

German Federalist Thinking and International Law

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Abstract

This paper examines the explanatory and the prescriptive value of German (and related) federalist ideas with regard to the constitutionalization of international law. The author contends that respective scholars have, on the one hand, developed federalist thought with regard to the national constitutional level which may help to explain or shape international processes of constitution-building. On the other hand, they have themselves promoted international federalism as a natural extension of their national constitutional doctrine, hence partially weakening the classical dichotomy between national and international law.

A. Introduction¹

This paper examines the value of German federalist thinking with regard to the constitutionalization of international law.² For the purpose of

¹ The author wishes to thank Dr. Thomas Kleinlein for his helpful comments and Gabriel Alexander Baumstark as well as the GoJIL team for editorial support.

² Generally on the notion of international constitutionalism see for example B. Ackerman, 'The Rise of World Constitutionalism', 83 *Virginia Law Review* (1997) 4, 771 *et seq.*; S. C. Breau, 'The Constitutionalization of the International Legal Order', 21 *Leiden Journal of International Law* (2008) 2, 545 *et seq.*; A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (2007), 703 *et seq.*; B. Fassbender, 'Grund und Grenzen der konstitutionellen Idee im Völkerrecht', in O. Depenheuer *et al.* (eds), *Staat im Wort: Festschrift für Josef Isensee* (2007), 73 *et seq.*; J. A. Frowein, 'Konstitutionalisierung des Völkerrechts', in K. Dicke *et al.*, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (2000), 427 *et seq.*; M. Hilf, 'Die Konstitutionalisierung der Welthandelsordnung: Struktur, Institutionen und Verfahren', in W. Heintschel von Heinegg *et al.* (eds), *Entschädigung nach bewaffneten Konflikten: Die Konstitutionalisierung der Welthandelsordnung* (2003), 257 *et seq.*; U. Haltern, 'Internationales Verfassungsrecht?: Anmerkungen zu einer kopernikanischen Wende', 128 *Archiv des Öffentlichen Rechts* (2003) 4, 511, 512 *et seq.*; S. Kadelbach & T. Kleinlein 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht', 44 *Archiv des Völkerrechts* (2006) 3, 235 *et seq.*; J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009); T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012); M. Knauff, 'Konstitutionalisierung im inner- und überstaatlichen Recht: Konvergenz oder Divergenz?', 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008), 453 *et seq.*; A. L. Paulus,

this analysis, federalism is defined as a formalized system providing an entrenched distribution of substantial governance powers between two or more levels, establishing mechanisms of conflict resolution between these levels and requiring their cooperation for any formal changes of the given power distribution.³ Transposed to the international level, federalism may be associated with the notions of multi-level constitutionalism, multi-level systems or international networks.⁴

‘Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts’, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 695 *et seq.*; A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 3, 579 *et seq.*; *id.*, ‘Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse’, 65 *Zeitschrift für öffentliches Recht* (2010) 1, 3 *et seq.*; N. Petersen, ‘Der Wandel des ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung’, 46 *Archiv des Völkerrechts* (2008) 4, 502 *et seq.*; A. Stone Sweet, ‘Constitutionalism, Legal Pluralism and International Regimes’, 16 *Indiana Journal of Global Legal Studies* (2009) 2, 621 *et seq.* Fundamental for the idea of constitutionalization are A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd ed. (1984), who identify certain constitutional principles (“*Verfassungsgrundsätze*”) of the international community of States (59 *et seq.*), in particular the constitution of the United Nations (69 *et seq.*); see furthermore A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001); C. Tomuschat, *Constitutive Elements of the Present-Day International Legal Order* (2001), 24 *et seq.*, rather cautiously speaks about “constitutive elements of the present-day international legal order”; for a distinct German perspective see A. von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’, 47 *Harvard International Law Journal* (2006) 1, 223; P.-M. Dupuy, ‘Taking International Law Seriously: On the German Approach to International Law’, *European University Working Papers Law* (2007), 1.

³ D. Hanschel, *Konfliktlösung im Bundesstaat: Die Lösung föderaler Kompetenz-, Finanz- und Territorialkonflikte in Deutschland, den USA und der Schweiz* (2012), 13.

⁴ On multi-level constitutionalism see I. Pernice, ‘The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalization’, in P.-M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Common Values of International Law* (2006), 973 *et seq.*, as well as E.-U. Petersmann, ‘International Integration Law and Multilevel Constitutionalism’, in A. Epiney, M. Haag & A. Heinemann (eds), *Die Herausforderung von Grenzen: Festschrift für Roland Bieber* (2007), 429 *et seq.*; E.-U. Petersmann, ‘The WTO Constitution and Human Rights’, 3 *Journal of International Economic Law* (2000) 1, 19 *et seq.*; on multi-level systems see Knauff, *supra* note 2, 482 *et seq.*, and Kleinlein, *supra* note 2, 538 *et seq.*; on networks („*Netzwerke*“) see K.-H. Ladeur, ‘Ein Recht der Netzwerke für die Weltgesellschaft oder Konstitutionalisierung der Völkergemeinschaft?’, 49 *Archiv des Völkerrechts* (2011) 3, 246; see furthermore the notion of “*Gewaltengliederung*” used by C. Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und*

