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International Constraints on Constitution-Making

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The human struggle for the development of constitutional orders is as old as mankind's quest for reliable forms of societal organization. However, it has started to take on its specific shape just slightly more than two centuries ago, beginning with the famous creation of the American Constitution and - in Europe - with the French Revolution. That was the "golden age" of the sovereign nation-state, and so it does not come as a surprise that constitution-making at that time took place within the borders of a certain state only. It seemed sufficient to achieve the possibility of constitution-making as such, leaving the details of constitutional commitments to the free will of the states, respectively, or of the people. By contrast, the idea that this inherently internal process should be the subject of international concern, that constitution-making could be legitimately influenced or even determined from the outside, is relatively new. Therefore, the heritage of the original struggle for the very existence of (written) constitutions still persists and necessitates some preliminary remarks in order to clarify the topic.

1. Qualification and recognition as a state

First of all, one of the most entrenched principles of public international law should be mentioned: The qualification and recognition of a certain entity as a state on the international plane does normally not depend on its internal structures[1] . A state is therefore in no way obliged to have a constitution in order to be respected as a full member of the international community. The criteria used in public international law to determine state quality do not include the existence of a constitution[2]. Thus, state sovereignty in its traditional understanding encompasses the *power* to adopt a constitution, but the question of whether this power is *exercised* lies beyond the realm of public international law. The example of the United Kingdom proves that this statement still holds true: Although it is widely claimed and accepted that British law knows of "constitutional conventions" which somehow fulfill the function performed by written constitutions in other countries[3], there is neither a coherent text nor a formal hierarchy established above the level of parliamentary laws; the latter would in particular be incompatible with the still valid British doctrine of "parliamentary sovereignty"[4]. Nevertheless, nobody would doubt that this constellation does not affect Britain's status within the international community at all. This negation of internal events by public international law usually extends to violations of an existing constitution as well as to revolutionary changes, which cannot touch upon the identity and continuity of the state in question under public international law[5].

2. The internal right to self-determination

Hence, an analysis of the international constraints on constitution-making must start from the premise that a state can and must decide for itself, within its constitution-making power, to provide itself with a constitution. Only then the question may be asked whether this constitution is subject to any requirements under public international law, and if so, what these requirements are.

However, there is another principle to be mentioned in that context: the so-called internal right to self-determination of the people concerned. In its usual meaning, this principle is supposed to regulate the relations between a state or government and the people constituting it and subjected to it. It demands that a people be free to shape its internal order the way they wish it to be, and has been recognized in numerous resolutions and declarations as well as in international treaties[6]. Thus, it is primarily addressed to the states as a kind of "collective" human right (a so-called "human right of the third dimension")[7], and the states are obliged to

describe the constitutional and political processes which in practice allow the exercise of this right[8].

But there are repercussions of this principle on the international level as well, for internal self-determination can only be meaningfully exercised if the international community – and therefore public international law as well – in general accepts that different people may choose different solutions for the legal order of their society. This consequence has been explicitly confirmed by the International Court of Justice in the *Nicaragua* case: "… adherence of a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole international law rests, and the freedom of choice of the political, social, economic and cultural system of a State"[9]. Public international law thus generally allows for a pluralism of legal and ideological as well as of constitutional cultures and normally restricts itself to the regulation of the *external* behavior of states in the international arena.

3. Consequences for framing the topic

These basic statements entail some consequences for the topic of „international constraints" in the context of constitution-making: The word "constraints" is usually understood as describing a state of certain restrictions or limits being imposed[11], commonly connected with the threat or use of force if these limits are overstepped. In the complex relationship between domestic (constitutional) and public international law, however, this definition can only be regarded as a first approximation. There is at least one distinction of possible constraints relevant here, which in turn leads to two different categories within the following analysis.

The distinguishing line in this respect must be drawn between formal constraints on the one hand and substantive constraints on the other. Formal constraints address the *procedure* that is used to achieve a constitution. From the standpoint of public international law, here it is of utmost importance to make sure that the principle of internal self-determination is implemented, i.e. that it is indeed the people which make the choice on the future political and constitutional system of their state. This is, however, not really a "restriction"; a procedure designed for that purpose rather aims at *expanding* the freedom of the people concerned. Substantive constraints, by contrast, concern the *contents* of a constitution, even under the assumption that these contents fully correspond to the will of the people at that time, and therefore are the only real limits on the exercise of that will, which is a pivotal argument for looking at them first.

