Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236

Armin von Bogdandy · Ingo Venzke (eds.)

International Judicial Lawmaking

Springer

Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

Band 236

Armin von Bogdandy · Ingo Venzke (eds.)

International Judicial Lawmaking

On Public Authority and Democratic Legitimation in Global Governance

With a foreword by Bruno Simma

Springer
the language of science

ISSN 0172-4770
ISBN 978-3-642-29586-7 ISBN 978-3-642-29587-4 (eBook)
DOI 10.1007/978-3-642-29587-4
Springer Heidelberg New York Dordrecht London

Gedruckt auf säurefreiem Papier

Springer ist Teil der Fachverlagsgruppe Springer Science+Business Media (www.springer.com)

Foreword

This book explores three interrelated propositions under one thematic project. First, it describes the phenomenon of judicial law-making arising from various forms of international adjudication and analogous mechanisms of international dispute settlement. Secondly, it endorses judicial law-making when conducted in a legitimate manner. As a third proposition, the book argues that the legitimacy of any form of judicial law-making should be measured according to the value of democracy. (This democracy-based test of legitimacy of the exercise of public authority appears to continue the Heidelberg Max Planck Institute's innovative undertaking which led in 2010 to the publication of *The Exercise of Public Authority by International Institutions: Advancing* International *Institutional Law*). The grand vision of the project is to reveal the discursive patterns presumably unique to, and inherent in, the role of judges, arbitrators, and other types of dispute-settlers in the international system, in order to reach a more scientific *précis* of international legal normativity as developed by this community of decision-makers. As an enterprise both bold and provocative in contemporary international legal scholarship, the present book is not – as shown in the individual articles comprising this volume – without attendant, but interesting, complexities.

Armin von Bogdandy and Ingo Venzke submit that judicial law-making comprises the "judicial development of the law", and as such "is an intrinsic element of adjudication and it is not as such ultra vires" (*On the Democratic Legitimation of International Judicial Lawmaking*, 12 German Law Journal 1341-1370 (2011), at 1345). They do not confine law-making to the "sources" of international law enumerated in Article 38 of the Statute of the International Court of Justice but rather hold law-making virtually synonymous with all forms of "legal normativity." (*Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 German Law Journal 979-1004 (2011), at 979). Clearly, the present

book purposely expands the notion of "law" into a broader "normative" concept. It does not intend to demonstrate that, and how, international judicial institutions "create" or "author" the pedestrian categories of "sources" of international law, such as treaties, custom, or general principles. Instead, the book maintains that these institutions conduct "law-making" when their international decisions wield a primarily contextual influence on the ultimate content of international legal principles. To this end, it becomes relevant for von Bogdandy, Venzke, and the subsequent contributors to the book to identify possible "shifts" in the "normative expectations" of international actors as well as the addressees of their acts (*ibid*.) Using this broader understanding of "law" as "norms", several contributions propose to map some new (and quite unorthodox) spheres of "judicial law-making" in the international system – apart from the expected influence of international decisions as precedents. These instances of "norm-setting", in the view of the authors of the volume, actually describe cases of judicial law-making. For them, "lawmaking is an inevitable aspect of judicial interpretation". (*On the Democratic Legitimation of International Judicial Lawmaking*, at p. 1344).

Positivist international lawyers may not readily accept this deliberate shift, from a determination of the positive content of international law through the sources listed in Article 38 of the ICJ Statute towards a broader (and possibly more unwieldy) process of locating international legal normativity based on trends in judicial reasoning. But it is nonetheless a significant scholarly position that can advance the understanding of progressive developments in international law. In my 1995 Hague Academy lectures, I made an attempt to demonstrate that the contemporary international legal order reflects a marked transition from interstate bilateralism to a legal order founded on broader community interests. In an EJIL article (*The 'International Community': Facing the Challenge of Globalization,* 9 Eur. J. Intl. L. (2) (1998) pp. 266-277), Andreas Paulus and I also contended that States now channel the pursuit of many individual interests through multilateral institutions with different functional mandates. If one accepts that multiple institutions, individuals, and authorities now assume roles in the postulation of international law, one can better appreciate the innovative approaches of this book, with a caveat that the leap from postulation to legality remains a fairly aspirational one for the present. For this reason, I have some lingering reservations about the book's eagerness to explore all potential sources of normativity, even if they might go too far beyond the canon of Article 38 sources (*On the Democratic Legitimation of In-*

ternational Judicial Lawmaking, p. 1350). It is not clear to me, for example, whether the authors' call to have international judges "make explicit the principles they pursue with a certain decision", or to be "more open about the policies they pursue and what kind of social effects they intend to promote with a judgment" *(ibid.,* p. 1349), would still remain within the realm of the Court's jurisdiction to resolve disputes framed strictly according to the submissions made by sovereign States as parties before the Court. To some, the authors' call for such 'policy' disclosures by international judges might be read as a rather dangerous license for judicial overreach.