The analysis focuses on the contribution of classical German (and related) federalist constitutional ideas.⁵ It will look at the explanatory value of German federalist thinking (and corresponding practice) for international constitutionalism, raising the question to what extent it helps to explain existing forms of constitution-building in international law. In addition, the paper will examine the prescriptive value of German doctrine by establishing in what ways it has influenced processes of constitutionalization or may do so in the future. The paper intends to show that German and Austrian scholars such as Hesse, Jellinek, Kant, Kelsen, Schmitt, Simma and Verdross have provided important contributions regarding federal doctrine that are relevant for international constitutionalism: on the one hand, they have developed federalist thought with regard to the national constitutional level that may help to explain or shape international processes of constitution-building. On the other hand, they have themselves made suggestions for *international* federalism as a more or less natural extension of their *national* constitutional doctrine. While other scholars have been equally influential in developing federalist ideas,⁶ one particular “German” contribution is to bridge the divide of national and international law, believing that international law can and should be shaped along the lines of national constitutionalism.⁷

internationalen Rechtsvergleich (2005) which includes the horizontal division of powers as to be found in federal States. S. Kadelbach & C. Tietje, ‘Autonomie und Bindung der Rechtsetzung in gestuften Rechtsordnungen’, 66 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2007), 7 *et seq.* & 45 *et seq.*, report on the notion of multi-level legal orders (“gestufte Rechtsordnungen”). While Kadelbach, 9 *et seq.*, starts from the premise of a federal State, Tietje, 52 *et seq.*, rather focuses on multi-level systems while concluding with remarks on transnational federalism (67 *et seq.*). According to Kadelbach & Kleinlein, *supra* note 2, 244, the concept of the federal State may be transposed to the abstract concept of multi-level systems which may, for instance, help to solve problems of distribution of powers. Stone Sweet, *supra* note 2, 621 *et seq.*, adds remarks on “legal pluralism and international regimes”.

⁵ The related approaches examined in this paper mainly stem from Austrian scholars. In line with the research design of the Goettingen Conference which constitutes the framework for this paper, this analysis is based on a rather broad understanding of the “German” approach which encompasses the contributions of foreign scholars that may still be associated with German constitutional doctrine, whilst remaining sensitive to their respective origin.

⁶ See L. Levi, *Federalist Thinking* (2008).

⁷ For this asset of German federalist doctrine as compared to, e.g., the founders of American federalism see *id.*, 23; for a traditional dichotomy between national and international federalism (federation/confederation) see, however, C. Schönberger, ‘Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des

B. German Constitutional Thinking with Regard to National Federalism

I. Entrenched Distribution of Substantial Powers

According to German federalist doctrine, an entrenched distribution of substantial governance powers is usually provided for by a formal constitution.⁸ Hans Kelsen considered decentralization to be the main function of such power distribution, ensuring that regional powers are substantive.⁹ This notion, however, corresponds only partially to the history of German constitutional federalism: While decentralization became crucial after 1945, earlier federal constructs such as the German Reich after 1871 were the results of centralization rather than decentralization. Furthermore, the peculiar arrangement of executive federalism, while formally reserving substantial powers to the regions on the executive level, was in fact designed by Bismarck to preserve Prussian dominance.¹⁰

A further point that Kelsen made with regard to the distribution of powers in a federation was to identify the theoretical construct of the State as a whole (*Gesamtstaat*) as a third entity embracing the center and the regions on the same level and allowing to distribute competencies between them from a neutral stance. Since the *Gesamtstaat* has no institutions of its own, it resorts to the central organs which hence provide a double

Staatenbund-Bundesstaat-Schemas', 129 *Archiv des öffentlichen Rechts* (2004) 1, 81, 88; on the transition from national to international federalism see E. Zoller, 'Aspects internationaux de droit constitutionnel: Contribution à la théorie de la fédération d'États', 294 *Recueil des Cours de l'Académie de Droit International* (2002-I), 39, 50; on various legal traditions with regard to federalism (international, mixed, national) see R. Schütze, *From Dual to Cooperative Federalism* (2009), 15.

⁸ See e.g. M. Bothe, *Die Kompetenzstruktur des modernen Bundesstaats in rechtsvergleichender Sicht* (1977), 10; J. Isensee (2008), '§ 126: Idee und Gestalt des Föderalismus im Grundgesetz', in J. Isensee & P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Volume VI, 3rd ed. (2008), para. 257 *et seq.*; on one particular aspect of entrenchment, namely the requirement of cooperation regarding changes of the given power distribution see B. III. below.

⁹ H. Kelsen, *Allgemeine Staatslehre* (1925), 193 *et seq.*, more generally on centralization and decentralization *id.*, 163 *et seq.*, distinguishing various types of decentralization; for an account on competencies from a more theoretical point of view see R. Stettner, *Grundfragen einer Kompetenzlehre* (1983).

¹⁰ See generally Hanschel, *supra* note 3, 36 *et seq.*

function.¹¹ While this remains a theoretical assumption, it has helped to explain why the State's central organs may interact vertically as well as horizontally with the regions, depending on whether these organs decide matters of the *Gesamtstaat* (e.g. rulings by the Federal Constitutional Court or shifts of legislative powers between the *Bund* and the *Länder* by the legislative organs) or whether they act within the confinements of the powers split up between them and the regions by the federal constitution (e.g. in the respective legislative process).

However, Kelsen's approach makes it difficult to explain the phenomenon of concurring or shared powers. They usually operate according to the principle of supremacy placing federal above regional legislation and ultimately voiding the latter in case of a collision (as according to Art. 31 of the German Basic Law). Supremacy is usually accompanied by pre-emption barring legislation by the regions once the federal level has legislated (as stipulated by Art. 72 para. 1 of the German Basic Law).¹² Kelsen, by contrast, suggests clearly delineated, mutually exclusive competencies which would render such principles futile. In his system, priority would be tantamount to claiming that a law enacted without the respective competence to do so should nevertheless remain valid.¹³

Segments of an entrenched power distribution may also be discerned in the existing international legal order. They clearly do not amount to a full division of powers through legally binding catalogues. However, various elements and traces of different forms of power distribution exist which display federal principles such as priority, subsidiarity, pre-emption etc., and may constitute the first steps towards a more encompassing quasi-federalist order.¹⁴ One pertinent example is the United Nations Organization: Arts

¹¹ H. Kelsen, 'Die Bundesexekution', in Z. Giacometti & D. Schindler (eds), *Festgabe für Fritz Fleiner zum 60. Geburtstag* (1927), 130 *et seq.*

¹² See Hanschel, *supra* note 3, 72.

