in Jes Bjarup's discussion of the relationship between Kelsen and Alf Ross, in J. Bjarup, 'Alf Ross', in R. Walter, C. Jabloner, and K. Zeleny (eds.), *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre* (2008), 409.

44 Aristotle, *Peri Psyches* 433a16; Aristotle, *Ethika Nikomacheia* 1139a26; Thomas Aquinas, *Summa Theologiae* I-II, q. 90 a. 2; Kant, *supra* note 41.

45 E.g. H. Kelsen, *Reine Rechtslehre* (1960), 414–25; Kelsen, 'Die Grundlagen der Naturrechtslehre', (1963) 13 *Zeitschrift für öffentliches Recht* 1, repr. in H. Klecatsky, R. Marcić, and H. Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1968), 869; Kelsen, *Allgemeine Theorie der Normen* (1979), 6, 52–5, 62–5.

46 'Als Vernunft bezeichnen wir die Erkenntnisfunktion des Menschen. Normsetzung, Gesetzgebung ist aber nicht Erkenntnisfunktion. Mit der Setzung einer Norm wird nicht ein schon gegebener Gegenstand erkannt, so wie er ist, sondern etwas gefordert, das sein soll. In diesem Sinne ist Normsetzung eine Funktion des Wollens, nicht des Erkennens.' Kelsen, *Reine Rechtslehre, supra* note 45, at 415.

47 I. Kant, *Grundlegung zur Metaphysik der Sitten* (1785), AA IV 412.

48 Kelsen, *Reine Rechtslehre, supra* note 45, at 421.

49 Citing Kant, *supra* note 47, at AA IV 391.

50 'Der Begriff der praktischen Vernunft ist somit das Resultat einer unzulässigen Vermengung zweier voneinander wesentlich verschiedenen . . . Vermögen des Menschen. Kant gibt zu, "daß es doch am Ende nur eine und dieselbe Vernunft sein kann . . ." Wenn es nur *eine* Vernunft ist, dann kann sie in beiden ihren Anwendungen nur erkennen; und dann kann sie sich nur in bezug auf ihre Gegenstände . . . der Erkenntnis, unterscheiden. Wenn [es] ein und dieselbe Vernunft ist, kann sie nicht als theoretische erkennen und als praktische eine hievon gänzlich verschiedene Funktion leisten, nämlich wollen [in diesem Falle: Normen erzeugen].' Kelsen, *Reine Rechtslehre, supra* note 45, at 423–5.

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objective principles by transferring to them the dignity of truth'.[51] In the end, Kelsen's potent critique of practical reason is that, by simultaneously being will and reason, it 'destroys the dualism of Is and Ought',[52] which, in turn, casts doubt on the possibility of norms.

4. As mentioned above, it is submitted here that one of the essential features of the constitutionalist method can be seen to fall under the Kelsenian interpretation of this feature of practical reason. The cognition by scholars of something as constitution creates norms; in constitutionalist rhetoric, the tension between will and thinking, between volition and cognition is established in the same way as the natural lawyers – and has to face the same objections. However, through a process which can be called 'theory amnesia' along the lines proposed by Otto Pfersman,[53] constitutionalist scholars 'forget' that their argument – subcutaneous as it may be – stands in this tradition and accordingly they are not aware of this aspect of their approach. Crucially – because this aspect of constitutionalist method is not new – the counter-arguments that have already been developed in response to the more established approach (naturalism) can be brought to bear against the new trend in scholarship as well.

2.3. Consequences: constitutional interpretation as modification?

'All this is very fine', one could object at this point, 'but what does it mean in practice that the constitutionalizers derive law from taxonomy? Is it not a case of a theoretical basis having no relevance for the practical workings of the law?' True, the methodological circle is subcutaneous and its consequences are not likely to be discussed openly. However, as pointed out above, it does come to light sometimes – most often as a plea for a specific 'constitutional' interpretation or reading of positive norms of international law, or for a different understanding of the received law in the light of the constitutionalist paradigm.[54] Thus we shall discuss that plea and its fundamental or theoretical critique here, while the concrete example of Article 2(6) of the UN Charter will be analysed in Section 3.

Many of the constitutionalizers' arguments on this head are related to a somewhat more established tradition that argues for different rules of interpretation to apply to the UN Charter,[55] to constituent instruments of international organizations, or to *traités-lois* in general – connected with the jurisprudence of the International

51 H. Kelsen, 'The Natural-Law Doctrine before the Tribunal of Science', (1949) 2 *Western Political Quarterly* 481, at 501.

