

UNDERSTANDING THE CURRENT FRAGMENTATION OF THE LAW AND THE COEXISTENCE OF SUPRANATIONAL LEGAL ORDERS¹

Entendiendo la fragmentación del derecho y la coexistencia de los ordenamientos jurídicos supranacionales

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Abstract

This paper focuses on the fragmentation of the law and some issues arising from the coexistence of supranational legal orders. It will depart from the classic

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concepts and approaches towards international law such as domestic law, monism or dualism and will focus on the new conceptions such as pluralism and constitutionalism. Subsequently, this article will explore the current situation of fragmentation of the Law within the supranational arena. In doing so, it critically analyzes the different conceptions and models proposed by the scholarship to try to govern the current complex legal structure. Finally, the paper tries to predict the future of the debate, pointing out the possible evolutions of the approaches towards the governance of supranational legal structures.

Keywords

Interordinal relations; fragmentation of the Law; legal pluralism; constitutionalization of international law.

Resumen

Este artículo se centra en la problemática derivada de la fragmentación del derecho y algunos de los aspectos derivados de la necesaria coexistencia entre ordenamientos jurídicos. El trabajo partirá del análisis de los conceptos clásicos, como derecho nacional, monismo o dualismo y se centrará, a continuación, en nuevas concepciones de las relaciones entre ordenamientos, tales como el pluralismo y el constitucionalismo. Seguidamente, este artículo explorará la situación actual de fragmentación del ordenamiento jurídico en el nivel supranacional. Para ello, analizará críticamente las diferentes concepciones y modelos propuestos por la doctrina para tratar de regular la compleja situación. Finalmente, este trabajo intentará predecir el futuro del debate, señalando posibles evoluciones en los distintos enfoques que pretenden aportar luz a la tarea de gestionar las relaciones interordinamentales.

Palabras clave

Relaciones interordinamentales; fragmentación del derecho; pluralismo jurídico; constitucionalización del derecho internacional.

SUMMARY

I. INTRODUCTION. II. DECONSTRUCTING THE CONCEPT: FROM HIERARCHY TO FRAGMENTATION. III. THE CLASSIC DEBATE: "MONISM" VS. "DUALISM". IV. THE CURRENT DEBATE: "PLURALISM" VS. "CONSTITUTIONALISM". V. CURRENT TENDENCIES. VI. EPILOGUE. *BIBLIOGRAPHY.*

I. INTRODUCTION

The existence of interactions and conflicts between overlapping legal orders has always drawn the interest of the doctrine whether we discuss the relationship is between international law and the domestic law of the states or between federal law and the members of the federation. Regardless of the difficulty of those problems at their time, today's fragmentation of the law, with an increasing number of international organizations (some of them claiming primacy of their rules over national constitutional law, such as the European Union), seems to be a quite more complex issue.

This paper will depart from the classic concepts and approaches towards international law such as "domestic law", monism or dualism and will focus on the new conceptions such as pluralism and constitutionalism. Subsequently, this article will explore the current situation of fragmentation of the Law within the supranational arena. In doing so, it critically analyzes the different conceptions and models proposed by the scholarship to try to govern the current complex legal structure. Finally, the paper tries to predict the future of the debate, pointing out the possible evolutions of the approaches towards the governance of supranational legal structures.

II. DECONSTRUCTING THE CONCEPT: FROM HIERARCHY TO FRAGMENTATION

The concept of "domestic law" (sometimes also called "municipal") is a quite subjective one and its meaning has evolved during the last decades within the legal theory and practice. Briefly, 'domestic law' refers to a national legal order, i.e., traditionally the legal system of a country. Indeed, domestic

law differs from International law, whether we refer to the International legal order in broad terms or to a specific supranational legal order (e.g. EU Law) or to the law of a specific supranational institution (e.g. WTO Law). Then, what we understand by “domestic law” will always depend on the parameter of reference, and the (quasi)hierarchical relationship of one legal order *vis-à-vis* another. For instance, the German Legal order is to be considered “domestic law” in relation with EU Law. However, EU Law itself will be considered “domestic” in relation with the WTO Law or, if the EU finally accedes, with the ECHR legal protection system. Accordingly, in order to define the concept of “domestic law”, for instance, it is necessary to take into account the its relationship with International Law and other related concepts, such as monism, dualism, (constitutional) pluralism, fragmentation of the Law and even the old concept of federalism³. The same would apply, if one were willing to define “International law” (or like some authors claim today “Supranational law”), i.e. at the end of the day it is a question of perspective, and in order to define this concept it is necessary to contextualize it.