Leaving that ambiguity aside, however, one can still take a moderate view of the equivalence between norms and law to appreciate and examine the authors' conception of judicial law-making premised on a specific (and fairly constitutionalist) separation of powers paradigm. Here von Bogdandy and Venzke find that it is a "core problem of international judicial lawmaking" that there is a "distance to parliamentary politics" (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1350). In order to expose this gap, several contributions in the present book focus on the processes of judicial reasoning in relation to political claims, institutional realities, and normative developments. For example, Niels Petersen (*Lawmaking by the International Court of Justice – Factors of Success*, 12 German Law Journal 1295-1316 (2011)) proposes innovations derived from game theory (although using some rather indeterminate variables for empirical measurement, such as 'state perceptions'), in order to isolate "legal developments" that are generated by decisions of the World Court. On the other hand, Thomas Kleinlein (*Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 German Law Journal 1141-1174 (2011)) presents an intriguing proportionality-based framework to rein in potentially overlapping, if not conflicting, interpretations of similar norms across different international regimes. Somewhat controversially, however, Eyal Benvenisti and George W. Downs draw a rather grim picture of the 'control' allegedly exercised by a "handful of powerful states that have tended to dominate the institutional design process [of international tribunals]" (*Prospects for the Increased Independence of International Tribunals*, 12 German Law Journal 1057-1082 (2011), at 1058) and which, according to these authors, have led to the issuance of international decisions of questionable legitimacy in the eyes of less powerful, or ultimately powerless, developing States. Resonating extreme realist overtones, these latter characterizations warrant further analysis and verification, in my view, where they suggest or im-

ply that international adjudication is ultimately a fatal enterprise because it is simply subordinated to the demands of *Realpolitik* and utterly devoid of any rule of law.

It is quite understandable that the various contributors to this book did not all adopt the same methodologies for determining or identifying the constituent elements of "judicial rule-making". The range of methodologies thus used provides insight into how the authors regarded and evaluated various aspects of international adjudication and dispute settlement. Marc Jacob takes a didactic and comparative law approach in his article on the theory of (often implied) precedents in international law (*Precedents: Lawmaking Through International Adjudication*, 12 German Law Journal 1005-1032 (2011)), an approach similarly employed by Stephan W. Schill when he argues that system-building occurs through precedent in investment treaty arbitration and accordingly generates normative expectations carried over to investment lawmaking (*System-Building in Investment Treaty Arbitration and Lawmaking*, 12 German Law Journal 1083-1110 (2011)); and by Ingo Venzke when he scrutinizes the effect of precedents from the WTO Appellate Body on the content of domestic regulatory policies protected under the exceptions of GATT Article XX (*Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 German Law Journal 1111-1140 (2011)). Karin Oellers-Frahm undertakes a taxonomic listing of the use of the advisory jurisdiction in numerous international organizations and tribunals (*Lawmaking Through Advisory Opinions?*, 12 German Law Journal 1033-1056 (2011)) as well as a description of the substantive and procedural requirements for the issuance of provisional measures by different international tribunals (*Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function*, 12 German Law Journal 1279-1294 (2011)). This descriptive approach is also mirrored in Michael Ioannidis' contribution on participation rights within the framework of rules contained in the WTO Covered Agreements (*A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 German Law Journal 1175-1202 (2011)), as well as in Markus Fyrnys' treatment of the pilot judgment procedure in the European Court of Human Rights (*Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 German Law Journal 1231-1260 (2011)). Christina Binder uses a functionalist lens to analyze the impact of internal structural arrangements within the Inter-American Court of Human Rights

