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## Book Reviews

Deborah Cass. ***The Constitutionalization of the World Trade Organization***. Oxford: Oxford University Press, 2005. Pp. 293. £20. ISBN 0-19-928584-5.

One of the great difficulties in writing a book on constitutionalization is that the object of analysis is not solely an empirically ascertainable social phenomenon. To be sure, there are certain social practices associated with constitutionalization which can be objectively observed. But constitutionalization is also constituted by shared perceptions about what those social practices mean. A common consciousness about constitutionalization – what it means, whether it exists – is a significant part of what shapes the process of constitutionalization itself. An important consequence is that constitutionalization is inseparable from discussion about it, and analysis of it. No significant study of constitutionalization can be ‘innocent’, so to speak, because any such study is necessarily part of the processes by which a consensus is (or is not) generated about what constitutionalization means, and about whether or not it is occurring.

This is particularly true for this book, written by an influential figure at a formative stage in the evolution of thinking about WTO constitutionalization. To her credit, Deborah Cass, Reader in Law at the London School of Economics, is acutely aware of this, and is highly sensitive to the normative implications of her own work, as well as that of others. Indeed, she criticizes other scholars for adopting an ‘empirical, pragmatic method’ (at 133), which in her view affects a false detachment and obscures the constitutive function of their scholarship. By contrast, Cass herself adopts a critical, reflexive methodology, reflected in the structure of her book. She begins in Part I by provisionally fixing a

definition of constitutionalization (the ‘received account’), which usefully clarifies discussion and orients the reader. In Part II, Cass uses this account as a fixed reference point from which to evaluate three different visions of WTO constitutionalization, and to ground her anti-constitutionalization critiques. In Part III, however, Cass turns her critical attention to the received account itself, and asks how we may need to modify or transform that account in light of experience at the WTO. In this way, Cass seeks to balance the need for clarity with her awareness of the constitutive role of definitions, and the need to pay close attention to their implicit normative implications.

In the end, however, it is not clear that this reflexive structure is fully successful in striking an appropriate balance between these objectives. On the one hand, Cass’s use of the received account shapes the book in important ways. It has the effect, for example, of limiting the critiques which Cass makes: her critiques tend to reflect the particular concerns of what she calls ‘core constitutionalization’ (deliberation, legitimacy, social and political constraints, and so on) much more than other legitimate concerns (such as the rule of law, protection of rights, separation of powers, substantive aims, and so on) which she associates with ‘elaborated constitutionalization’. On the other hand, Part III, in which Cass critiques the received account of constitutionalization, is somewhat too brief. It comes too late to be fully effective in destabilizing and counteracting the powerful constraining influence that the received account has on the ways in which constitutionalization is imagined.

Aside from establishing a working definition of constitutionalization, Part I is notable for setting out the historical and conceptual context out of which the debate over constitutionalization has arisen. Cass’s

emphasis on re-contextualization is welcome, and in many ways fits naturally with her later critique of the universalizing and reifying impulse of much constitutionalization scholarship. Indeed, for this reviewer, these sections contained some of the most stimulating material in the book. Chapter 3 in particular is a penetrating analysis of the discipline of trade scholarship, which lays bare in a very helpful fashion some of its hidden tendencies and orientations. For example, Cass helpfully draws the reader's attention to the pragmatic strain running through international trade scholarship, to the way in which such scholarship blurs 'the lines between economics, politics and law (at 71), as well as to its self-reflexive obsession with defining the field of international trade law.

For all that, the picture of the discipline which Cass paints in Chapter 3 is somewhat too homogeneous, and fails to take sufficient account of its internal inconsistencies. For example, while Cass is right to see trade scholarship as characterized in part by pragmatic anti-formalism, surely there is also a simultaneous contradictory impulse towards a kind of legalistic rule-centrism.<sup>1</sup> Similarly, the undeniably messianic 'transformative' urge of some trade scholarship seems paradoxically to sit side by side a contrary emphasis on system stability.<sup>2</sup> And while a consensus (albeit a thin one) no doubt does exist as to the benefits of trade liberalization, is it not