Historically, the existing doctrines on interordinal relations between international law and domestic law could be classified into the so-called “parallelism” (recognition of the coexistence of two separate independent legal orders), “internationalism” (recognition of the primacy of international law) or “constitutional nationalism” (recognition of the primacy of national law)⁴. However, the classification finally imposed on the doctrine is the one opposing *dualism* to *monism*. Thus, the so-called “parallelism” would be equivalent to *dualism* while the so-called “internationalism” and the “constitutional nationalism” would be equivalent to the *monistic* conception. Despite the irreconcilable differences that these different conceptions had, the need to make the system viable and very existence of the international society led back existing conflicts into pragmatic solutions⁵.

³ The approach to International Law led by Kelsen against the then dominant positions represented by Triepel altered dramatically the future conception of International and domestic law. See Rigaux (1998).

⁴ See one of the first books developing this idea, La Pégola (1961) and La Pégola (1985). The work of professor La Pégola has deeply contributed to isolate the founding constitutional principles of the relationship between International and National (domestic) law.

⁵ The innovative ideas on the constitutionalization of International Law anticipated the strong process of international cooperation that ultimately ended with the establishment of supranational organizations and the issue of the conflict International-domestic law started to be analyzed (and then, solved) as a legal problem. See Mirkine-Guetzévitch (1931).

Likewise, in the national field, discussions about the primacy of federal law in connection with the constitutions of the Federated States were intense, especially during the early years of American federalism⁶. The application of the American federal experience to the EU has been largely theorized. The theory of the constitutionalization of Europe as a federalizing process (partially similar to the US one) is particularly suggestive⁷.

But the problems at the time of the discussions between supporters of monism or dualism regarding International law or the primacy or faculty to not apply a federal law contrary to the Constitution of the federate State in the discussion of federalism could not be compared with the current situation, where different and overlapped legal orders must coexist. Indeed, in those cases the difficulties focused on the problem of coordination between “only” two legal systems (international and internal order) or, perhaps three in the case of the United States (if we add the relationship of Federated States law with international law). Since the end of World War II there have been many new and parallel systems. The United Nations Organization (UN) and its specialized agencies or, more recently, the World Trade Organization (WTO) structure the international society from a political and economic view. In Europe, the system of protection of human rights established by the Council of Europe and the one developed within the European Union are the most troubled systems in this sense, despite being two different systems, as shown by recent decisions of its major interpreters. But these are only some examples and the listing is not at all exhaustive. The picture is enhanced as international organizations emerge whose bodies approve actions that must be executed. The coordination between general international law and specific or regional “sub-orders” is by no means a new phenomenon, but issues relating to the relationship between general law and special rules, or even among their own special rules, are gaining in importance. I.e, in relation to the WTO, many questions have been raised regarding the relationship between international trade law and international environmental law or international labor law (Trebilcock and R. Howse, 1999; Arriola, 2017). Besides, the emergence of transnational commercial rules poses a new challenge to the monopoly of the Law

⁶ On the evolution and the founding legal principles of federalism, mainly the relationship between Federal law and State (domestic) law, the study of the American case is particularly interesting. See Mclaughlin (1935) and Loewenstein (1940). The analysis of the evolution of the German federalism provides a good contrast with the American experience, see Loewenstein (1940).

⁷ See, among other works of the author, Weiler (1999).

traditionally defended by States and International organizations (Kronke and R. Goode, 2007).

In this context, once feasible solutions developed in the field of interpretation of treaties or relations between successive treaties is now, at least, incomplete. Typically, the relationships between different orders have not been subject to regulation through specific provisions contained in the founding treaties of the legal systems in question. It is true that Article 103 of the UN Charter proclaims the primacy of the obligations derived from it over any other international obligation agreed by the Member States of this organization. Within the European Union, Article 351 of the TFEU voices a provisional coexistence between community obligations and those from previous agreements concluded by Member States and third parties. But the original EU treaties did not contain any indication of their relations with the European Convention on Human Rights. In that context, it was difficult to apply systematically the classical solutions on the relationship between successive treaties without questioning the uniformity of the rules applied to the internal market. Similarly, it would have threaten the unity of the market that was being built the fact that of the founding states (except France) did not apply a Community rule deemed contrary to the European Convention on Human Rights (ECHR). On the other hand, France, that was not a member in the initial period, could execute it without a word of complaint⁸.