II. Substantive Constraints

Apart from the principles mentioned above, one could even argue that the necessity of substantive constraints on constitution-making flows from the very function of a constitution itself. Constitutions are, as one German writer puts it, essentially tools of societal integration; they are supposed to provide a framework for the peaceful settlement of conflicts within a society so every member of it can be expected to accept to live by their rules[12]. But in order to find this broad acceptance, a constitution must reflect the fundamental legal principles and convictions to which the people governed by it adhere. The crucial point can therefore be described as the *legitimacy* of a constitution. But what does this mean?

Legitimacy is different from legality, because – if one leaves aside the rather philosophical question of "natural laws" – there are at least no domestic norms a constitution-maker would have to comply with[13], and the question whether there are any international ones is precisely

our point at issue. Legitimacy asks for the fundamental justification at the basis of the whole state order. According to a well-known modern German philosopher, it therefore encompasses all publicly announced reasons and constructions which have been designed to secure the acceptability of a constitution[14]. In other words, there is always a certain idea of legitimacy within a given society, and the legitimacy of the constitution depends on the degree of its conformity with this idea[15].

All this is true with respect to the domestic legal order concerned. However, from the international perspective we are taking on here, the question of legitimacy does not appear fundamentally different. In an international community being ever more globalized and intertwined, it seems an almost natural development for the process and results of constitution-making to receive increasing attention by other nations. Thus, our question eventually boils down to ascertaining an *international* idea of legitimacy.

The general existence of such an idea can no longer be seriously denied. It is amply demonstrated by the fact that no constitution-maker of today could openly dare to defy those values and fundamental convictions which the modern international community has come to accept as binding on all its members[16]. These values are certainly embodied in norms of public international law, but most of them do essentially ground in general principles of law which are considered independent of any specific assent by the states. To emphasize again the German perspective called for in this report, one of the earliest decisions of the German Federal Constitutional Court may be cited at this point, where the justices stated that the only limitation put on every constitution-making power from the outside consists of those legal principles which exist before and lie beyond any written norms that are later agreed to[17].

This statement, however, simultaneously shows the existence of international constraints on constitution-making as well as their necessary limits. For if these constraints are grounded in the most fundamental values and principles of law, then only those rules of public international law which are of an absolute character can contain constraints of this kind. This will in particular apply to norms which are considered "ius cogens" within the meaning of Art. 53 of the Vienna Convention on the Law of Treaties[18]. For instance, it would not be imaginable today to come up with a constitution that would support or even mandate genocide or a war of aggression contrary to Art. 2 Par. 4 of the Charter of the United Nations[19]. But since modern international law is also increasingly concerned with the internal relationship between the state and its citizens, there might as well be norms of a similar character governing this relationship and therefore being directly concerned with the object and purpose of constitution-making. It is this category of norms upon which we will focus our attention.

Within this category, however, another distinction seems appropriate: drawn between those restrictions which the majority needs for their own protection, i.e. to make sure that the people can still exercise their internal right to self-determination under the constitution once adopted, and those which are supposed to protect the minorities within a society against being overwhelmed by a majority will. As the latter one is the probably most widely accepted restriction on the internal behavior of a state towards its citizens, it deserves our consideration at first.

1. Fundamental human rights

It has already been stated that the individual has continuously gained importance as a subject of modern public international law[21]. The definite beginning of this development is marked by the Charter of the United Nations which claims in its preamble as well as in Art. 1 Nr. 3 that the respect for human rights and fundamental freedoms is one of its major foundations as well as objectives[22]. The corresponding obligation to "promote … universal respect for, and obser-

vance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" is expressly stated in Art. 55 for the organization and in Art. 56 for the member states of the United Nations, "with a view to the creation of conditions for stability and well-being which are necessary for peaceful and friendly relations among nations".

A meanwhile really impressive number of human rights treaties underlines the prominent position which the fundamental rights of the individual have assumed in current public international law. The probably highest authority in that respect belongs to the Universal Declaration on Human Rights as the first international catalogue of human rights of all categories. This is fascinating because in 1948, when it was promulgated, it merely appeared as the result of a failure, since the attempt to create a "Universal Bill of Human Rights" as a fully binding document had proven impossible at that time[23]. From a strictly legal perspective, the Declaration can thus only claim the status of a non-binding resolution of the General Assembly, demonstrated by the fact that it may call itself in its own preamble a "common standard of achievement" only.