¹³ Kelsen, *supra* note 9, 220 *et seq.*

¹⁴ On subsidiarity in international law see U. Fastenrath, 'Subsidiarität im Völkerrecht', 33 *Rechtstheorie* (2002), *Beiheft* 20, 475 *et seq.*, and I. Feichtner, 'Subsidiarity', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX, 652, 655-657, paras 16-30; T. Broude & Y. Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Subsidiarity and Supremacy* (2008); on subsidiarity in the European Union Law see I. Feichtner, *supra* note 14, 654-655, paras 7-15; C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union*, 2nd ed. (1999); on subsidiarity in the WTO see R. Howse & K. Nicolaidis, 'Enhancing Legitimacy: Constitutionalization or Global Subsidiarity', 16 *Governance* (2003) 1, 73; on *ius cogens* and *erga omnes* norms as potential

33 and 37, Arts 39-51, Art. 52 and Art. 103 UN Charter lay down rules which display a potential division of powers between the United Nations and its member States as well as other international organizations.¹⁵ Art. 33 in conjunction with Art. 37 UN Charter calls upon parties to first engage in dispute resolution before the matter is transferred to the United Nations. The Chapter VII rules display a neatly devised system of gradually increased Security Council powers where other means of dispute resolution fail. Art. 52 UN Charter balances the relationship of regional institutions and the powers of the Security Council by following a subsidiarity approach: According to Art. 52 para. 2 UN Charter “[t]he members entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council”. Finally, Art. 103 UN Charter stipulates the priority of the Charter vis-à-vis other treaties by stating that “[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligation under any other international agreement, their obligations under the present Charter shall prevail”.¹⁶

There are many other examples of global international institutions distributing international and national legal powers, e.g. in the field of international trade law.¹⁷ In the founding treaties the State parties may define powers to be transferred to the international level. Generally, in accordance with the sovereignty doctrine, powers not transferred are retained at the national level. Based on their respective competencies, international institutions such as the International Labour Organization or

phenomena of constitutionalization see the critical account of Kadelbach & Kleinlein, *supra* note 2, 251 *et seq.*, who focus on the (disputed) contents of these norms rather than on the underlying principles themselves. On the division of competencies of international organizations see N. Weiß, *Kompetenzlehre internationaler Organisationen* (2009).

¹⁵ On Art. 52 UN Charter see, for instance, W. Hummer & M. Schweitzer, ‘Art. 52’, in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. I, 2nd ed. (2002), 807-853.

¹⁶ See Kadelbach & Kleinlein, *supra* note 2, 249 *et seq.*, who, however, rather construe this provision as a mere collision norm instead of a stipulation of constitutional status for the UN; generally on the UN as a “Constitution of the International Community” see B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009).

¹⁷ See, for instance, W. Benedek, ‘Die Konstitutionalisierung der Welthandelsordnung: Kompetenzen und Rechtsordnung der WTO’, 40 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2003), 283.

the World Health Organization exercise quasi-legislative (standard setting), judicial and administrative tasks; this resembles the exercise of State authority under a national constitution. Such observations have nurtured academic theories encapsulating these analogies, such as the Global Administrative Law approach and related concepts.¹⁸ Much of today's international law is made up by international regulatory regimes with an institutionally entrenched division of powers, comprising rules at the global, regional, national and subnational level, e.g. in the field of human rights law. As to the latter, Art. 60 of the European Convention on Human Rights (ECHR) clarifies the relationship with other fundamental rights guarantees by stating that “[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.” The most elaborated entrenchment of competencies is obviously stipulated by the treaties of the European Union which lay down the principles of subsidiarity, enumerated competencies and proportionality, as well as a distinction between exclusive, shared, as well as supporting, coordinating and complementary powers (Art. 2 TFEU).¹⁹

While these examples display analogies to national constitutionalism, transfers of powers onto the international level (if they occur at all) are rarely considered irreversible and have a limited effect on sovereignty, especially from the domestic constitutional viewpoint. But the idea of dividing international competencies as such has at least partially been influenced by German constitutional thought.²⁰ The additional merit of scholars such as Jellinek and Kelsen was to remove sovereignty from the equation, i.e. out of the definition of statehood. Hence, they rejected Tocqueville's notion of a division of sovereignty in the federal State, which would have been an alternative, though slightly artificial route to deal with the problem.²¹ Jellinek already expressed the notion that sovereignty, as

¹⁸ See, for example, B. Kingsbury, N. Krisch & R. B. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 3/4, 15; A. von Bogdandy *et al.*, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010).

¹⁹ See, for example, S. Hobe, *Europarecht*, 7th ed. (2012), 54 *et seq.*; J. H. H. Weiler & M. Wind (eds), *European Constitutionalism Beyond the State* (2003).

²⁰ As discussed later under C V. below, Verdross and Simma have even provided direct contributions to an international power division.

²¹ See G. Jellinek, *Allgemeine Staatslehre*, 3rd ed. (1914), 502 *et seq.*; similarly Kelsen, *supra* note 9, 116 *et seq.*, who considers a division of sovereignty as grotesque.

opposed to legal power, was indivisible and could only be vested in one entity, which was traditionally the State.²² One might conclude that international federalism would require a complete transfer of sovereignty to an international institution (which is nowhere in sight). Fortunately, however, Jellinek, by focussing on his three-elements-theory (*Drei-Elemente-Lehre*) of the State comprising people, territory and power, as well as Kelsen rejected the notion that sovereignty should be a defining element of statehood.²³ Removing sovereignty from the equation certainly helped to capture the phenomenon of the federal State, while at the same time facilitating the transfer of federalist doctrine to the analysis of international multi-level systems.