Thus, the potential for conflict multiplies exponentially as each of these systems is constantly evolving through the decisions of its major interpreters or supervisory bodies⁹.

The consequence of this changing or evolving nature and of the different orders that must coexist is the increase of the chances of clash or conflict as if they were shifting tectonic plates drifting over the Earth's mantle. With this background, even if the different systems strive to make the measures adopted within it compatible with other orders or, at least, with their essential values, the risk of conflict does not disappear at all, since what today might be acceptable to the other, tomorrow might not be the case, given the constant development they undergo.

⁸ This kind of questions is the inevitable consequence of the current "fragmentation" of international law in orders and different and uncoordinated sub-systems, see Buffard and others (2008).

⁹ The European Court of Human Rights has developed an evolutive interpretation of the ECHR, i.e., as a "living instrument to be interpreted in light of present-day conditions", see *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995, Series A vol 310) para 71.

This situation, which is to create an apparent complexity in the management of the interordinal relationships, a complexity that, also affects, in a significant manner, the legal security. For individuals (either an individual or a legal person from a foundation to the largest corporations) perhaps the most important thing is to live under a firm order that makes the legal consequences of their actions predictable. Because talking about “fragmentation of international law”, “legal pluralism” or orders that organize their coexistence through “counterlimits” or “contrapunctual law” principles or, more generally, the so-called “global governance” that some call “governance” (to give some examples that shall be discussed in this paper) is undoubtedly of great interest to the doctrine, that tries to understand some realities and influence them. And there is no doubt that these ideas have inspired the solutions that supranational courts have been given to the litigations arisen. But it brings about some doubts the fact that these constructions trust multinational companies and the investment funds they operate in a context that could be described as transnational¹⁰.

Even if the various jurisdictions involved, either national or supranational, develop through constructive dialogue laudable and complex efforts to, at least, keep coexistence in a complex scenario in which the inherent contradictions among orders come to light, the presumed victim who claims a violation of their fundamental rights (recognized in some of the applying overlapping orders) shall hardly be in a position to wait for such “cross-jurisdictional” dialogue or for the complex doctrinal constructions to tell him which court he should go to in order to file the complaint or what are the regulations applicable to his case. The uncertainty about the applicable law or litigation expenses shall constitute, without any doubt, an obstacle that few would try to overcome in order to assert their rights. But we must clear up any lingering doubts as to the potential criticisms addressee¹¹.

In fact, a construction based on the principle of hierarchy (which later became “constitutionalist”) would not let, in the current situation, to report

¹⁰ The traditional division between domestic and International law is facing the emergence of new concepts, such as “Transnational law” that describe the current situation in a more accurate manner, even though their true meaning is still under construction, see Scott (2009) and Zumbansen (2006).

¹¹ Criticism shall not be directed to the doctrine which has made strenuous efforts to shed some light) or the courts or to the courts (operating at the limit of their powers and possibilities), but to their political power, unable to provide a solution to the deep-seated problem or, perhaps satisfied with the status quo or, even worst, simply passive. See the excellent article Jacqu e (2007).

the real situation or to give answer to the specific problems that arise, unless a rather simplistic and of questionable value approach is carried out.

Furthermore, if the construction based on the Kelsen's pyramid has a clear utility in the context of internormative relations within any legal order; it is less effective at coordinating the complex interordinal relationships where, in addition, each order would consider that their rules prevail over the other. On the other hand, a vision founded on the idea of a "mesh" or "net" (to which in this book shall be called "pluralism") would be conceptually more accurate, but not at all clear that would be capable of giving a practical answer to the existing difficulties. Certainly in the (few) cases in which the founders of the orders had organized the interordinal relations of that legal system and other existing or in those situations where the rules of the concerning orders were fully compatible among them¹².