Nevertheless, due to manifold efforts undertaken by all kinds of actors on the international plane[24], it nowadays largely enjoys binding force in that its provisions are considered to be part of international customary law, partly even of "ius cogens". In particular, the International Court of Justice regularly refers to its "fundamental principles" and views them as an almost authentic interpretation of the corresponding provisions of the Charter mentioned above[25]. And in Germany, the Federal Constitutional Court has always insisted that at least a "minimum standard" of human rights be part of the general principles of public international law which are binding on all members of the international community[26].

In the meantime, moreover, most of the contents of the Universal Declaration have come to be codified in international human rights treaties, namely, in the two International Covenants on Civil and Political and, respectively, on Economic, Social and Cultural Rights[27]. The globally effective treaties designed for the protection of specific groups or against certain infringements of human rights – like the Convention on the Rights of the Child or the Convention on the Elimination of All Forms of Racial Discrimination – almost defy any effort to count them[28]. In addition, these universally enshrined rights are to a large extent also guaranteed by regional instruments, namely, by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights[29]. Each of these instruments deals with specific entitlements accruing to individual citizens, but their goals, structures and foundations are more or less identical. They constitute internationally mandated restraints on the behavior of governments and have by and large become so widely accepted that at least their fundamental contents must now be regarded as binding even on those members of the international community that have not explicitly ratified them.

As a consequence, no state today could expect any more to receive international recognition for its constitutional order if this order would not provide for the protection of individual rights and freedoms. This has been made clear by the international community in the recent case of the former Yugoslavia: The successor states had to undergo an examination of their internal human rights situation (and the corresponding constitutional provisions) before the international community was ready to accept them as full members[31]. It is thus no longer imaginable that a state could draw up a constitution which would, for instance, openly call for discrimination or allow for torture. This argument, however, does not work the other way round: As the already cited British example – at least before the promulgation of the Human Rights Act in 1998[32] – proves, human rights must not be explicitly enumerated in a constitutional text as long as the respect for them is otherwise guaranteed within the state's legal or-

der. Moreover, the conclusion that human rights today embody a central international restraint on constitution-making is limited to the really fundamental rights and freedoms: it cannot extend to such postulates which are still heavily disputed at the international level. But these caveats do eventually not impair the general thrust of the argument: as an empirical observation shows, basically every modern written constitution – including the German Basic Law as a prominent example – contains a more or less elaborate catalogue of human rights guarantees[33]. It does therefore not seem exaggerated to qualify this as the fulfillment of a fundamental demand which the international legal order nowadays directs at every constitution-making process.

2. The guarantee of democracy

The question whether and how a constitution is supposed to make sure that the internal right of the people to self-determination does not vanish with its enactment cannot be as clearly answered yet. It boils down to asking whether the development of public international law has already reached the point where the international community is no longer willing to accept a result of constitution-making that would provide for non-democratic structures of governance.

At first sight, of course, one finds ample proof of the basic principle mentioned above that public international law in general does not care about the internal forms of state organization. Many states are not governed through democratic mechanisms at all without having suffered any negative impact so far on behalf of the international community. There is also a good deal of scepticism to be exercised with regard to the belief that democracy is always the most suited form of ordering society[34]. However, at the same time there have not only been claims of a clear "victory for democracy" in the world[35], but in particular a widespread support for democracy can be detected within the international system, stemming from the actions of international institutions as well as from many calls for greater societal and political participation uttered by the individuals and groups concerned[36]. This, in turn, has led some famous writers to believe that a right to democracy in public international law is already existent or at least emerging[37].

The roots of this belief ground in several areas of the law of international relations. They can altogether be seen as related elements of an international law of democracy[38] which covers a whole range of different rules, principles and practices all aiming at the same goals and purposes. The following elements may be peculiarly emphasized[39]:

a) Treaty law

From the viewpoint of a public international lawyer, any provisions in international treaties that reflect a general demand for democratic structures are of course considered especially fruitful. In fact, this category is also closely linked with the two major bodies of rules already mentioned: the protection of human rights and the internal right to self-determination. Self-determination is basically inconceivable without a sufficient protection of certain human rights, such as the freedom of opinion and expression, the right of peaceful assembly and the freedom of association, all of which are contained in the very same International Covenant on Civil and Political Rights which at its beginning emphasizes the necessity to recognize the right to self-determination. In addition, this Covenant provides for the perhaps most explicit mentioning of democratic principles in an international treaty, stating in its Art. 25 that "every citizen shall have the right and the opportunity … (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors". As *Cassese* comments:

"Whenever these rights are recognized for individuals, the people as a whole enjoy the right of internal (political) self-determination; whenever those rights are trampled upon, the right of the people to self-determination is infringed"[41]. To be sure, this correlation is equally valid vice versa; as the *Badinter* Commission entrusted with evaluating the situation in the successor states of the former Yugoslavia put it: "the right to self-determination serves to safeguard human rights"[42].