possible to view this consensus as the product of a conflicted discipline, which likes to see itself as in turn (depending on context) value-neutral and value-laden? One danger of Cass's account is that it runs the risk of implicitly supporting the visions of constitutionalization which she later critiques. Trade scholars' current preoccupation (such as it is) with the process of constitutionalization emerges from Cass's account as a natural product of an essentially unified discipline. The concerns and orientations of the 'constitutionalizers' therefore come to define the discipline, while opposing concerns and orientations are implicitly marginalized. An alternative account, it should be remembered, would have been possible: one in which the discipline is characterized in terms of its constitutive ambiguities rather than its substantive orientations, and in which the turn to constitutionalization is understood as a suppression of these ambiguities, and as a way of 'closing the door' to competing voices. But Cass does not present this possibility (at least not initially<sup>3</sup>), and therefore opens herself up to precisely the same criticisms she makes of others: that she is naturalizing the constitutionalization process, and presupposing precisely the conditions for which she is trying to test.

The largest part of the book is Part II, which sets out and evaluates three different visions of constitutionalization, which Cass terms 'institutional managerialism', 'rights-based constitutionalization' and 'judicial norm-generation'. The mode of these three chapters is one of relentless critique – turning to self-critique in Chapter 6, where Cass applies admirably rigorous scrutiny to her own earlier work on the subject. Many of the themes of this material simply reflect and add weight to criticisms which have already been made by numerous commentators. For example, like many others, Cass is quick to criticize as implausible and indefensible any model of

<sup>1</sup> It is not hard to find evidence of this: the history of the trade regime is told in many textbooks as a story of the progressive elaboration of more detailed legal rules and a more binding dispute settlement system; the WTO itself expends a very significant part of its energies on designing, implementing and negotiating new legal rules; even criticism of the WTO focuses on the constraining influence of its rules. Cass herself seems also to note this rule-centrism in Chapter 4 (at 116–118).

<sup>2</sup> Again, the emphasis on maintaining the stability of the system, and preserving the status quo is recognized by Cass herself in Chapter 4 (at 120).

<sup>3</sup> Cass does, it is true, refer to this view later in the book. My point is that the terms of Chapter 2 implicitly work against this argument.

constitutionalization which fails to take seriously the question of participation and inclusive deliberation. And, like many others, she has a keen eye for the implicit values orientation of different visions of constitutionalization, often criticizing them for a failure to be sensitive to a plurality of competing public values.

Less familiar, however, is Cass's striking ability to expose and undermine the numerous techniques of legitimation embedded in accounts of constitutionalism. In her chapter on institutional managerialism, for example, Cass takes aim at its 'institutionalist' orientation: by moving beyond a focus on formal rules to a focus on the WTO as an institution, she argues, and by conflating institutions with constitutions, institutional managerialism lends a legitimacy to the trade system that it might otherwise lack. It is a subtle argument, but one that may in the end be better framed as a critique of *functionalism* – a mode of analysis which has had a powerful influence within international trade circles. For all their undoubted explanatory power, functionalist understandings of institutions like the WTO can tend to legitimize their objects of study. This is in part because, in such analyses, the form and evolutionary path of the WTO comes to appear as a matter of logic or necessity, a natural or efficient response to a pre-existing social demand.<sup>4</sup> It may be, then, that non-functionalist approaches to the study of institutions provide as good a corrective to these accounts as non-institutionalist approaches to the study of the trade regime.

To say that these chapters are relentlessly critical is not to say they are blunt or unfair. Cass takes an admirably nuanced approach, for example, to Petersmann's work on constitutionalization. While echoing the concerns of others – that key terms of Petersmann's account remain ambiguous, that his vision effectively represents a radical libertarian

free-trade agenda, and that he borrows the legitimacy of human rights while selectively ignoring their substance – Cass also observes in Petersmann's work 'some interesting tendencies ... towards equality and participation' (at 176). This ambivalence, in fact, is a key characteristic of Cass's approach to constitutionalization generally. On the one hand, Cass explicitly situates her current thinking within the anti-constitutionalization camp, and in Part III sets out with a degree of approval of a range of far-reaching critiques of the constitutionalization project. Yet, for all that, Cass does not want to give up on constitutionalization as a concept for orienting debate about the operation and reform of the WTO. Provided that the meaning of constitutionalization is opened up to vigorous debate, she argues, its strong connotations of 'democracy, rule of law, certainty and protection from abuse of power' (at 236) give the concept of constitutionalization the potential to orient discussions in productive directions.