52 '[D]er Dualismus von Sein und Sollen aufgehoben ist.' Kelsen, *Allgemeine Theorie der Normen*, *supra* note 45, at 63.

53 Pfersman, *supra* note 23, at 371–2.

54 Fassbender, *supra* note 1, at 131–6; T. M. Franck, 'Preface: International Institutions: Why Constitutionalize?', in Dunoff and Trachtman, *supra* note 1, xi–xiv; Kumm, *supra* note 4, at 269; Paulus, *supra* note 9, at 108.

55 From the older tradition see E. P. Hexner, 'Teleological Interpretation of Basic Instruments of Public International Organizations', in S. Engel (ed.), *Law, State and International Legal Order: Essays in Honor of Hans Kelsen* (1964), 119; W. Karl, 'Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffs', in R. Bieber and G. Ress (eds.), *Die Dynamik des europäischen Gemeinschaftsrechts. Die Auslegung des europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe* (1987), 81; G. Ress, 'The Interpretation of the Charter', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 13. On this tradition of Charter interpretation see J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2010), 36–104.

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Court of Justice (ICJ) in, *inter alia*, *Reparation*, *Certain Expenses*, and *Namibia*.[56] In the light of this tradition, the scholars discussed can be seen as merely continuing it: 'an interpretation of the Charter as constitution must aim to establish, at the time of interpretation, its objective meaning . . . ("dynamic-evolutionary" or "objective interpretation")'.[57] The same applies to the doctrine of 'implied powers', for '[d]etermining the powers that complete or supplement those expressly defined in the Charter is an indispensable method of constitutional development'.[58] This argument is often connected with the plea for a teleological[59] and instrumentalist 'interpretation'.

> A constitution, however, calls for another interpretative mode altogether . . . such an instrument, meant to last for the ages, should be seen as 'a living tree' . . . Applied to the interpretation of the UN Charter, this means, at the least, that the constitutive instrument establishing the United Nations should be read broadly *so as to advance*, rather than encumber, *its institutional ability* to accomplish the purposes for which it was created.[60]

In Kumm's words, 'characteristically public-reason-oriented, purposive interpretations and the proportionality requirement play a central role and are openly endorsed'[61] by the constitutionalists. In more critical terms, '[t]he interpretation of norms is thereby covertly transformed into a means–ends test in which norms are submitted to instrumental scrutiny and consequently adjusted and readjusted in light of their purpose.'[62]

The main problem with this view is that interpretation cannot do what the constitutionalizers want it to do – they overestimate the legal powers of interpretation. Interpretation is a hermeneutic process: the cognition of legal norms. Humans start interpreting as soon as they look at a legal text; interpretation takes place, however clear the words may sound, because they only sound clear as a result of interpretation. In treaties, the text is the norm and all texts are subject to the inherent vagueness of language. Norms are merely a frame of possible meanings, not any one of those meanings themselves.[63] Legal scholars cannot decide between multiple

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56 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 15; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16.

57 Fassbender, *supra* note 1, at 131–2.

58 Ibid., at 133.

59 Again, harking back to the older tradition, C. F. Amerashinge, 'Interpretation of Texts in Open International Organizations', (1995) 65 *British Yearbook of International Law* 175, at 193; M. Bos, 'Theory and Practice of Treaty Interpretation', (1980) 27 *Netherlands International Law Review* 3, 135, at 160; Hexner, *supra* note 55, at 130–1; Ress, *supra* note 55, at 30; I. Seidl-Hohenveldern and G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der supranationalen Gemeinschaften* (2000), 247; O. Schachter, 'Interpretation of the Charter in the Political Organs of the United Nations', in Engel, *supra* note 55, 269, at 279; K. Skubiszewski, 'Remarks on the Interpretation of the United Nations Charter', in R. Bernhardt et al. (eds.), *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte: Festschrift für Hermann Mosler* (1983), 891, at 893; Verdross and Simma, *supra* note 33, at 494.

60 T. M. Franck, 'Is the UN Charter a Constitution?', in J. A. Frowein et al. (eds.), *Verhandeln für den Frieden. Liber amicorum Tono Eitel* (2003), 95, at 102–3 (emphasis added).