After all, it can be said that international human rights law, which today is largely embodied in international treaties, directly supports the basic principles of democracy as the way of governing which is most suitable for the individual's needs and desires in the various spheres of society[43]. At the regional level, this connection has become even more explicitly recognized than on the universal scale. For instance, the European Human Rights Convention claims in its preamble that democracy is the most appropriate form of government to guarantee the rights and the dignity of the human being, and Art. 3 of its Additional Protocol No. 1 reiterates the call for free elections. The European Court of Human Rights has established that the Convention is "an instrument designed to maintain and promote the ideals and values of a democratic society"[44] and repeatedly emphasized the importance of participation of the individuals in different respects[45]. The Inter-American Court of Human Rights has taken a similar stance by declaring that signing up to the corresponding Human Rights Convention means that a democratic system must be in place[46].

Even at the universal level, the monitoring bodies of the relevant human rights treaties seem to be increasingly inclined to support democracy as the most effective form of government for ensuring that states live up to their obligations under international human rights law[47]. As Art. 25 of the Covenant on Civil and Political Rights already indicates, in that context especially the right to free elections is considered crucial, since free elections are the indispensable basis of democracy and therefore kind of a "synthesis of all human rights"[48]. The UN General Assembly has neatly summarized that as follows: "… periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and …, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms,…"[49]. As a conclusion, it can therefore be said that "undemocratic electoral processes imposed upon a people by their government are now almost universally regarded as counternormative and not beyond the purview of the international community". This must be all the more true if a government would try to incorporate processes of this kind in a newly devised constitutional order.

b) Membership requirements in international organizations

An additional indication that non-democratic constitutional structures will no longer be accepted by the international community can be derived from the fact that most international political organizations today explicitly require new members to be internally organized in a democratic fashion. It is worth noting that this requirement is most strongly stated in the most recent documents of that kind, which underpins the assumption that it is at least in an ongoing process of emerging as an international constraint on constitution-making.

Within Europe, the Charter of the Council of Europe does not yet contain a statement expressis verbis with regard to democracy, but, as the Parliamentary Assembly has repeatedly confirmed, the presumption of democracy has always existed[51]. The OSCE does not know legally binding membership requirements involving democracy, but its participants, at least since the Cold War has ended, have promulgated several documents in which they commit themselves to the establishment of multi-party democracy, based on free, periodic and genuine

elections[52]. The European Union claims democracy to be one of its fundamental principles common to all of its member states, and has in the meantime even established a regime of possible sanctions against those member states which might be violating this principle at any time in the future[53].

In some other parts of the world, the corresponding commitments read equally strong. The Charter of the Organization of American States in its Art. 3 lit. d specifically requires "the effective exercise of representative democracy" to be the basis of the political organization of its member states. The Charter of the newly founded African Union does not establish democracy as a prerequisite for admission to membership, but in its Art. 4 lit. m at least declares "respect for democratic principles" to be one of its underlying principles. And the Commonwealth has adopted a range of declarations that contain a clear commitment to democracy, in particular the Harare Declaration of 1991[54]. Of course, some of these commitments may be considered pure lip service, taking into account the fact that way too many member states of these organizations do still not conform to the basic demands of democracy. But even this observation clearly proves that today a state can no longer afford to openly disregard the idea of democracy, which in turn will affect every upcoming constitution-making process as a substantive constraint.

c) Recognition of states and governments

A most recent development could even contradict one of the preliminary remarks made at the outset of this article: the old-fashioned but deeply entrenched principle that the internal structures of a state do not affect its legal personality under public international law[55]. While the recognition of governments can be – and often is – made dependent on their (democratic) legitimacy[56], the recognition of states has traditionally been evaluated according to seemingly objective criteria only. As the Montevideo Convention put it already in 1933[57], there needs to be territory, population and a government which possesses "effective control" over the territory in question and the capacity to enter into international relations with other states. In principle, these criteria are still not disputed; but there is a new tendency appearing on the international plane which tries to define "effective government" as meaning, in fact, democratic government.