Certainly, the application of the rules governing the relationships between successive treaties is, at least, delicate in cases of orders derived from international agreements whose members maintain close ties at various levels, as if they were Russian dolls. Thus, all members of the European Union are present in the Council of Europe, whose members are all part of the UN. The treaties supporting each legal order establish mandatory rules that cannot be exempted through an agreement between several of its members. Indeed, in most cases, these orders are comprehensive or complete systems, in the sense that the relationships established between the parties cannot be decomposed into a set of bilateral relations. Moreover, the provisions of the Vienna Convention on the Law of Treaties (in particular Article 30 on successive treaties and Article 41 dealing the *inter partes* agreements within in a multilateral treaty) do not always offer appropriate solutions, especially in cases where there are power or transfer of powers from the Member States to an organization they belong to, as in the case of the European Union. To make it more complex, the application of rules on the successive treaties is difficult when not all States have become part of the same treaties at the same time. Thus, Germany became a UN member in 1973 and France did not ratify the European Convention on Human Rights until 1974. By that time, the European Economic Community, whose founding treaty entered into force in 1958, had already a past and the ECJ proved already its importance.

¹² The usual assumption happens to be one in which information is missing on the coordination of the interordinal relations and/or the rules arising from the legal systems in fights are incompatible, in which case the judge (or the equivalent authority) would have to rely on the general rules on successive treaties or in the classic conceptions of relations between national and international law. See Brownlie (2003).

Besides, it should be that some organizations intend to establish their own constitutional order. Thus, if the United Nations Charter is sometimes introduced as the “Global constitution”, the Court of Justice in Luxembourg considers the EU Treaties as a “Constitutional charter” and, on the other hand, the European Court of Human Rights has defined the ECHR as the constitutional instrument of a “European public order”. In this context, recourse to the rules governing the relations between these orders that consider themselves as constitutional orders through general rules of treaty law seems, at best, insufficient. Moreover, regarding the application of the rules on relations between national and international law, the primacy and direct effect of EC/EU rules guaranteed by the Judge of Luxembourg would deviate from the traditional views on the subject¹³.

In this kind of “legal globalization” where different orders established by founding texts that share all or a group of members of other systems and each seems to move at their own pace, the interest of analyzing the rules and internal procedures would give in to the challenge of understanding and, if possible, resolve any possible conflicts that may arise between them. Thus, judges have emerged as the guarantors (sometimes *vigilantes*) that the obvious contradictions will not trigger irreconcilable conflicts. The different Courts at play (i.e. the ECtHR, the CJEU or the national Courts) have authored a series of unilateral declarations in which they have set minimum standard rules that essentially all of them have accepted: the key element was to produce decisions that the other Courts would accept or at least tolerate. But, to the extent in which each judge decides on the basis of the legal instrument used for their competence, in a kind of *Kompetenz-Kompetenz* judicial loop, the absence of final or all-encompassing solutions is not surprising. Thanks are due to these courts for being able to measure time and not provoking irreconcilable differences that could have led to unsolvable crisis. The differences among major interpreters have become “theories” and *obiter dicta* and, through a rich dialogue fed by jurisprudential conceptions, they have been able to find concrete solutions to specific problems as they arose without compromising individual projects converging. The livelihood of the entire system owes much to the tolerance and the mutual opening of the national and supranational jurisdictions. In this context, the most important difficulties when coordinating the interordinal relationships have arisen mainly around national constitutional

¹³ The relationship between the different coexisting and overlapping legal orders is one of the most challenging issues of today’s international legal scholarship. Among others, see MacDonald and Johnston (2005).

law, the law of the European Union (before the EC), the European Convention on Human Rights and the UN Charter (Gordillo, 2012).

III. THE CLASSIC DEBATE: "MONISM" VS. "DUALISM"

The term "dualism", as well as the term "monism", is used by the doctrine in different ways. "Dualism" has been used to refer to a concept that understands national and international law as distinct and different legal systems in where national law would establish the conditions under which international law would enter into the national scope and the legal consequences of such action. However, a more specialized and technical concept uses the term "dualistic" to make reference to that legal order in which international law would require would require a transposition (or domestic implementing act) in order to be part of national legal order. The dualist model implies that only domestic law is to be enforced by national judges, so international treaties need to be implemented into domestic law¹⁴.

Even though the monist theory had initially a minority of supporters (Kunz, 1925), Kelsen's challenge of the dualistic view supported by H. Triepel changed dramatically the approach "international-domestic law"¹⁵. The discussion between the supporters of the monistic and dualistic approaches domestic-international law was one of the most intense legal debates of the XXth century¹⁶. And today, most of National legal orders keep some kind of dualistic approach¹⁷. In Europe, Italy and the United Kingdom have a long "dualistic tradition". In the case of Germany or Spain, even though they embrace a monistic approach, their National Constitutional Courts, despite international Agreements, could enforce a National guarantee of their respective constitutional identities¹⁸.