The dividing line between the international and the national level is still substantially clearer than the one between the central and the regional level within a national federation. There hardly exists a constitutional authority on the international plane compromising the domestic constitutional prerogative, which would be tantamount to the situation of regions within a federal State. Likewise, the sovereignty doctrine stipulates that, as a matter of principle, States have full competencies to act on the international level. The exception is an international institution that is equipped with substantial supranational powers, the pertinent example being the European Union. In some ways, this institution may be considered to be a model for future international constitution-building.²⁴ However, a certain amount of scepticism is in order when considering the failure of the constitutional treaty and the growing resistance of some member States' constituencies against further steps of integration.²⁵ Furthermore, the German Constitutional Court has ultimately denied a European *Kompetenz-Kompetenz* (competence-competence), thus limiting the effects of European Union law at the national level by a doctrine which is consistent with

²² Jellinek, *supra* note 21, 502 *et seq.*

²³ *Id.*, 486 *et seq.*; on the elements of statehood see 394 *et seq.*; see furthermore Kelsen, *supra* note 9, 117.

²⁴ Very optimistic Levi, *supra*, note 6, 140, claiming that "the international role of the European Union is not just that of a model, but also that of the motor of the unification of the world."

²⁵ See for example R. Streinz, 'The European Constitution After the Failure of the Constitutional Treaty', 63 *Zeitschrift für Öffentliches Recht* (2008) 2, 159 *et seq.*; M. Thiel, *The Limits of Transnationalism: Collective Identities and EU Integration* (2011).

classical German constitutional thought and has caused substantial repercussions abroad.²⁶

Hence, Kelsen's fiction of a *Gesamtstaat* does not reflect the current status quo of the international order which is still far away from a world federation even though certain elements of constitutionalization may be identified. However, the borrowing of organs that he describes with regard to the central level may in fact be observed in the opposite direction: Due to the frequent lack of effective enforcement agencies at the international level, international institutions resort to national organs in order to remedy this deficit.²⁷ This may go beyond a mere reliance on member States for the implementation of their international obligations. In the European Union, member States' organs often operate as an extension of the EU organs, governing the implementation process and results.

II. Mechanisms of Conflict Resolution

The necessity for conflict resolution within a federation can clearly be discerned both in German scholarly doctrine and practice. Carl Schmitt considered acts of legislation passed by each level as antinomies in their relations to each other. In his view, the federal level restricts the autonomy and political independence of the regions which it actually wants to preserve as much as its own. It appears as a logical consequence that such antinomies may produce conflicts that cannot be solved in a principal fashion since they are inherent in the notion of a federal State. Schmitt suggested that only negotiations and military action may be chosen as remedies in that situation.²⁸ One may conclude from this that creating a federal State automatically causes a certain tension or places an already existing tension on a contractual or constitutional basis. This tension is caused by an underlying struggle for power that is institutionalized, hence transformed into a legal format. While this institutionalization may not solve this

²⁶ See A. L. Paulus, 'From Dualism to Pluralism: The Relationship Between International Law, European Law and Domestic Law', in P. H. F. Bekker, R. Dolzer & M. Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (2010), 132, 138, 150; on the term of "Kompetenz-Kompetenz" see already C. Schmitt, *Verfassungslehre* (1928), 386 *et seq.*; Kelsen, *supra* 9, 208.

²⁷ Generally on this phenomenon see G. Scelle, 'Le phénomène juridique de dédoublement fonctionnel', in W. Schätzel & H.-J. Schlochauer, *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg* (1956), 324.

²⁸ See for the above C. Schmitt, *supra* note 26, 386 *et seq.*; Hanschel, *supra* note 3, 47.

fundamental conflict regarding political power, it may balance out the competing claims and at the same time provide mechanisms to resolve concrete legal conflicts.²⁹ Schmitt marginalizes the distinction between federation and confederation by stressing the idea of the *foedus* as such.³⁰ He claims that the decisive point is who can decide about war and the state of emergency.³¹ The way to avoid the mentioned antinomy is, to him, the establishment of an equivalence of substance, i.e. homogeneity between the different levels; a modern example would be the substantive principle of homogeneity in the German federal State (as stipulated in Art. 28 or indirectly in Art. 72 para. 2 of the German Basic Law).³² This feature of the German federal State and its tendency of coordination between the *Länder* and the *Bund* in order to achieve uniform decisions partially led Hesse to coin the term of the unitary federal State.³³

Conflict resolution is obviously a major concern of international law, ranging from informal means of negotiation, arbitration and mediation to formal dispute resolution and quasi-judicial or even judicial mechanisms.³⁴ Such mechanisms primarily aim to solve conflicts between States regarding their rights and duties under international law. Conflicts regarding the delineation of legal powers, be it amongst States or between States and international institutions, are less ordinary, since competencies are rarely limited by international institutions, and existing limitations may usually not be litigated by member States that have agreed on establishing them. The most prominent exception is litigation before the European Court of Justice, in particular the action for annulment for lack of competence (Art. 263 TFEU) as well as the subsidiarity action according to Art. 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality. This suggests that international “federalization” partially follows a bottom-up instead of a top-down approach – unless one sees the UN Charter as a fully-fledged world constitution (which in light of the above caveats is less than fully convincing). At the same time, international

²⁹ Hanschel, *supra* note 3, 2 with further references.

³⁰ Schmitt, *supra* note 26, 370 *et seq.*

³¹ *Id.*, 366.