The European Union is at the forefront of this development. The Guidelines on Recognition of New States, which it promulgated in 1992 to deal with the break-up of Yugoslavia and the Soviet Union[58], announced that the Union and its member states would recognize new states emanating from the changes in the region only after they had constituted themselves on a democratic basis, and supplemented this by setting up specific requirements which the candidates had to be met. This marks the possible beginning of a major shift in the process of recognition in international law[59]. It is not yet clear whether democracy will really emerge as a compelling prerequisite of any "effective government", especially because the EU itself did not fully adhere to its Guidelines when accepting the successor states of Yugoslavia and the Soviet Union, but again, this development can at least be regarded as an additional milestone in establishing democracy as an international constraint on future constitution-making processes.

d) Good governance, the right to peace, and prudential concerns

Some other arguments which can be brought forward to buttress this conclusion shall be only briefly mentioned here. Democracy can also be regarded as an essential element of "good governance" because it allows for participation in the various processes which have an impact on individuals and the society, and good governance, in turn, is a pivotal presupposition for

human development insofar as it attempts to ensure the creation and implementation of structures and policies which help people to develop their full potential in accord with their needs and interests. Thus, especially the European Union tries to promote good governance and democracy in its relations with third states, and the Council as well as the Commission have repeatedly made clear that in their view democracy and human rights are inseparably connected with sustainable social development and economic growth[61].

On a slightly different note that already transcends the realm of strictly legal obligations, it may be said that no prudent government today will try to govern by force alone. As *Franck*, one of the first advocates of a right to democracy in modern international law, puts it: "To be effective, law needs to secure the habitual, voluntary compliance of its subjects; it cannot rely entirely, or even primarily, upon the commanding power of a sovereign to compel obedience"[62]. In this view, calling for democracy as a necessary prerequisite of modern constitution-making is beyond all its normative underpinnings just dictated by the nature of modern legal orders and governments.

Finally, historical experience teaches us that democracies tend not to go to war, at least not against each other[63]. This leads to the presumption that if all states on this globe were democracies, the chances of a total elimination of war from this world, as the United Nations Charter envisaged it, would significantly increase. Thus, a call for democratic structures within the existing states and their constitutional orders may also be derived from the prohibition of the use of force contained in Art. 2 Par. 4 of the UN Charter. To cite *Franck* again: "It appears with increasing clarity, in normative context and practice, that compliance with the norms prohibiting war is inextricably linked to observance of human rights and democratic entitlement"[64].

e) Conclusion

There is, of course, one problem remaining which this article will not address: the question of what elements precisely constitute a democracy or make a constitution a democratic one. This question would deserve an article of its own and has indeed already triggered lots of publications because there is no generally accepted definition of democracy that would be valid for all conceivable contexts[65]. However, some basic features of a democratic system can be identified, as they are, for instance, contained in the Copenhagen Document of the CSCE (today OSCE) issued in 1990, the final declaration of the UN World Conference on Human Rights promulgated in 1993 or more recent statements by other organs of the United Nations[66]. For the purposes of this contribution, though, it suffices to say that the general principle of democracy is at least emerging as a fundamental norm of public international law which is directed towards any modern constitution-making process, so that a new constitution which so clearly violated the basic features of this principle that its non-democratic character were apparent would no longer be recognized by the international community. Needless to say, the German Basic Law in its Art. 20 therefore also names democracy as one of its fundamental structural principles.

III. Formal Constraints

We will now turn from substantive to formal constraints, i.e. from the substance of a constitution to the process of its adoption. As has been stated above, here it is of utmost importance to make sure that the principle of internal self-determination is implemented, i.e. that it is indeed the people which make the choice on the future political and constitutional system of their state. In this regard, Germany can serve as a most useful example of analysis because the

adoption of the current German constitution, the so-called "Basic Law", basically involved all imaginable problems that can surface within a constitution-making process.

1. Octroi

The first of these problems concerns the question to what extent a foreign power may exert influence on the constitution-making process. This question seems to be particularly relevant again, taking into consideration the various attempts at "nation-building" that are currently undertaken by the international community, for instance, the creation of a new constitution for Afghanistan under the auspices of the United Nations or, even more bluntly, the upcoming constitution-making process in Iraq under the Authority of the Anglo-American occupying powers.

The German Basic Law also originated within a regime of occupation, when after World War II the Western Powers wanted to set up a new West German state from the remnants of the legally still lingering, but in fact vanquished German Empire. The various states of what was later to become the Federal Republic of Germany had already been constituted when on July 1, 1948 the military governors of the American, British and French occupation zones authorized their prime ministers to convene a constituent assembly for the purpose of drafting a constitutional document[67]. However, the so-called "Frankfurt Documents" did not only contain this authorization, but also set up a number of requirements regarding the contents of the new constitution and made pretty clear that an approval by the military governors could only be expected if these requirements – which were basically identical with the substantive constraints mentioned above, only adding the demand for a federal structure of the new state – were met[68].