At the end of the day, every Court of Constitutional nature (National constitutional Courts or the CJEU, for instance) would enforce their respective constitutional rules over any other external norm producing effects within their area of competence, if this external norm does not respect the

¹⁴ See the works of Triepel (1907) and Triepel (1923).

¹⁵ See the classic Kelsen (1926) and the later Kelsen (1952).

¹⁶ See, for instance, Starke (1936).

¹⁷ US Courts are still reluctant to directly enforce International Law, see Bradley and Goldsmith (1998).

¹⁸ This issue has been a classic one in the development of the European Union integration and the conflicts between national constitutional law and EU (before, EC) law. See Gordillo (2012: 13-56).

constitutional essence (or identity) of their respective legal order. The *Solange* jurisprudence of the German Constitutional Court, followed by similar decisions of the Italian, the French, the Spanish, the Polish and other EU Constitutional Courts shows this willingness at the national level (Gordillo, 2012: 19-38), whereas the *Kadi* case-law shows the very same intentions of the CJEU if any binding rule of International Law undermines the fundamental rights protected at the EU level (Gordillo-Martinico, 2015: 197-231).

In this situation, the debate monism-dualism, is in fact a matter of perspective: every legal order of constitutional nature would be ultimately “monistic” from point of view of their respective Constitutional Court, and “dualistic” for an external observer. In this context of monists and dualistic approaches, which hide also a conflict of ultimate supremacy of National-Supranational Law, the progressive assumption of constitutional principles and values within the International legal arena, empowered by international organizations such as the European Union and even the United Nations, would help to prevent possible conflicts, since National and Supranational legal orders would share common constitutional values¹⁹.

IV. THE CURRENT DEBATE: “PLURALISM” VS. “CONSTITUTIONALISM”

There is an increasing number of international organizations, from those based on functional or regional philosophies created to face specific transnational needs or to achieve specific objectives, up to those large multilateral organizations created to address more general or fundamental common tasks (political economic, cultural, military, technical, etc.), each with many variations²⁰.

Thus, a classical definition of international organization would be that of a voluntary association of subjects of international law, established by international acts and illustrated in relations between parties by rules of international law, specified in a stable entity, endowed with organs and institutions, through which it carries out common goals of the fellow members through the development of special functions and the exercise of powers conferred for that purpose. Similarly, in the traditional sense, the term international organization means a union of several subjects of international law, established on

¹⁹ See the excellent paper, De Búrca and Gerstenberg (2005).

²⁰ Given the diversity of profiles of international organizations, it is not easy to build a general theory or even a specific definition of the international organization. Probably one of the best books on the issue is this one of Professor Sarooshi (2007).

equal basis, equipped with their own rules and with entities and institutions, aimed to achieve, according to their constitutive act, a goal shared by their members.

Besides, in principle, international organizations would not be higher political institutions, but organizations based on the principle of cooperation and respect for the sovereignty of the state. However, among the doctrine appeared a new kind of organization: integration or supranational organizations, which would detract from the above theories. Such organizations would go beyond the imperative of cooperation of any international organization to capture the alienation of certain sovereign powers in pursuit of a larger unit within which the boundaries become more flexible and permeable. In contrast to the characteristics of the organizations for cooperation, the integration ones would be distinguished by the transfer of sovereign powers by member states, initially in specific subjects, in their favor, which are exercised through legitimated bodies entitled to act directly on citizens. Moreover, these organizations would reduce or limit the sovereignty of their Member States, as they were intended to create an entity with their own powers to achieve common goals, usually economic or political ones²¹.

Together with these developments at the institutional level, there is a large amount of literature and great doctrinal interest towards what has been called “legal pluralism” but also the well-known “international fragmentation” (or “fragmentation of international law”), both derived from the increased density of the international legal environment. The pluralistic approach describes very accurately the current coexistence of different (in quality and capacity) international organizations and their sub-legal orders and is based on the very concept of liberty and self-restraint of the classic political literature, whose main principles have been lately revisited to construct this theory²².

²¹ International Organizations (particularly those called “integration organizations”) would reduce or limit the sovereignty of their Member States, as they are intended to create an entity with their own powers to achieve common goals, usually economic or political ones, Schermers and Blokker (2004).