61 Kumm, *supra* note 4, at 269.

62 Somek, *supra* note 32, at 12.

63 Kelsen, *Reine Rechtslehre*, *supra* note 45, at 348–9.

choices by interpreting (cognizing) the norm. If one were to choose one possible meaning over others, one would add norms which do not belong to the normative order to be described,[64] and personal values would be superimposed on positive law[65] in order to be able to choose, for example, the 'constitutional reading' of a norm. Interpretation as a hermeneutic process therefore by definition *cannot change the norm or its possible meanings*.

Any claim to change the norm by interpretation is an example for the methodological circle. Instrumentalist scholarship presets values from outside the legal order and applies it to the law to come to a predetermined solution. If norms should now be interpreted in a specific, purposive way, where do the norms 'should be interpreted' and 'interpreted in constitutionalist sense' come from? If anything, constitutionalist (instrumentalist) interpretation now closes the methodological circle. Not only do we have a repetition of the methodical syncretism displayed above (section 2.2) – scholarly cognition (namely interpretation) changing the law (by 'reading' the law in a constitutional light – see section 3) – but we are also faced with a *circulum vitiosum*, for *only* through instrumentalist interpretation is the result that instrumentalist interpretation is mandated established in the first place. The premise incorporates the conclusion – but this is not a new feature of international legal scholarship.

3. A CONSTITUTIONALIZED READING FOR ARTICLE 2(6) OF THE UN CHARTER?

At a more concrete level, the constitutionalist avant-garde clearly shows the consequences of the constitutionalist reading of international law. In the following, we shall analyse and critique a constitutional reading of Article 2(6) of the UN Charter, for it is here that the practical relevance of theory is demonstrated. It is here where, according to the Kelsenian ideal of legal scholarship, the methodology adopted by constitutionalists arguably hampers rather than improves our knowledge of the positive law.

Article 2(6) provides, 'The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.' Hence, so it has variously been claimed,[66] the Charter does attempt to prescribe duties for non-parties. Understandably, this reading of Article 2(6) accords with constitutionalist ideology and, accordingly, is taken up by our scholars; however, it takes on the specific flavour of constitutionalist rhetoric.

The most erudite and complex argument for a rereading of Article 2(6) in a constitutional light has been developed in Bardo Fassbender's recent book.[67] A

64 A. J. Merkl, 'Zum Interpretationsproblem', (1916) 42 *Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart* 535, repr. in H. Klecatsky, R. Marcić, and H. Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1968), 1059, at 1063, 1069–70.

65 M. Thaler, *Mehrdeutigkeit und juristische Auslegung* (1982), 159.

66 E.g. A. Ross, *Constitution of the United Nations: Analysis of Structure and Function* (1950), 33; J. Soder, *Die Vereinten Nationen und die Nichtmitglieder. Zum Problem der Weltstaatenorganisation* (1956), 278.

67 Fassbender, *supra* note 1, at 78–82, 109–14, 147–8; see also Franck, *supra* note 60, at 97.

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'self-authorizing . . . revolutionary grand design'[68] is dismissed for the purposes of his argument and a more circumspect route is adopted. This may be motivated by the fact that, as he admits, 'the claim that the Charter itself lays to the allegiance of non-member states . . . is phrased in rather cautious terms'.[69] Thus he argues 'that it is a functional interpretation of the concept of sovereignty' – one presumably where functionality, namely instrumentality, is supplied by the constitutionalist paradigm – 'which explains the Charter's universal legal force, and accordingly legitimizes'[70] the claim made by Article 2(6).

The maxim *pacta tertiis nec nocent nec prosunt* has been at the focus of the traditional debate on the reach of Article 2(6), and has been given as a main reason why its reach is limited;[71] indeed, it might be true to say that '[t]he overwhelming majority of commentators maintain . . . that Art. 2(6), being a norm of mere treaty law, can have no binding effect *vis-à-vis* non-member States.'[72] In his argument, Fassbender attempts to turn the tables on the *pacta tertiis* rule and adopts a reinterpretation of sovereign equality in order to come to a conclusion that would benefit constitutionalism, but which, in effect, eliminates the need for Article 2(6).