on the kind of 'norm-control' manifested in the trend of the Court's amnesty jurisprudence (*The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 German Law Journal 1203-1230 (2011)); somewhat analytically similar to the tools of discourse theory and institutional analysis employed by Milan Kuhli and Klaus Günther to expose the deliberate 'norm justification' conducted by the International Criminal Tribunal for the former Yugoslavia in its judgments (*Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, 12 German Law Journal 1261-1278 (2011)). Most of the articles portray international decisions as forming a coherent (albeit at times dissonant) architecture of legal reasoning and international policy – which might be challenged in some quarters to be a foregone result of the authors' *a priori* selection of methodological tools that might be supportive of their ultimate conclusions. Nevertheless, irrespective of the occasional methodological disparities, I find that the contributions in this book valuably elicit, and helpfully succeed in provoking, a profound discussion of the actual scope of the "larger discursive contexts" (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1354) that underlie the making and enforcement of international decisions, including the potential effect of these discursive contexts upon similar disputes in the future.

Beyond describing judicial law-making, however, the present book moves to more provocative propositions. It endorses legitimate judicial law-making and tests for such legitimacy based on judicial law-making's conformity with democratic values. Von Bogdandy and Venzke are quite careful to state that their investigation into the democratic legitimation of judicial law-making does not aim "at bringing the noise of popular assemblies to the quiet halls of learnt justice… (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1343). Rather, on the premise that the "generation of legal normativity in the course of international adjudication should be understood as judicial lawmaking and as an exercise of public authority" (*Beyond Dispute: International Judicial Institutions as Lawmakers*, p. 980), they posit that judicial lawmaking can (or indeed should) "be linked to the values, interests, and opinions of those whom it governs, i.e. its democratic credentials." (*Ibid*.). Manifestations of these democratic values include, among others, the independence and impartiality of international judges and the processes for their appointment; the public or transparent nature of international judicial proceedings as well as the access of a wider set of interested parties and public stakeholders to the disputes pending before international tribunals. As described in the various contributions

of the book, there are 'democratic deficits' in these aspects of international adjudication, which, the authors argue, ultimately militate against fulfilling the international community's expectations of the legitimacy of international judgments.

With the value of 'democracy' as its primary yardstick and a Montesquieu-esque constitutional theory of separation of powers as its foremost analytical paradigm, the book succeeds in thus depicting several 'democratic deficits' in various international tribunals such as ICSID tribunals, the WTO, ITLOS, and the ICJ. These critiques of undemocratic procedures in international adjudication also call to mind Francesco Francioni's arguments on the notion of an international right to access to justice (*Access to Justice as a Human Right*, 2007), but more importantly, the book brings to the forefront the key issue of international legitimacy as a separate and valid question in international lawmaking. The book's reliance on democracy as a key value in international relations, in my view, cogently delivers interesting realities and aspirations towards the achievement of common values in the international system. I still maintain that a strongly constitutionalist approach for assessing progressive developments in international law could be somewhat misguided as it "forces thinking about these developments into dogmatic structures (and strictures) that are, with regard to many questions, alien to the field and do not contribute to their creative-constructive handling." (Bruno Simma, *Fragmentation in a Positive Light*, 25 Mich. J. Int'l L. 845 (2003-2004)). However, I do not find that to be the case in the present book, as its authors carefully advance their claims about the lack of democratization within the institutional structures, rules, and processes of various international courts and tribunals. My only reservation lies with the extent of the authors' conceptions of democratization as a legitimating value, which, in my view, should perhaps be carefully differentiated with contextual sensitivity towards the actual internal mandates of such courts and tribunals and their corollary influence on the eventual paths of the international adjudicative practices of judges, arbitrators, and other dispute-settlers. For example, the 'exercise of public authority' by ICSID arbitral tribunals and the alleged accretive effect of ICSID awards on the evolving contours of international investment law, will necessarily be of a much different complexion from that wielded by the International Court of Justice according to its Rules of Court, Practice Directions, institutional history dating back to its predecessor, the work of the Permanent Court of International Justice, and the ultimate authoritativeness of the Court's jurisprudence as international precedents especially on general international