Moreover, even during the proceedings of the constituent assembly that was convened on this basis – the so-called "Parliamentary Council" – the military governors were continuously informed about their progress and followed it closely. As a rule, they refrained from trying to exert direct influence on the proceedings, but when the first draft of the new constitution came out, they expressed their disagreement on certain points concerning the legislative power of the states because they feared the resurrection of a strong unitary government in Germany that had proven so ill-fated during the Nazi period[69]. The Parliamentary Council took that into account when working out its final draft, and eventually the new Basic Law was approved by the military governors on May 12, 1949.

This procedure of creating a new constitution was understandably criticized from the very beginning. Since the regime of occupation – although considerably softened and modified after the first West German government had been installed according to the provisions of the new Basic Law – continued for another six years until 1955, most German writers commenting on it during this period contested the ultimate legitimacy of the new constitution, accepting it as a transitional and temporary framework only. It was not regarded as an act of the "pouvoir constituant", not as a comprehensive expression of the free will of the German people, but merely as a limited act of self-determination within borders set from the outside[71].

It is extremely interesting to note how this picture has changed. The substance of the Basic Law is still the same as it was in 1949, and even the adjustments made in the nineties because of re-unification can be considered marginal[72]. Nevertheless, its legitimacy is no longer called into question, at least not because of the external influence during the process of its creation. The arguments offered for the explanation of this phenomenon differ only slightly. Their basic thrust can be summarized as follows: The material requirements set up by the military governors of the occupying powers conformed to the will of the German people. The Parlia-

mentary Council did not just accept them because it had to, but because it fundamentally agreed with them. The Basic Law therefore was a German creation from the very beginning and can be considered an act of "pouvoir constituant" at the latest after the regime of occupation ended and it became the constitution of a sovereign West German state[73].

This observation already points to the assumption that deficits in the constitution-making process – and *octroi* is certainly not the ideal of how this process should be conducted – do eventually not matter if the substance of the final product goes unchallenged. But of course, there are also other procedural ways available to compensate for such a deficit. It is therefore the question of procedural alternatives to which we now turn.

2. Referendum

The usual procedure for establishing a democratic constitution is to put the draft that an elected constituent assembly has worked out to a referendum in order to make the people directly decide on it. To be sure, there is a whole range of alternatives how a constitution may be adopted: One can try to do it all by plebiscite, which, however, happens very rarely due to the practical difficulties associated with negotiating a legal text among all members of a given society. Or one can choose the opposite way and leave the whole constitution-making process to one or several representative bodies[74]. The procedure described above as "usual" somehow strikes a middle ground. In sum, all these alternatives do not necessarily differ in terms of democratic legitimacy[75]. But again, none of these generally accepted procedures has been employed in the German case.

The deviations already start with the establishment of what in fact became the constituent assembly. The Parliamentary Council itself was not an elected body. An election was not even an option, considering the time restraints set up by the military governors of the Allies[76]. Perhaps in order to make up for that, the governors had initially envisaged a referendum to be held on the result of the proceedings, but this did not work out either because the idea of a referendum was rejected by the state governments of the Western part of Germany. They did so for a simple reason: to make sure that the newly created constitution would from its very beginning bear the stamp of being a temporary and provisional solution only[77]. This was considered necessary in order to keep the "German Question" open and to avoid any arrangements that could later stand in the way of the desired reunification of Germany. In the view of the states' prime ministers in 1948/49, a referendum could have created the impression that the West Germans had already given up on this goal. Therefore, they chose the alternative of having the new constitution approved by the state parliaments only[78]. For the same reason, even the word "constitution" was avoided by calling the new text a "Basic Law".

German writers at that time consequently regarded the "Basic Law" as lacking full democratic legitimacy, a deficit that was nevertheless declared to be tolerable for the time being until a definitive solution for Germany as a whole would be found[79]. It seemed all the more appropriate to overlook this deficit, taking into account the fact that all of Germany remained under a regime of occupation even after the Basic Law had entered into force. But history ran a different course: the occupation was ended in 1955 without reunification, and so the Basic Law stayed in force for what was then the Federal Republic of Germany until almost everybody had become so happy with this constitution that its legitimacy was no longer called into question.