³² Hanschel, *supra* note 3, 47; on the equality of substance and the precursors to Art. 28 GG, e.g. in the Weimar Constitution, see Schmitt, *supra* note 26, 375.

³³ K. Hesse, *Der unitarische Bundesstaat* (1962), 18 *et seq.*; Hanschel, *supra* note 3, 84 *et seq.*

³⁴ See, e.g., D. Campbell (ed.), *International Dispute Resolution* (2010); G. Born, *A New Generation of International Adjudication* (2012).

homogeneity is, widely understood, enhanced by multiple efforts of law-making, in particular standard-setting or mainstreaming activities by international institutions, e.g. in the fields of labour, health, free trade, environmental protection or human rights.³⁵ Apart from treaty law, rules and principles that are both accepted at the national and the international level (e.g. certain minimum standards of fundamental rights) may constitute legally-binding custom or general principles.³⁶ However, they primarily serve to homogenize the domestic laws of different States, in particular their constitutional law, whereas in a multi-level system they should also homogenize the behaviour of States and international organs. As the cascade of human rights standards on the global, regional, national and sub-national level shows, such norms are usually primarily addressed to the States themselves – whereas the question to what extent they may bind international institutions such as the United Nations has not been fully answered yet.³⁷ By contrast, the constitutionalization of the European Union has progressed much further, binding EU organs to unwritten legal principles derived inter alia from the legal orders of the member States.³⁸ A certain homogeneity may furthermore be achieved regardless of the States' consent, i.e. by the concepts of *ius cogens* (and its rank according to Art. 53 of the Vienna Convention on the Law of Treaties) and *erga omnes*.³⁹ However, since the actual content of norms qualifying for these categories is heavily disputed, these concepts rather generate formal than substantive

³⁵ See, e.g., Y. Naiki, 'Accountability and Safety in Global Health and Safety Governance', 43 *Journal of World Trade* (2009) 6, 1255 *et seq.*; K. Samson, 'The Standard-Setting and Supervisory System of the International Labour Organization', in R. Hanski (ed.), *An Introduction to the International Protection of Human Rights* (1997), 149 *et seq.*; N. Matz-Lück, 'Promoting the Unity of International Law: Standard-Setting by International Tribunals, International Law Today: New challenges and the Need for Reform?', in D. König *et al.*, *International Law Today: New Challenges and the Need for Reform* (2008), 99 *et seq.*

³⁶ For an analysis of principles of international law as elements of international constitutionalization see Kadelbach & Kleinlein, *supra* note 2, 255 *et seq.*

³⁷ For a discussion of this question with regard to the UN see, for instance, B. Fassbender, 'Sources of Human Rights Obligations Binding the Security Council', in Bekker, Dolzer & Waibel, *supra* note 26, 71 *et seq.*; more generally Kadelbach & Kleinlein, *supra* note 2, 255 who discuss the binding effect of fundamental principles for international organizations such as the UN, the ILO, the OAS, etc; see furthermore Janik, *Die Bindung internationaler Organisationen an internationalen Menschenrechtsstandards* (2012).

³⁸ Kadelbach & Kleinlein, *supra* note 2, 256.

³⁹ *Id.*, 251 *et seq.*

homogeneity, in the sense that certain uniform norm categories are created without agreeing on their contents. Hence, they are probably less suitable to achieve the equivalence of substance that Schmitt had in mind.

III. Cooperation Regarding Changes to the Given Power Distribution

The requirement of participation regarding changes of the given distribution of powers is linked to the notion of entrenchment elaborated above.⁴⁰ In German federalism the requirement of cooperation is safeguarded by the role of the German Federal Council (the *Bundesrat*) in the federal legislative process which was the centerpiece of Bismarck's "invention" of German executive federalism. While this institution is located at the federal level, it is composed by representatives of the *Länder* governments hence representing their interests.⁴¹ Schmitt asserts that the formal constitutional competence regarding power shifts may be concentrated on the federal level; however, apart from the political representation of the regions on the federal level, there are usually constitutional limits where centralization leads to a sell-out of regional competencies eliminating their sheer political existence.⁴²

The joint decision system provides a substantial veto position of the *Länder* representatives when their financial or administrative autonomy is affected by a parliamentary bill.⁴³ Changing the distribution of power even requires a two-third-majority in the *Bundesrat* (Art. 79 para. 2 of the Basic Law), which is often difficult to achieve.⁴⁴ Using Kelsen's doctrine, one might translate the need for joint decision-making as the authority of the *Gesamtstaat* to decide about the division of competencies.⁴⁵ Hesse's construct of the unitary State aptly and in a more practical fashion describes how uniform decisions are achieved by cooperating below the threshold of

⁴⁰ Generally on the participation of the regions in the exercise of federal powers see Jellinek, *supra* note 21, 771 *et seq.*; Kelsen, *supra* note 9, 175 *et seq.*

⁴¹ D. Hanschel, 'Conflict Resolution in Federal States: Balancing Legislative Powers as a Viable Means?', 19 *Public Law Review* (2008), 146; D. Hanschel, *supra* note 3, 131; see furthermore F. Scharpf 'No Exit from the Joint Decision Trap?: Can German Federalism Reform Itself?', *European University Institute Working Papers* (2005), showing that other (such as party) interest may play an important role as well.

⁴² Schmitt, *supra* note 26, 386.

⁴³ Hanschel, *supra* note 41, 146 *et seq.*

⁴⁴ Hanschel, *supra* note 3, 129.