It is in precisely this spirit, of reinvigorating debate about the meaning of constitutionalization, that Cass ultimately offers her vision of 'trading democracy'. This involves, first of all, a procedural transformation, a thoroughgoing democratization of decision-making processes within the WTO. But it also involves something more: a substantive reorienting of the *telos* of the trading system, a re-visioning of the aims that the trading system should be directed towards achieving. For Cass, this means recalibrating the WTO with its fundamental goal of *development*.

This claim – that procedural transformation in the WTO is insufficient on its own – is an important insight. But it may come as a surprise to some readers. After all, Cass's own distinction in Chapter 2 between 'core' and 'elaborated' constitutionalization places greater emphasis on proceduralist concerns than substantive ones, and as a result Cass implicitly foregrounds procedural matters throughout the book. Furthermore, some will be surprised by Cass's choice of development as the overriding *telos* of the trading system, at least within the context of this book. Development as an aim is largely absent from (and

<sup>4</sup> Of course, this is neither an explicit claim nor a logical consequence of functionalist arguments, merely a potential (and powerful) discursive effect.

even refuted by) the historical account of the evolution of international trade institutions which Cass gives in Chapter 1, and the subject of development hardly arises throughout the book. This is not to deny, however, the attractiveness of Cass's vision. Whatever role development has historically played in the evolution of the trade regime, it is hard to deny that development represents one of the most suitable and important aims for the trade regime in contemporary conditions. At the very least, Cass's vision of 'trading democracy' serves as a reminder of the task facing trade lawyers, of exploring and elaborating precisely what this might mean.

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Maison, Rafaëlle. ***La responsabilité individuelle pour crime d'Etat en droit international public***. Brussels: Bruylant, 2004. Pp 568. €95. ISBN 2802718207

The aim of this book by Rafaëlle Maison, professor at the Université de Picardie, is to demonstrate the existence under international customary law of a secondary norm which places individual criminal responsibility among the consequences of state-aggravated responsibility for international crimes. In other words, Maison argues that the punishment of individuals for crimes such as aggression, genocide, crimes against humanity and war crimes is nothing more nor less than a sanction against the author state. The underlying idea is that states are the only subjects capable of committing such serious breaches of international obligations towards the international community as a whole.

From a methodological point of view, the book has two principal merits. Firstly, it deals with a difficult subject – the foundations of individual criminal liability in the international legal order. This requires the author to examine issues such as state sovereignty, immunities from jurisdiction, the theory of international subjects, state responsibility for

international crimes, and many others. From this perspective, Maison's effort is remarkable and her book may provide insightful reading for international scholars dealing with such issues.

Secondly, in undertaking her analysis, Maison considers voluminous amounts of international documents, judgments and scholarly works. In particular, she examines in detail many important, but often neglected materials relating to the origin of 'individual' criminal responsibility under international law; for example, a number of international criminal theories developed in the 1920s, the various documents relating to the Nuremberg and Tokyo trials, and the so-called 'subsequent trials'. However, while this reliance on less recent practice and doctrine is to be commended, it is unfortunate that greater attention was not paid to more recent scholarship, which has increasingly addressed such problems. Moreover, the most recent jurisprudence, particularly the many judgments of the International Criminal Court for the former Yugoslavia, could have been more adequately examined, particularly since they may prove to be more instructive than some of the vague Rule 61 decisions that are cited throughout the book.

Maison starts with a detailed analysis of international crimes. Aggression, crimes against humanity and war crimes are conceived of exclusively as collective criminal phenomena, that is, as 'system' crimes. Indeed, she holds that international norms for their prohibition are only directed towards states. Thus, according to Maison, aggression is a typical state crime, perpetration of crimes against humanity requires a discriminatory intent and state organization, and war crimes are always connected to a state activity: an international or internal armed conflict.

Such an assumption is of fundamental importance for Maison's subsequent analysis: accordingly, individual criminal responsibility must always be connected to a wider criminal context, i.e., to a serious breach by the author state. However, whether this premise is robust in all cases may well be questioned. The *ad hoc* tribunals have made clear that both crimes against humanity and war crimes may be perpetrated by private individuals without any 'state policy' element