law issues of State responsibility, treaty interpretation, or the formation of custom, among others. To this end, Niels Petersen's use of game theory and reputational proxies to determine what states perceive as a "good decision" of the World Court (*Lawmaking by the International Court of Justice*, p. 1300) should be construed as his arbitrary view of possible determinants for the acceptance of an international judgment, inasmuch as it is Stephan Schill's perception that the development of a *jurisprudence constante* strikes an appropriate balance between the interests of investors and States is a democratic operation of 'legal certainty and predictability' (*System-Building in Investment Treaty Arbitration and Lawmaking*, p. 1106). While von Bogdandy's and Venzke's initial and concluding articles tightly describe their conceptual understanding of the value of democracy from judicial reasoning and forms of argument to issues of systematic interpretation and procedural legitimacy through the independence and impartiality of judges and the openness of international judicial procedures, this understanding does not always permeate all of the contributions to the book in equal or comparable degrees. As I have previously discussed, various authors also highlight other manifestations of the value of democracy in a given form of international adjudication – a tendency which might, at times, fail to adequately capture the overall functional realities faced by, and the integral nature of the institutional operations of, an international court or tribunal.

Finally, I note that while the book views "fragmentation" as a problem for democracy, it is laudable that the authors do not paint all international courts and tribunals with the same brush. As I stressed several years ago, "various judicial institutions dealing with questions of international law have displayed utmost caution in avoiding to contradict each other" (*Fragmentation in a Positive Light* at 846). The extent to which this holds true at present, given the undeniable "variation of themes" in international arbitral awards and court judgments, might be debatable, but the book in any case prudently refrains from viewing the problem of fragmentation according to the notion of a supposed overriding unity or extreme universality of treaty regimes. Rather, the book cautiously examines and explains internal fragmentation in the different fields of international adjudication as a symptom of the lack of political oversight within most functional treaty regimes. These concepts of political oversight and institutional accountability are, yet again, pillars of constitutionalist reasoning that were adapted to accomplish the purposes of this book.

I congratulate the Max Planck Institute on issuing this noteworthy analytical contribution to the growing number of critical works that seek to reframe and recharacterize the nature of progressive developments of modern international institutions, processes, and norms. The volume exemplifies a truly innovative perspective, with valuable insights into, and hypotheses on, the nature of international judicial reasoning, and their visibly larger consequences on the robust (if not, at times, controverted and controversial) trajectories of international law.

Bruno Simma, The Hague, June 2011

Preface by the Editors

The increase of international adjudication has been one of the most remarkable developments within the international legal order of the past two decades. New international courts and tribunals have entered the scene and existing institutions have started to play more significant roles. We identify and study one particular dimension of this development: international judicial lawmaking. We observe that in a number of fields of international law, judicial institutions have become weighty actors and shape the law in their practice. Their authority transcends particular disputes and bears on the law in general. The contributions in this volume set out to capture this phenomenon and ask: How does international judicial lawmaking score when it comes to democratic legitimation?

One of our principal propositions is that international judicial lawmaking can and should be understood as an exercise of public authority. We thereby connect to our previous work, see "The Exercise of Public Authority by International Organizations", Special Issue, 9 *German Law Journal* (2008); Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer 2010). We now develop the thought that international judicial institutions influence all participants of the legal system with their decisions and have become noteworthy lawmakers. Sure enough, judicial lawmaking is a common phenomenon of any legal order, but there are a number of reasons that make it especially intriguing at the international level and that exacerbate its normative challenges. The contributions unfold these thoughts in principle, in particular detail, and with regard to a number of specific institutions.

The present volume is the product of a long process of discussion and mutual learning in which the active engagement of all contributors has been key. Participants met together with other colleagues for a first

workshop in October 2009. They discussed drafts at a second workshop in April 2010 and presented their contributions at an international conference at the Institute in Heidelberg in June 2010. We are grateful to our commentators and critics inside and outside the Institute, especially to our colleagues who work on related themes under the rubric of Global Administrative Law. Isabel Feichtner has been of great help in organizing these steps.

Our gratitude further extends to the editors in chief of the German Law Journal, Professors Russell Miller (Washington and Lee University, School of Law) and Peer Zumbansen (Osgoode Hall Law School, York University, Toronto), who published the contributions in a special issue of the German Law Journal (vol. 5, 2011) and whose tireless dedication is truly admirable. We also thank their team of students who assisted in the publication process. Anna Lechermann, Hannes Fischer, Max Mayer, Lea Roth-Isigkeit and Matthias Schmidt were all of great help in finalizing the contributions at the Institute. Lewis Enim and Eric Pickett proofread the texts. Angelika Schmidt touched up the contributions for the present edited volume.

Finally, we wish to thank Bruno Simma for offering a profound foreword.

Heidelberg, August 2011

Armin von Bogdandy
Ingo Venzke