

2011-2013: „International law between constitutionalisation and fragmentation: The role of law in a post-national constellation”; principal investigator: PhD Łukasz Gruszczynski

Description of the project

The project intends to show that the processes of constitutionalization, fragmentation, politicization (C/F/P) of international law are dimensions of more fundamental systemic change in the contemporary world. The project will look at the C/F/P processes from three different but also interdependent perspectives: (i) territorial angle (emergence of different, and sometimes competing, centres of authority in international law); (ii) functional angle (emergence of specialized international organizations and systems); and (iii) temporal angle (shift to preventive and precautionary measures in international law).

The overview of the scientific literature shows that the C/F/P processes are seldom treated as interconnected. They are rather conceptualized as three separate phenomena that contradict each other. The added value of the project is, therefore, to further explore the relationships between these processes and to supplement existing literature with more detailed case studies. Another novelty of the project is that it brings together researchers from different disciplines (lawyers, political scientists and sociologists). This interdisciplinary approach allows consolidating knowledge dispersed in different disciplines, and by doing this it will contribute to the creation of new insights on the current state of international law.

The research conducted within the project is organized on the basis of three thematic working groups (territorial, functional and temporal aspects of C/F/P). Although each of them has a distinct set of research tasks, they work remain mutually interdependent, permitting cross-comparisons. Polish researchers will participate in work conducted within two working groups (I and II).

The Working Group I (Constitutionalization and territorial fragmentation) will investigate one of the paradoxical consequences of the rise of constitutionalism in international law. Whereas constitutionalism aims at providing unity and hierarchy within a legal order, international constitutionalism so far has (also) resulted in a dispersion of authority. Different actors (e.g. regional organizations, sovereign states, private groups) have been endowed with the task of maintaining and protecting the international constitutional order. Based on case studies and more general theoretical studies, this working group will examine the relation between the constitutionalisation of international law and its diversification (fragmentation) into different centres of authority, both public and private.

The specific topic proposed by the Polish research team concerns relationship between the International Criminal Court (ICC) and national judicial authorities. The Statute of the Court integrates basic rules of international criminal law and humanitarian law that were previously included in different instruments (or customary international law). Those norms are clearly designated to protect common values of international community as whole and may be seen as “constitutional”. At the same time, the ICC Statute reflects a diversification trend (in the sense of fragmentation into different centres of authority) by introducing the complementarity rule with regard to the jurisdiction of the Court. Consequently, the ICC assumes its jurisdiction only if a particular state that is entitled to initiate a proceeding fails to do so. The research will analyze this rule in the context of C/F/P debate. This analysis will subsequently serve for more general discussion (most probably undertaken by the research group as whole) relating to the advantages and disadvantages of complementarity mechanisms for other areas of international law. This will be also confronted with the research results produced by other participants of the consortium (e.g. complementarity rule in the EU law).

The Working Group II (Constitutionalization and functional fragmentation) will study two rather different effects of the process of globalization: on the one hand, the rise a more homogeneous set of values shared across borders and, on the other, an increasing fragmentation of international law

into specialised, functional regimes. On the basis of theoretical studies and concrete case studies, this working group studies the interrelationship between these two aspects of globalization. Moreover, the working group studies the political consequences of the diversification of international law into separate specialized regimes. In particular, it studies how in concrete cases societal problems have been translated into the vocabulary of a specific institutional regime, and why other ways of conceptualizing the same problem have been closed off. The Polish team will address two issues:

- First, it will analyze the development of international rules relating to protection of cultural heritage in terms of constitutionalization and fragmentation of international law. This area of international law evolved over last years into a significant regime of treaties and customary practice, creating its own catalogue of “constitutional” rules. In this context, the research will analyze the procedural principle of co-operation in cultural matters (fight against the destruction of cultural heritage; comity between domestic judges and tribunals in dealing with cases involving illicit activities in respect of cultural material, facilitation and promotion of international cultural exchange). In particular, it will address the status of principle, its source and nature.

- Second, it will investigate the relation between the WTO system and other international legal regimes, in particular environmental law. Although the WTO is primarily concerned with combating protectionism, it also, indirectly, established some specific constraints on implementation of national environmental measures (even if they are adopted as a consequence of international initiatives undertaken by WTO Members within other organizations or processes). At the same time, numerous studies have shown that such measures frequently constitute a form of disguised restriction on international trade (e.g. ban on importation of genetically modified organisms). The question that arises in this context is what kind of criteria should be used to distinguish between legitimate and illegal measures. This part of the research will provide a basis for more general analysis performed at the level of the whole group that will connect trade and environment debate (co-existence of two different systems with diverse values in the absence of meta-constitutional rules) with the problem of constitutionalization / functional fragmentation of international law

Finally, the Working Group III (Constitutionalization, fragmentation and the changing role of temporality) will concentrate on the turn towards prevention and precaution in different fields such as environmental protection, peace and security, anti-terrorism, human rights etc. It examines how the turn to the regulation of uncertainty and future threats relates to the emerging framework of international constitutional law. To what extent does the turn to prevention undermine constitutional guarantees (e.g. the right to fair trial)?