The argument starts by interpreting the Charter as treaty *in favour* of third states, for 'non-member states would benefit from the protection granted by the Charter . . . [y]et [they] would not be subject to any obligation set out in the Charter.'[73] For Fassbender,

> [i]t is obvious that such a privileged position for some states would go directly against the fundamental principle of equality . . . It follows from the concept of sovereign equality itself that if a state can refer to Chapter VII as a remedy against unlawful action by other states, it must also be a possible addressee of Chapter VII measures when it violates the Charter.[74]

One just wonders at this point about the position of the permanent members of the Security Council. Surely their exalted position in the Charter is contrary to the principle of sovereign equality – after all, they receive the benefit of Chapter VII action while no Chapter VII action can be brought against them. So why should not the Charter law be 'disregarded' in the light of an instrumentalist reading of international law, rather than the *pacta tertiis* rule (if it is indeed a norm of positive international law)?

Furthermore, if indeed the *pacta tertiis* rule 'itself is based on principle of sovereign equality' and 'it is not by virtue of Article 2, paragraph 6 that the Charter is binding on non-member states' but 'because of the overriding principle of sovereign equality',[75] one might wish to consider that if the law privileges non-parties

68 Fassbender, *supra* note 1, at 110.
69 Ibid., at 110–11.
70 Ibid., at 111.
71 L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents* (1949), 108–9; Verdross and Simma, *supra* note 33, at 177.
72 W. Vitzthum, 'Article 2(6)', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 141, at 146.
73 Fassbender, *supra* note 1, at 113.
74 Ibid., at 113.
75 Ibid., at 114.

as against treaty parties by allowing non-parties the benefits of the parties' compliance with the treaty,[76] it is the law that establishes the difference. Understood in this sense, sovereign equality would be broken as part of the law everywhere and does not hinder the existence of differentiated obligations. The non-membership of Canada in the ECHR, for example, does not mean that it is bound by it nonetheless. Because Canada is not bound by the ECHR, Canadian subjects enjoy the protection of the ECHR in Europe, while Canada does not have any obligations under the ECHR. This 'privileged position' of Canada does not mean that this would violate the principle of sovereign equality vis-à-vis Germany, for example. On a legal view, sovereign equality only means that the subjects of law are a priori equal before the law and if the law differentiates, the equality is not broken.

The political and instrumentalist nature of such a line of argument can be taken from the conclusions that Fassbender draws:

> Seeing the Charter as a constitution that applies to all community members offers the best possible explanation for the demands made on non-member states by Articles 2, paragraph 6, and 103 . . . It is true that the two provisions 'are merely partial answers . . .' Nevertheless, they give a strong hint of its constitutional character.[77]

Then, of course, we have an issue that seems minor to many of the commentators on Article 2(6), the Kelsen of *The Law of the United Nations* (1950) included.[78] The paragraph simply cannot be read to include a *duty* for non-members. It says very clearly that the 'Organization shall ensure' – non-members are not addressed at all. This reading not only 'comes closest to the actual wording of Art. 2(6)',[79] there is no possible interpretation – as cumulative possible meanings of a norm – which would incorporate a prescription for any entity but the UN as juridical person.[80] Kelsen himself has become notorious in this connection for supporting a wide interpretation of Article 2(6), but this can only be understood within Kelsen's coercive order paradigm, which itself is a rather problematic element (even if one popular with other positivists) of Kelsen's oeuvre.[81]

According to that paradigm, '[a] feature common to societal orders designated as law is that they are coercive orders in the sense that they react to anti-social "facts", especially to such human behaviour, by [prescribing] an evil'[82] – that is, sanctions.

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76 The issue of formal rights is slightly different; see Art. 36 Vienna Convention on the Law of Treaties 1969.

77 Fassbender, *supra* note 1, at 147–8.

78 Kelsen had opined on the issue of the interpretation of Art. 2(6): H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), 106–10. We shall adopt a reading here which may diverge slightly from his specific doctrinal views on the concrete issue, but is arguably somewhat more in tune with the true theoretical basis of the Pure Theory of Law. In this journal the present author has had the opportunity to describe the possibility of divorcing the historical Kelsen from an a-personal, ahistoric view of the Pure Theory of Law as an approach, in particular with respect to Kelsen's interpretation of the UN Charter: J. Kammerhofer, 'Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law', (2009) 22 LJIL 225.

79 Vitzthum, *supra* note 72, at 142.

80 Goodrich and Hambro, *supra* note 71, at 108.

81 For a critical appraisal of that paradigm see Kammerhofer, *supra* note 78, at 227–33, 236–40, 244–5; similarly J. Kammerhofer, 'Hans Kelsen's Place in the Theory of International Law', in A. Orakhelashvili (ed.), *Research Handbook in International Legal Theory* (2010, forthcoming), s. 3.