⁴⁵ Kelsen, *supra* note 9, 208 *et seq.*

formal changes to the constitution, e.g. by creating unified standards through cooperation within intergovernmental forums composed of *Bund* and *Länder* representatives, including the option to conclude intergovernmental agreements.⁴⁶

Hesse's approach certainly helps to understand elements of formal decentralization counter-balanced by coordinative and harmonization efforts as outlined above. Factual centralization on the national as well as the international level may hence occur through coordinated decentralized efforts. Conversely, while Kelsen captures the requirement of joint decision-making with regard to shifts of competencies, his rather artificial concept of the *Gesamtstaat* makes it more difficult to explain international processes of federalization, where no such entity appears to exist. Nevertheless, the requirement of the actors' participation at both levels to achieve power shifts may be identified in international law, as well. Elements of power distribution between the international and the national level may be laid down in founding treaties of international organizations although, as shown above, this does not occur very often. Unless otherwise agreed, treaty amendment requires consensus of all parties (Art. 39 Vienna Convention of the Law of Treaties), at least when it comes to ratification. However, amendments are often negotiated and adopted by organs of the respective international organization. Depending on the degree of institutionalization, the amount of independence of the international decision-making bodies from the will of their member States may be smaller (as in the WTO) or more substantial (as in the case of the European Union). Criteria are, for instance, the composition of these organs, their mandate and decision-making procedures, as well as the effects of their decisions. A leading (although disputed) German constitutional doctrine states that the member States remain the masters of their treaties (*Herren der Verträge*) even where they have transferred supranational powers to an international institution.⁴⁷ Kelsen's approach allows to explain the interaction of central institutions and their member States in such cases which are characterized by a very high degree of institutionalization.

⁴⁶ See Hesse, *supra* note 33, 18 *et seq.*; Hanschel, *supra* note 3, 84 *et seq.*, 155 *et seq.*

⁴⁷ Paulus, *supra* note 26.

C. German Constitutional Thinking with Regard to International Federalism

Apart from generating national federal doctrine from which conclusions may be drawn for the international level, several eminent scholars have drawn such conclusions themselves and developed elements of international federal doctrine viewed from their particular historical and ideational perspective.

I. Immanuel Kant

An early and at the same time very pronounced plea for an international federation was made by Immanuel Kant in his *Perpetual Peace*.⁴⁸ In his second defining article he stated that international law should be based on a “federation of free states” in order to preserve the peace (a “*pacific alliance*” or *foedus pacificum*), hence a kind of confederation.⁴⁹ He saw international federalism as the international surrogate of national constitution-building based on the civil compact. He suggested that peoples which have already organized themselves domestically in the form of a republic will have a model function and constitute the center of an international federal cluster that may attract more and more countries from the outside.⁵⁰ However, as opposed to a preferable, but unattainable world republic (*civitas gentium*), he considered such world federalism as merely a “negative supplement” which bears the consistent danger of disruption.⁵¹

Elements of his model are visible in the League of Nations and the United Nations. While Kant’s ideas have certainly provided inspiration for these institutions, even his less ambitious *foedus pacificum* has not been fully realized on the international plane. Instead, States have shown to be rather hesitant to embark on such long-term and far-reaching compromises to their sovereignty. While the monopolization of the use of force by the United Nations is a major breakthrough, it is in many ways the flip side of

⁴⁸ I. Kant, *Perpetual Peace* (1795); see further Levi, *supra* note 6, 23 *et seq.*, who even considers Kant as the “first great federalist thinker” whose “theoretical contribution is to have founded federalism on an autonomous vision of values and of the course of history” (31 *et seq.*).

⁴⁹ Kant, *supra* note 48, 30, 33.

⁵⁰ *Id.*, 33: „other States might adhere thereto, in order to guarantee their liberty according to the principles of public right; and this alliance might insensibly be extended”.

⁵¹ *Id.*, 34 *et seq.*

the nations' interest to effectively safeguard their sovereignty. Even though major inroads into national sovereignty have occurred at the regional level, most prominently in the European Union, the question remains whether the current financial crisis will lead to more or less integration.⁵² Looking through the lenses of Kelsen's idealistic conception, today's international relations reveal a very mixed picture: Instead of steadily continuing to weave the web of a world confederation, international cooperation has become much more multi-faceted and fragmented.⁵³

II. Georg Jellinek

Jellinek, by his monograph on Associations of States (*Staatenverbindungen*), influenced the subsequent debate substantially even though some of his hypotheses stirred considerable controversy.⁵⁴ In this volume he upheld the distinction already made by Laband between associations under State law (*staatsrechtliche Staatenverbindungen*) and associations under international law (*völkerrechtliche Staatenverbindungen*).⁵⁵ According to Jellinek, the former are created by a treaty, the latter by a constitution.⁵⁶ Under the generic term of organized associations of States (*organisierte Staatenverbindungen*) he subsumed the confederation, the international administrative union and the union in reality (*Realunion*).⁵⁷ Furthermore, in contrast to the international administrative union he qualified the confederation as highly political.⁵⁸ As von Bernstorff shows, the highly political nature of the League of Nations founded in 1919 led most scholars to qualify it by resorting to the disputed term of confederation.⁵⁹ This was not without consequences since Jellinek had claimed that a confederation, as opposed to a federal State, is characterized by a legal relationship between its members which cannot confer legal

⁵² See, for instance, N. Moloney, 'The Financial Crisis, EU Financial Markets Law, and the European Security and Markets Authority', 60 *International & Comparative Law Quarterly* (2011) 2, 521 *et seq.*

⁵³ On fragmentation see M. Koskenniemi, *Fragmentation of International Law* (2007).