The issue resurfaced when reunification suddenly again became an option in 1989/90. Relying on Art. 146 of the Basic Law in its original wording, a considerable number of politicians and academics then called for a referendum on a new constitution – based on the Basic Law –

by the whole German people. However, once again a different decision was taken: The first freely elected parliament of the East German state, the "People's Chamber" (*Volkskammer*) of the "German Democratic Republic", chose simply to join the Federal Republic of Germany by way of accession, thereby accepting the Basic Law as the constitution of reunified Germany. With the conclusion of the Unification Treaty between the two German states on September 19, 1990[81], the accession could eventually take effect on October 3, 1990.

That was not yet the definite end of the story, since Art. 4 of this Treaty called for a constitutional reform within two years of reunification, and indeed some provisions of the Basic Law had become obsolete because of the reunion. So a "Common Constitutional Commission" of the new Federation and all its states was convened and proposed some modifications of the text of the Basic Law. However, these changes were not of a fundamental nature at all, and thus they were finally adopted through the normal procedure for constitutional amendments without any referendum being held[82]. Not even the name of the document was changed: therefore, Germany still just has a "basic law" instead of a formal constitution.

The majority of German constitutional lawyers did – and still does – not consider this in any way objectionable. Their main argument can be stated as follows[83]: The populace of West Germany had long accepted the Basic Law as the foundation of its constitutional order, and the people of the GDR deliberately chose it for the same purpose when voting in the first and only free *Volkskammer* elections by bringing those political parties to power which had promised a swift unification by accession under the then-applicable Art. 23 of the Basic Law. Thus, there was no need to hold a referendum on both sides.

3. Factual consensus

The thrust of this argument points to the decisive possibility of compensating most conceivable formal deficits of a constitution-making process: through the emergence of a general consensus among the people that the document in question should be accepted as the legitimate constitution. In the case of Germany, this acceptance can be proven relatively easily. The first element of this chain of proof may be discerned in the first parliamentary elections held under the new Basic Law in 1949[84]. Almost 80% of the West German populace turned out to vote for the new parliament and thereby to seize the opportunity of finally establishing a new coherent state order after 4 years of "statelessness". And this high participation of the people has persisted over decades until now. In particular, the new institutional structures installed by the Basic Law – let alone its remarkable human rights catalogue – were accepted continuously from the very beginning, with the Federal Constitutional Court constantly maintaining the top position among all institutions of state and society when the people are asked whom they trust most.

For this reason, it may be said that the Basic Law has at least acquired sufficient legitimacy through its permanent unquestioned application, relegating all deviations in the process of its creation to the realm of history[85]. One of the leading German constitutional interpreters speaks of an informal daily "plebiscite de tous les jours", which he considers even more persuasive than any formal referendum that could only depict the attitude of the people at a given moment[86]. To be sure, one may still ask at what point in time the "legitimacy gap" produced by these deviations has eventually been bridged[87]. But for practical purposes, this question may remain open as well as the theoretical one what would happen if the relevant consensus among the people would get lost[88]. In sum, we therefore cling to the famous thoughts first articulated by Thomas *Hobbes*: " … the Legislator is he, not by whose authority the Lawes were first made, but by whose authority they now continue to be Lawes".

IV. Final Conclusion

The insights gained from looking at the development of the German constitution lead to one pivotal conclusion: Legitimation deficits within the constitution-making process may hamper the legitimacy of a constitution at the outset, but if the constitution in question is accepted by the people as the legally binding framework of their society and political system, these deficits will be overcome, and at the end of the day, the constitution will enjoy full and undoubted legitimacy. By contrast, if the substance of a constitution lacks crucial elements like a sufficient guarantee of human rights and democratic decision-making procedures, these failures cannot be cured. From the viewpoint of our topic, the result can thus be stated as follows: International constraints on constitution-making do exist, in a substantive as well as in a formal respect. But in this context, substance matters much more than form. The formal constraints are therefore only of a loose character, embodying guidelines and standards rather than rules from which no derogation is possible. Contrary to that, the substantive constraints set up by modern international law – namely, the requirement of protecting human rights and the basic demand for democracy – fulfill a really indispensable function with regard to constitution-making. As a consequence, today it appears inconceivable that any "pouvoir constituant" could openly disregard these constraints without expelling itself from the international community.

[1] *J. Isensee*, Staat und Verfassung, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. I, 2 nd ed., 1995, § 13 para. 29, p. 603.