²² See, among others, Krisch (2006) and Walker (2002). The International Law Commission (“ILC”) set up in 2002 a Working Group under the name of “Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law” to the issue of the fragmentation on International Law. The Group delivered a report to the UN General Assembly in 2006, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (U.N. Doc. A/CN.4/L.702, 18 July 2006, ref. GE.06-62863 [E] 200706).

Given the lack of an homogeneous international legal order to define responsibilities and assign jurisdictions, the relationship between these different types of entities with each other, as well as the relationship between the States, international organizations and other international actors are complicated and some of the problems generated are still without a final solution. There are significant overlaps in the jurisdiction that these different subjects are trying to exercise, and their powers and responsibilities are generally neither defined nor concretized in a way as to avoid conflicts with others or either how such conflicts should be addressed²³.

This can be understood from two different conceptions. On the one hand, the interest in these overlaps and other complications derived from the increasing fragmentation of international legal order would be the formalist view, derived from the kelsenian desire to establish a global legal order perfectly hierarchized as a result of the transposition of the governing principles of the state legal order to the international level.

Another point of view, however, would argue that in the situation described above there is an interest that goes beyond the mere desire of establishing some specific orderly principles or the defense of the hegemonic expectations of international legal liberalism.

Many of these international organizations have been enlarging their powers from their very inception, increasingly exerting the functions of a government and increasing their autonomy and authority and at the same time, usually showing two complementary trends. Firstly, they tend to focus and strengthen their executive and administrative powers. In order to do so, they grant powers to the national executive bodies purporting to represent the State interests in the international forum and the new bureaucratic structures that constitute the secretariats and institutional frameworks of these organizations²⁴. Secondly, these organizations tend not to provide mechanisms or require responsibility to control their activity, although they are features that do appear on the state level. Thus, this model of international governance is particularly far from the citizen and generates important problems regarding

²³ Whereas before the debate was focused on local and infra state orders that coexisted in the same spatial area of national character, now the interest is directed beyond the state, to the global legal orders that coexist in the world with the existing state and infra state systems. See, Sousa Santos (2003).

²⁴ This tendency creates more and more international organizations and agencies brings new challenges of constitutional nature, mainly, the problem of co-existence of those sub-legal orders and the problems of accountability of those international structures. See Choudhry (2006).

responsibility in the increasingly complex transnational scenario²⁵. And consequently, this situation brings a context in which is difficult to set up (and maintain) a genuine accountability mechanism. As a result, one can argue that states may try to circumvent their constitutional duties (such as power limitation, protection of fundamental rights, accountability of their actions...) by creating international organizations with no such constraints²⁶.

Pluralistic conceptions share with dualism the emphasis given to the existence of distinct and separate legal orders, but while pluralism stresses the plurality of different regulatory systems, the traditional dualistic approach has focused on the relationship between the national (or domestic) law and international law. Likewise, the traditional constitutionalist approaches to the international legal order coincide significantly with the monistic ones on their assumptions of the existence of a single and integrated legal order, but the category that should be a constitutionalist approach of the international legal order is extensive and includes some positions that do not necessarily assume that inherent integration and could not easily be equated with the traditional monistic theory.

Unlike what usually one might think, the main difference between constitutional and pluralist approaches is not that one has a normative orientation and the other a descriptive one, although many of the pluralistic approach supporters have the advantage that their descriptive explanations seem more plausible and some variants of the constitutional approach may seem unrealistic and unattractive given the deep and wide diversity of orders²⁷.

Unlike the doctrine in the field of legal pluralism that, although increasing, is quite recent and not excessive, there is an abundant literature on the constitutional conceptions of international law²⁸. The literature regarding a concept so suggestive and complex to define as constitutionalism is wide and there are a number of different arguments and conceptions in this field (Loughlin and Walker, 2008). In fact, a risk inherent to the concept of “constitutionalism” consists on the extension and excessive use that has been made,

²⁵ The new rules and principles of international lawmaking resemble the old mediaeval ages of privatization of policies, politics and polities. See Held and Koenig-Archibugi (2003).

²⁶ See the interesting work of Slaughter (2001), criticizing the lack of genuine accountability systems in those situations.

²⁷ Understanding the theory of legal pluralism and the pluralist approach to international law is currently critical to understand international law and ultimate significance of the dichotomy “international v domestic law”. See MacCormick (1999).