⁵⁴ G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882); see for the following also J. von Bernstorff, *Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001), 110 *et seq.*

⁵⁵ Jellinek, *supra* note 54, 178 *et seq.*

⁵⁶ *Id.*

⁵⁷ *Id.*, 158 *et seq.*

⁵⁸ *Id.*, 172 *et seq.*

⁵⁹ Von Bernstorff, *supra* note 54, 116 *et seq.*

subjectivity onto the resulting entity.⁶⁰ Jellinek hence provides an example of scholarly thought influencing future debate as well as legal practice. At the same time, his view regarding the distinction between federation and confederation according to their respective legal basis did not remain undisputed, as discussed in the following analysis of the doctrine of Kelsen and Schmitt.⁶¹ This criticism helped to strengthen the bridge between national and international federalist constructions, since according to Jellinek the latter could not assume legal subjectivity of their own.⁶² Nevertheless, subsequent theorists largely operated on the premise and based their ideas on the early writings of Jellinek, be it in a more critical or more approving fashion.

III. Hans Kelsen

As von Bernstorff has revealed, Kelsen's view on international law is clearly inspired by his insight into national constitutional law.⁶³ This statement is valid with regard to Kelsen's views on federalism, as well. This is illustrated by the fact that, to him, the only difference between a federation and a confederation is the degree of centralization, which opens the door for analogy.⁶⁴ The conclusions made above about a potential transfer of Kelsen's constitutional views to the international level from today's point of view need to be supplemented by his own views on such interrelations at the time of writing. In his book "Peace through Law" Hans Kelsen shared Kant's view that international law should aim to preserve peace, which is to be achieved by a powerful world federation.⁶⁵ In his "choice hypothesis" ("*Wahlhypothese*") he claimed that primacy could be asserted by either international or national law.⁶⁶ From his positivist point of view, Kelsen accepted both hypotheses as equivalent, while ultimately favouring the former which in his eyes strengthened the objectivity of the law whereas the former might lead to relativity and ultimately rejection of international law as law.⁶⁷ Like Kant, he doubted the feasibility of a fully-

⁶⁰ *Id.*, 111; see Jellinek, *supra* note 54, 179.

⁶¹ See C. III. and IV. below.

⁶² Jellinek, *supra* note 54, 111.

⁶³ *Id.*, 202 *et seq.*

⁶⁴ *Id.*, 113 *et seq.*

⁶⁵ H. Kelsen, *Peace Through Law* (1944), 12.

⁶⁶ See Kelsen, *supra* note 9, 120 *et seq.*; on the following debate regarding the *Wahlhypothese* see von Bernstorff, *supra* note 55, 91 *et seq.*

⁶⁷ *Id.*, 128 *et seq.*

fledged world State. Furthermore, he had to deal with legitimacy concerns regarding a world federation which must not become a tyranny. With that in mind, he saw the transition towards a world federation as a long-term process similar to the formation of the State. However, he pictured this world federation as a federation of nation States, hence rather as a confederation. In the transition process he considered the creation of an international court as the crucial first step.⁶⁸

Kelsen's view has found important parallels on the international level and has shown to be quite influential.⁶⁹ One caveat is that his own draft for the UN Charter was not considered in the actual process which may have led him to produce a very critical commentary.⁷⁰ In light of his Pure Theory of Law, he reduced the lawyer to a non-political norm technician, which led him to identify weaknesses, ambiguities and contradictions of the legal text.⁷¹ While this in itself constituted an important, though partially destructive exercise, he used the opportunity to strengthen his most important plea with regard to legal policy, i.e. individual standing before international courts.⁷² With regard to international courts per se, the creation of the Permanent International Court of Justice and its successor, the International Court of Justice, as well as the recent International Criminal Court constitute important steps which help to strengthen international law. While not constituting a fully-fledged court, the WTO Dispute Settlement Body is another example of (quasi-)adjudication which operates on a large scale and is quite effective. Furthermore, the International Criminal Court presents an important step forward and may develop into an important institution of international law enforcement. Nevertheless, individual claim rights are still a rare occasion in international law; they exist mostly on the regional level as under European Union law or under the European Convention of Human Rights. They, however, underline Kelsen's view that in the long run the individual should be at the heart of international law.⁷³

Yet, on an overall scale, the scope and effectiveness of international adjudication is still limited, as the number of States not subjecting themselves to it reveals. Moreover, when looking at the idea of a world

⁶⁸ Kelsen, *supra* note 65, 12, 21 *et seq.*; see furthermore Levi, *supra* note 6, 134 *et seq.*

⁶⁹ More generally on the Vienna school of international law (*Wiener Schule*) and its notion of international federalism see von Bernstorff, *supra* note 54.

⁷⁰ *Id.*, 199 *et seq.*

⁷¹ *Id.*, see H. Kelsen, *Reine Rechtslehre*(1934).

⁷² Von Bernstorff, *supra* note 54, 199 *et seq.*

⁷³ See Levi, *supra* note 6, 136.

federation, a court should be able to decide on the division of competencies between the international and the national level, which is rarely the case. Due to the lack of an all-encompassing entrenchment of such a distribution of powers at the international level, cases rather concern rights and obligations than formal legal powers. A further limitation of Kelsen's proposal is that he does not see any intermediate level between the national State and world governance.⁷⁴ Hence, his doctrine cannot be used to explain the multitude of issue-specific arrangements with limited membership and overlapping powers which have led to observations of fragmentation.⁷⁵ Finally, his focus on the nation State does not account for factual inequality of States, which is arguably one of the main problems of the United Nations.⁷⁶ Even with these caveats, Kelsen's influence with regard to international processes of federalization may not be discarded.

IV. Carl Schmitt

When laying out his constitutional doctrine of the *foedus* (*Verfassungslehre des Bundes*) Carl Schmitt defined its elements without distinguishing between federations and confederations.⁷⁷ He considered such a distinction to be the cause of over-simplification and artificial antagonism which he explained by the historical framework since 1871.⁷⁸ This clearly reflects that the doctrine regarding associations of States (*Lehre von den Staatenverbindungen*) was a highly disputed legal matter.⁷⁹ From his own terminology he derived the conclusion that any *foedus* is both a subject of international and of State law (*Staatsrecht*).⁸⁰ According to Schmitt, the former expresses itself by the conferral of the *ius belli* onto the *foedus*, which, at least from today's perspective, is certainly an unfortunate

⁷⁴ *Id.*, 136.