82 'Ein . . . den als Recht bezeichneten Gesellschaftsordnungen gemeinsames Merkmal ist, daß sie Zwangsordnungen in dem Sinne sind, daß sie auf bestimmte für unerwünscht, weil sozial schädlich angesehene

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If coercion is the legal reaction against certain behaviour, a normative order can be called law. Hence Kelsen is adamant that

> The Charter establishes a true legal obligation of Members to behave in a certain way only if it attaches to the contrary behaviour a sanction. If the Charter attaches a sanction to certain behaviour of non-Members, it establishes a true obligation of non-Members to observe the contrary behaviour.[83]

If (and that is the crucial point) the coercive order paradigm is relevant (Kelsen keeps open the possibility of not interpreting the Charter according to that paradigm):[84] 'the Charter imposes . . . [obligations] indirectly also upon all the states which are not members of the United Nations'.[85] This is so only

> provided it may be interpreted to mean that the Organisation is *authorised to react* against a non-Member state which does not act in accordance with . . . Article 2 *with a sanction* provided for by the Charter. There can be little doubt that such interpretation is possible at least with respect to the enforcement measures determined in Chapter VII of the Charter. According to the wording of the articles concerned, these enforcement measures are not restricted to Members.[86]

Is not the question whether the Charter does indeed authorize the UN to take enforcement measures (outside the purview of Articles 53(1) and 107) vis-à-vis non-members determined by Article 2(6), rather than by Chapter VII? Kelsen realizes that this would be a dramatic departure from received law and uses language that reminds us strongly of present-day constitutionalizers:

> In Article 2, paragraph 6, the Charter shows the tendency to be the law not only of the United Nations but also of the whole international community, that is to say, to be general, not only particular international law . . . [T]his tendency is in contradiction to one of the fundamental principles of existing international law[.][87]

The resemblance to the scholarly approach discussed here is uncanny. Understandably, Fassbender places much emphasis on Kelsen.[88] But is Kelsen in line with the constitutionalist paradigm? It is submitted here that there are some important differences, starting with the commitment of the Pure Theory to methodological purity of a specifically legal scholarship vis-à-vis the constitutionalizers' syncretism. Accordingly, for Kelsen, such a claim may be made by legal norms, but '[f]rom the point of view of existing international law the attempt . . . must be characterised as *revolutionary*.'[89] A revolution establishes a new legal order on top of another; that is, it does not rely on the 'old' order for its validity. There simply is no way to decide between the two orders on the basis of a 'better' validity. The man in the street could

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Umstände, insbesondere auf menschliches Verhalten dieser Art, mit einem Zwangsakt, das heißt mit einem Übel . . . reagieren.' Kelsen, *Reine Rechtslehre*, *supra* note 45, at 34.

83 Kelsen, *supra* note 78, at 107.
84 Kammerhofer, *supra* note 78, at 230–1.
85 Kelsen, *supra* note 78, at 106.
86 Ibid., at 106–7 (emphasis added).
87 Ibid., at 109.
88 Fassbender, *supra* note 1, at 114.
89 Kelsen, *supra* note 78, at 110 (emphasis added).

establish such an order simply by willing that he be regarded as the world's only law-giver; his claim would be irrelevant from the point of view of existing international law, but it would establish a legal revolution, however laughable the attempt may sound. From the point of view of a Pure Theory of Law, however, reliance on factual criteria – whether the claim of the man in the street or the Charter's illicit claim (if Article 2(6) were interpreted in such a fashion) is effective or not – does not change or end the validity of the norms thus established. Effectiveness as well as Kelsen's coercive order paradigm can only be a tactical choice for a scholar as to which legal orders it makes most sense to analyse. It is an empirical decision not impinging on the validity of norms.[90]

4. The Pure Theory of Law and the structural constitution

As against the constitutionalists' theories, the Pure Theory of Law can produce only a pallid conception of the constitution of international law. For those used to a more 'dense' conception of 'constitution', the positive law must remain unsatisfactory and full of gaps if Kelsen's own view, that substantive decisions cannot be pre-made by the scholar, is applied. The only small advantages of the Pure Theory's structural view of the constitution – reduced as it is – are, first, that it tends to reflect the law in force more accurately and, second, that the structural or formal view is more in keeping with the law as form – that is, as a type of vessel which can be filled with almost any content.