²⁸ See Fassbender (2009), where the author provides an explanation of three possible approaches to constitutionalism and international legal order.

to the point that speaking of a “constitutionalist approach” does not clarify too much the description of a particular approach to international law (Dunoff and Trachtman, 2009).

Some authors have severely criticized the inflationist use of the term “Constitution” comparing it with an increase in regulation or with the evolution of a hierarchical legal system (Cass, 2005). However, there are many variants of the concepts international-constitutionalists that could be considered as such in the sense of the terms “international” and “constitutionalists”. Among them, we should highlight the influential German school represented lately by Simma and Tomuschat (among others), stressing the idea of an international legal order based on an international community and international solidarity as opposed to the concept based on separate and distinct interests of national States individually considered (Simma, 1994; Tomuschat, 1999). In this latter sense there are those who categorically conclude that the essential object of international constitutionalism has been to force states to comply with the constitutional principles of the international community (Tomuschat, 1999).

Constitutional approaches vis-à-vis international Law tend finally to accept the existence of a fragmentation of International law, but they stress the necessity of the different interpreters of the given sublegal orders to adopt decisions that may be accepted by the others legal orders and, finally, they propose to create mechanisms to solve the possible conflicts that may emerge²⁹.

V. CURRENT TENDENCIES

Whether we talk about a constitutionalist or pluralist (as a new version of the old dichotomy monism-dualism) approach of international law, the vector of the debate was the protection of fundamental rights, i.e., the area where national and supranational courts could potentially disagree and force a breach of international relations rules and/or national duties vis-à-vis international law was the one involving the protection of fundamental rights, where different levels of protection could potentially clash³⁰.

²⁹ See the excellent article De Búrca (2010). Professor De Búrca was the first in proposing a kind of soft constitutional approach vis-à-vis international legal arena in order to provide some kind of order and legal certainty.

³⁰ The literature on this issue is huge. For a sample see Zucca (2008), Torres (2009) and Gordillo (2012).

This debate has been partially overcome by two other emerging issues in International law, the law of lawmaking and the impact of the economy and the markets in the global governance.

As for the first of them, the so-called law “law of lawmaking”, we refer mainly to the administrative development of the increasing number of international organizations and the way in which they produce and implement norms. This could be seen as a logical follow-up of the old Convention on the Law of the Treaties (Vienna, 1969), which puts forward the need for a law through which the processes of transnational decision making can be structured so as to ensure their legitimacy and the rule of law (Joerges, 2006). Underlying these approaches is the desire that the various forms of transnational governance that would otherwise escape the national constitutional review should, however, be governed by the law. Specifically, these concepts have shown the need to transfer, to the transnational context, a set of constitutional principles similar to those that have developed in the national constitutional context such as the rule of law, separation of powers, the protection of fundamental rights, and democracy (Peters, 2006). Many supporters of the constitutional approach of the international order wanted to see in the development of the EU with its extremely dense legal order and positive argument that a constitutional approach beyond the state is possible and plausible (De Wet, 2006: 52-53). Among the supporters of this approach, one can find the more orthodox one (proposing a system with a pre-established hierarchy of norms) and maybe a more realistic one supporting the existence of a set of basic rules principles previously agreed upon to coordinate the global governance³¹.

The second set of constructions stresses the necessity to embrace a cosmopolitan vision of international law (Koskenniemi, 2007: 31-36), by relying Kant’s theories on cosmopolitanism (Habermas, 2004: 113-187). According to an authorized interpreter, for Habermas, international law constitutionalism seems to be equally in the substantive quality of the general rules, in its institutional effectiveness and its capacity for globalization (Walker, 2007: 228). Habermas pursued the reaffirmation of Kantian cosmopolitanism as the basis of international legal order, rather than Schmitt’s hegemonic unilateralism³². However, despite embracing the peace ideals of Kant or the objectives

³¹ The most developed orthodox theory in this aspect would be the one from Professor Christian Tomuschat (1999). For the less ambitious approach, see Walker (2002: 353-354), Bustos (2005: 189-205), De Búrca (2010) or Gordillo (2014).

³² In that sense, he opens the last chapter of his book asking himself “Does the Constitutionalization of International Law still have any chance?” (Habermas, 2004) facing the prevalence of the use of brute force.

ensuring freedom and security of constitutionalism, it rejects the idea of a world republic and believes in a different way of constitutionalizing international law³³. Thus, describing the constitutional process in the development of modern nation states as the one that is no longer a mere instrument of power trying to assert the dominant interests in a hegemonic manner, Habermas claims that great powers are more likely to meet justice and cooperation expectations if they are used to seeing themselves on the supranational level as members of a global community, and even more when they are perceived in this role from the perspective of their own national public spheres, before which they have to be legitimated.