⁷⁵ This phenomenon is even harder to explain from the perspective of Jellinek, *supra* note 21, 503, who presupposes an unlimited legal power of the sovereign State, even if competencies may not always be exercised. By contrast, Kelsen, *supra* note 9, 163 *et seq.* allows for various forms and degrees of decentralization which may help to capture divisions of legal authority both on the national and international level.

⁷⁶ See Levi, *supra* note 6, 136.

⁷⁷ Schmitt, *supra* note 27, 361 *et seq.*, 366; similarly Kelsen, *supra* note 9, 208.

⁷⁸ *Id.*, 366.

⁷⁹ See von Bernstorff, *supra* note 54, 109, according to whom the classical distinction between associations of States founded by a constitution or a treaty was introduced by Laband and further developed by Jellinek.

⁸⁰ Schmitt, *supra* note 26, 379.

litmus test.⁸¹ Nevertheless, through its effort of bridging the divide between national and international law (while maintaining their separate validity), Schmitt's approach provides an important contribution of German constitutional thought. He conceded that the *foedus* does not provide his own *pouvoir constituant* and is based on a treaty.⁸² At the same time, he considered the *foedus* to be a subject of "state law" or constitutional law, since this law confers rights onto it and governs its relations with the member States.⁸³

V. Alfred Verdross and Bruno Simma

Alfred Verdross, together with his disciple Bruno Simma, is probably the most distinct proponent of a parallelism between constitutional law and international law while clearly asserting the primacy of the latter.⁸⁴ He implicitly asserted that a constitution may exist without statehood which is replaced by the international law community. In his 1926 monograph on the constitution for the community of international law, he suggested the League of Nations as a model determined to encompass all States in the future.⁸⁵ From a federalist view the most striking part is his division of competencies *ratione materiae* in international law: While joint State competencies exist with regard to issues that concern their affairs amongst each other, individual State competencies dominate where norms are meant to bind the individual, although there may also be implementing organs at the international level. He further distinguished between rules that States are obliged to enact and rules that they are merely authorized to enact according to their own discretion (be it exclusively or concurrently).⁸⁶

Bruno Simma has continued this project by identifying the constitutional principles of international law, distinguishing between those of the non-organized community of States and extensions through international institutions, in particular the League of Nations and the United Nations. He considers the latter to be the constitution of the universal

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*, 26 *et seq.*

⁸⁴ A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), 12 *et seq.*

⁸⁵ *Id.*, 111 *et seq.*

⁸⁶ *Id.*, 163 *et seq.*

community of States. On the basis of Verdross' constitutionalism he hence further strengthens the transfer of federal ideas to the international level.⁸⁷

While the idea of an inherent division of competencies with regard to international and national legal actors is appealing and constituted an important change of paradigm at the time, it may appear slightly more basic from today's perspective. To some extent, it boils down to stating that international affairs may only be regulated at the international level, while States may regulate individual behaviour within their territory. Today's burning question, however, would rather be *which* issues that have traditionally belonged to the national sphere (such as human rights or environmental questions) have at least been partially transferred to the international level and may henceforth not be solely regulated by the national level anymore. They might hence require regulation by the national and international levels concurrently or maybe by a model of "executive federalism" where the overarching norms are set at the international level and then implemented (by further legislation, administration and adjudication) at the national level. However, this merely shows that Verdross' model is worth to be developed further in the light of changes in the relationship between national and international law which make further research desirable.

D. Conclusions

The doctrine of federalism as developed by German (and related) scholars does not adequately reflect the current international legal order as a whole.⁸⁸ Even strong supporters of international federalism doubt its feasibility, at least when construed as a state-like federation and not a mere confederation. Apart from the notion of sovereignty evolving from statehood, fragmentation and legal pluralism are clear obstacles. While German scholars appear to focus on State authority (*Staatsgewalt*) rather than sovereignty, their federalist doctrine only partially accepts limitations to that authority which would help to explain international federal or quasi-federal structures. Nevertheless, their federal thinking may help to explain certain phenomena of quasi-federalism on the international level, and, due to its constitutional embedding, provide guidance in the current debate on

⁸⁷ Verdross & Simma, *supra* note 2, 59; see furthermore A. Paulus, *supra* note 2; B. Simma & A. Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *European Journal of International Law* (1998) 2, 266 *et seq.*

⁸⁸ On attempts to establish world federalism see also Levi, *supra* note 6, 130 *et seq.*

international constitutional engineering. Elements such as entrenchment, participation and conflict resolution, but also formal and substantive federalist principles coinciding with them, such as priority, pre-emption, subsidiarity, homogeneity etc., may serve as useful building blocks in a potential future edifice of international constitutional law. A real transfer of sovereignty necessary to strengthen international federalism, however, may only be achieved through a fully-fledged world constitution which is not at hand. Likewise, current constraints such as fragmentation and pluralism cannot be discarded, but might at least be partially embraced and hence mitigated by elements of a federalist construction that builds on these precepts and develops them further in the absence of international statehood and hierarchy. One path forward might be to identify principles of conflict resolution exceeding the currently existing collision rules between international legal regimes which are or may become legally binding on the States.⁸⁹ Another might be to further develop a doctrine on the division of competencies in international law. The German approach, which is inspired traditionally by the quest for a balance of unity and diversity and by an extension of national paradigm towards international law, has helped to lay the foundation to do so.

⁸⁹ On regime collisions see G. Teubner & A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004) 4, 999; on current research results regarding conflict resolution in multi-level systems see for example H. Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (2008).