The asceticism demanded of scholars by the Pure Theory of Law is not welcome in present-day international legal scholarship.[91] 'This is so because it is very difficult to limit one's gaze to the realm of the Ought . . . in the face of the eternal temptation to escape to the real world, the realm of the Is, and to explain what actually happens.'[92] Yet in using Kelsen's ideas of constitution[93] we may find that this different, structural, conception of constitution – while not helpful to the constitutionalists' political programme – is better able to reduce the notion to its legal core.

Kelsen classifies constitutions as either formal or material. A 'constitution in the formal sense' is a statute calling itself 'constitution' and regulating certain matters, constituting a statal organization and creating specialized organs such as parliaments and governments.[94] What Kelsen calls a 'constitution in the material sense'[95] is perhaps better described as a norm-logical or structural constitution. Every legal

90 See Kelsen, *Reine Rechtslehre*, *supra* note 45, at 215–21; Kelsen, *Allgemeine Theorie der Normen*, *supra* note 45, at 112–13.

91 On this notion see also Kammerhofer, *supra* note 5.

92 'Denn es ist nicht leicht . . . seinen Blick immer nur auf die Welt des Sollens gerichtet zu halten, wo doch immer wieder die Versuchung an einen herantritt, in die Welt des wirklichen Lebens, des Seins zu entweichen und das tatsächliche Geschehen zu erklären.' H. Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (1911), vii.

93 For a more detailed look at the notion of constitution of the Pure Theory than is possible here see Kammerhofer, *supra* note 55, at 135–240.

94 Kelsen, *Reine Rechtslehre*, *supra* note 45, at 228–9.

95 Ibid., at 228; R. A. Métall, 'Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre', (1931) 11 *Zeitschrift für öffentliches Recht* 416, at 421.

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order necessarily has a constitution, even though its form is determined by positive regulation. That constitution is the highest echelon of positive authorizing norms in a given normative order.[96] For Kelsen, the notion of constitution is intimately connected with the hierarchy of norm-creating norms vis-à-vis norms created under it.

The structural constitution has an ordering function, and the formal sources of international law – as hierarchically higher norms determining norm creation – are the foundation of the international legal order. We could say that the Pure Theory is no more than a theory of sources,[97] because the structure of normative orders depends upon the authorization to create norms.[98] Yet because a source usually allows the creation of many norms, norms with a common 'pedigree' belong to the same source, which Adolf Merkl would call a legal form (*Rechtsform*).[99] The 'hierarchy of legal conditionality' is a necessary element of all normative orders. This, the concept of the *Stufenbau*, is one of the most important contributions of the Vienna School of Jurisprudence to legal theory,[100] allowing for a hierarchical ordering of norms on a purely legal, formal, and structural basis without admitting external elements such as scholar's political value preferences.

But how is it determined which sources international law has? This is one of the crucial questions of international law. The answer of the Pure Theory may be theoretically clear, but it is of little practical value. The notion of a structural constitution (the highest positive norms of a legal order) at least allows us to ask the right questions: which norms of international law empower the creation of norm-creating norms?[101] Are there positive norms of international law that create source-law?[102] In no case can scholars assume that the traditional trias of sources in Article 38 of the ICJ Statute has pre-legal status[103] – they will have to find out whether there is such positive law. But this is extremely difficult, if not impossible, because in all likelihood no one bothered actually to create law at this high level. Hence we may be faced with as many constitutions of international law as there are

96 'Verfassung als . . . letzten positivrechtlichen Grund für die Geltung von positivem . . . Recht.' R. Alexy, 'Hans Kelsens Begriff der Verfassung', in S. L. Paulson and M. Stolleis (eds.), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (2005), 333, at 333; J. L. Kunz, 'The "Vienna School" and International Law', (1934) 11 *New York University Law Quarterly Review* 370, at 412.

97 V. Petev, 'Rechtsquellenlehre und Reine Rechtslehre', in W. Kawietz and H. Schelski (eds.), *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* (1984), 273, at 273.

98 Kelsen, *Allgemeine Theorie der Normen*, *supra* note 45, at 82–4.

99 A. J. Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaues', in A. Verdross (ed.), *Gesellschaft, Staat und Recht. Festschrift für Hans Kelsen zum 50. Geburtstag* (1931), 252, repr. in Klecatsky, Marcic, and Schambeck *supra* note 45, 1311, at 1331.