In this scenario, and inspired by these neo-Kantian principles, some authors, such as Professor De Búrca, have proposed what they call a “soft constitutionalist approach”. This understanding of the Law within a multilevel and transnational context implies, first, to assume the existence of an international community of some kind. Second, and derived from the Kantian moral and categorical imperative, this model would emphasize the possibility of universal principles inspiring the different legal orders which coexist in this community. Third, there is a need for common rules or principles of communication between these orders that allow to re-address the real conflicts that may arise. These three characteristics clearly distinguish soft constitutionalism from pluralistic approaches, since these assume the existence of a different plurality and separated from entities rejecting the idea of a global community, they emphasize the autonomous decision-making processes based on their own authority and in the native values of each of the entities, while channeling communication and conflict resolution through “agonizing” political processes, ad hoc negotiations and specific and pragmatic adjustments. The soft constitutional approach also differs from more orthodox constitutionalist conceptions because it would not insist on a clear hierarchy of rules, but rather in a series of commonly traded and shared principles to redirect conflicts (De Búrca, 2010). The authors who share, to a greater or lesser extent, this soft approach would differ from the strictly monistic doctrine or that based on a clearly hierarchical conception of the international order because it is identified with pluralist thinking (nothing else) on the assumption of diversity and mechanisms for negotiation and dialogue to manage conflict. Thus, the “soft” constitutional doctrine claims the use of universalized standards, mutual deference, general coherence and commitment to a common international order (Walker, 2002; Von Bogdandy, 2008; Kumm, 2006; Halberstam, 2010).

³³ Habermas (2004: 113-193), where he revisits the Kantian proposal for a World republic, and where he finally refuses this possibility.

The third and emerging option deals with the role of the economy in global governance, which would be a version of international constitutionalism proposing the limitation of public power and which emphasizes the need for a global law of integration protecting human rights and economic freedoms, with direct effect and legally enforceable (Petersmann, 2007; 2007b; 2008; 2008b; 2016; 2016b). This approach is currently quite popular among scholars analysing the recent process of mutation of the European Union Economic Constitution from an ordoliberal perspective (Gordillo-Canedo, 2016). The different measures adopted within the EU area to fight the financial crisis are still being scrutinized by the scholarship, since they have operated a sort of centralization of competences in the financial area without a corresponding reinforcement of the control mechanisms. Besides, the assumption of competences by the EU institutions in detriment of the national governments in the area of economics and financial affairs in moments of real economic emergency for some States (such as Greece, Ireland, Portugal or Spain) has demonstrated that the current level of economic integration needs a corresponding level of economic federalization, i.e. the economic governance of the EU should advance towards a truly economic government (increasing the federal powers of the EU)³⁴. Some authors have stressed the necessity of a more “federal economic EU”, otherwise the whole model could collapse, since the level of economic integration within the EU and as between the EU with other economic areas does not stand the current asymmetries in economic governance (García Guerrero, 2017).

VI. EPILOGUE

The classic approaches towards international law, taking into account the old concept of national domestic law as well as the monist and dualistic theories do not provide the answers that the current situation of emerging complexity of international relations and economic integration process demands.

In the current context of transnational legal fragmentation of the law, with an increasing number of international organizations with very active adjudicating authorities deciding cases and passing new norms, the aforementioned model of soft constitutionalism seems to provide the kind or legal certainty that any jurist may wish. The model, however, relies of the synchro-

³⁴ See the papers presented at the International Congress, Constitution and Markets in the crisis of the EU, July 12-14, 2017, at www.marco3.org.

nization of common values (that ultimately will become fundamental rights), something that may only be feasible within the European area.

Finally, a reflection towards the near future may seem appropriate. Economic integration always precedes the legal integration, and the establishment of single markets areas (integrated by countries or by economic supranational areas) may have a centralizing effect in the rules and principles governing those markets. The example of the EU and the initial four freedoms that subsequently spilled over and forced an ever closer (economic) union, seems to announce an impasse in the current status of most economic integration areas: whether they converge towards a single economic government or the current asymmetries in the governance process may compromise the whole project.

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