100 A. Jakab, 'Probleme der Stufenbaulehre. Das Scheitern des Ableitungsgedankens und die Aussichten der Reinen Rechtslehre', (2005) 91 *Archiv für Rechts- und Sozialphilosophie* 333, at 333; T. Öhlinger, *Der Stufenbau der Rechtsordnung. Rechtstheoretische und ideologische Aspekte* (1975), 9.

101 A. Rub, *Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung* (1995), 312–13.

102 A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), 43.

103 R. S. Pathak, 'The General Theory of the Sources of Contemporary International Law', (1979) 19 *Indian Journal of International Law* 483, at 484; G. M. Danilenko, 'The Theory of International Customary Law', (1988) 31 *German Yearbook of International Law* 9, at 17; R. Bernhardt, 'Ungeschriebenes Völkerrecht', (1976) 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 50, at 64; J. Charney, 'International Lawmaking – Article 38 of the ICJ Statute Reconsidered', in J. Delbrück (ed.), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (1997), 171, at 174; H. Thirlway, *International Customary Law and Codification* (1972), 36.

formal sources. By default – if we cannot prove a normative superstructure – the main sources would not be connected by norms[104] and, consequently, would not be hierarchically ordered.

Parts of constitutionalist scholarship claim that 'the Charter is the supporting frame of all international law'[105] because a revolution (section 3) took place in 1945 which mediated the rest of international law through incorporation.[106] This is achieved by 'the rules of law making in article 38 of the ICJ Statute'[107] becoming the source-law for all 'ordinary' international law. It is highly unlikely, however, that the drafters of the Charter, for all their talk of a new beginning after 1945, of a clean slate, actually intended the Charter to supplant ordinary international law and relegate the latter to being an appendage of the former, rather than seeing the Charter as a further treaty of great political importance. What is more, the concrete terms of the Charter and the Statute will not support such an interpretation. Article 38 of the ICJ Statute is an applicable law clause for a particular international tribunal and is formulated as such. Not without reason it is not part of the Charter *sensu stricto*, where we would have expected such a massively important incorporation clause. Not without reason does it say that '[*t*]*he Court*, whose function is to decide in accordance with international law such disputes as are submitted to it, *shall apply*' (emphasis added), and it does not say that the following *litera* are the basis of validity of, say, customary international law itself. Moreover, how can a treaty include the formal source of all treaties without begging the question, for on what legal basis does the Charter operate? In the end, this is perhaps yet another example of the overly optimistic – less kindly one might be tempted to call it 'tendentious' – reimagining of international law to make it fit the constitutionalist paradigm (section 2.2).

5. Conclusion

In critiquing constitutionalism as a scholarly movement from a viewpoint that seeks to keep the various scholarly methodologies apart, we seem to be faced with a rather stark choice. International constitutionalism according to this view is either banal or illicit. Either it is an empirical taxonomy of a legal order as 'constitution(al)', which has no consequences and for a legal scholarly analysis is as irrelevant as our calling a rose a 'stench-blossom'[108] is for its smell. If legal consequences are created from this taxonomy – and the clear tendency is to do so – the law is claimed to be changed by means other than the law provides. On balance, it is a project to advance internationalist or cosmopolitan values vis-à-vis the perceived interests of national states, nationalism, and 'anti-international developments'.[109] In other words, it is political activism by international legal scholars – how else to interpret

104 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (1920), 106–7.
105 Fassbender, *supra* note 1, at 118.
106 Ibid., at 118–21.
107 Paulus, *supra* note 9, at 77.
108 *The Simpsons*, Season 9, Episode 2 ('The Principal and the Pauper').
109 Wet, *supra* note 26, at 76.

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the following: 'international constitutionalism as *an attempt to establish and control international power* remains a worthy endeavor'?[110]

Perhaps we really do need Philip Allott's revolution of the mind – a true and complete re-formation (in the literal sense) of the legal bases of the international legal system.[111] In no case, however, can this revolution be achieved by scholars who take it upon themselves to change the positive law through their legal analysis. International law does not have certain features because scholars say it does. In this respect the Pure Theory's keeping law and external elements apart and the 'scientific' rigour in not allowing cognition to create law may make it a beneficial tool for the analysis of the constitutional elements of international law and for the critique of scholarship's designs for the law.

110 Paulus, *supra* note 9, at 88 (emphasis added).
111 P. Allott, *Eunomia: New Order for a New World* (1990).

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