[2] Montevideo Convention (1933), Art. 1: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.", see AJIL Vol. 28, 1934, Supplement, pp. 75 et seq.

[3] Cf. *A. W. Bradley/K. D. Ewing*, Constitutional and Administrative Law, 13 th ed., 2003, pp. 4 et seq.; *J. F. McEldowney*, Public Law, 2 nd ed., 1998, Chap. 4, para. 5 et seq., pp. 112 et seq.

[4] *A. V. Dicey*, Introduction to the Study of the Law of the Constitution, 7 th ed., 1908, p. 38; *A. W. Bradley/K. D. Ewing*, supra note 3, p. 53; *J. F. McEldowney*, supra note 3, Chap. 6, para. 12, pp. 177 et seq.; cf. also *Theo Langheid*, Souveränität und Verfassungsstaat. „The Sovereignty of Parliament", 1984, pp. 76 et seq.

[5] *A. Verdross/B. Simma*, Universelles Völkerrecht, 3 rd ed., 1984, § 391, pp. 231 et seq.; *A. Cassese*, International Law, 2001 , para. 3.4, p. 52.

[6] Cf. - as the most prominent example - Art. 1 of the two UN Covenants (ICCPR and ICSECR):
para. 1 "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
para. 2 "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."
para. 3 "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

and *F. Ermacora*, Über die innere Selbstbestimmung, in: F. H. Riedl (ed.), Menschenrechte, Volksgruppen, Regionalismus, Festgabe für T. Veiter, 1982, pp. 31, 33 et seq. as to its origins.

[7] Cf. *E. Riedel*, Theorie der Menschenrechtsstandards, 1986, pp. 210 et seq. with further references; *A. Rosas*, Internal Self-Determination, in: C. Tomuschat (ed.), Modern Law of Self-Determination, 1993, pp. 225, 227.

[8]*Human Rights Committee*, General Comment 12/21, 1984, para. 4; cf. *M. Nowak*, CCPR Commentary, 1993, p. 857.

[9] ICJ Rep. 1986, p. 133.

Cf. *T. Schweisfurth*, Cultural and Ideological Pluralism and Contemporary International Law, 1986, p. 172; *E. Riedel*, Universality of Human Rights and Cultural Pluralism, in: C. Starck (ed.), Constitutionalism, Universalism and Democracy – a comparative analysis, 1999, pp. 25 et seq.

[11] Cf. Black's Law Dictionary, 6 th ed., 1990, p. 312.

[12]*H.-P. Schneider*, Die verfassunggebende Gewalt, in: J. Isensee/P. Kirchhof (eds.), supra note 1, Vol. VII, 1992, § 158 para. 30, p. 19.

[13]*K. Stern*, Das Staatsrecht der Bundesrepublik Deutschland, Vol. I, 2 ed ed., 1984, § 5, p. 151.

[14]*J. Habermas*, Zur Legitimation durch Menschenrechte, in: Die postnationale Konstellation, 1998, p. 171.

[15]*D. Murswiek*, Die verfassungsgebende Gewalt nach dem Grundgesetz für die Bundesrepublik Deutschland, 1978, p. 229.

[16]*H.-P. Schneider*, supra note 12, § 158 para. 32, pp. 19 et seq.

[17]*BVerfGE* 1, pp. 14, 61.

[18]*A. Verdross/B. Simma*, supra note 5, § 526, p. 331; *M. Shaw*, International Law, 4 th ed., 1997, pp. 97 et seq.

[19]*A. Cassese*, supra note 5, para. 6.5.2, p. 141.

C. Tomuschat, Der Verfassungsstaat im Geflecht der internationalen Beziehungen, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 36 (1977), pp. 7, 50 et seq.

[21]*R. A. Lorz*, Träger und Adressaten internationaler Menschenrechtsforderungen, in: E. Klein/C. Menke (eds.), Menschheit und Menschenrechte, 2002, pp. 105, 111 et seq.

[22] Cf. *A. Verdross*, Idées directrices de l'organisation des Nations Unies, in: Recueil des Cours 83 (1953 II), pp. 1, 23 et seq.

[23]*E. Riedel*, Assertion and Protection of Human Rights in International Treaties and their Impact in the Basic Law, in: C. Starck (ed.), Rights, Institutions and Impact of International Law according to the German Basic Law, 1987, pp. 197, 201 et seq.

[24] *W. Brugger*, Human Rights Norms in Ethical Perspective, in: German Yearbook of International Law 25 (1982), pp. 113 et seq.; *E. Riedel*, supra note 7, pp. 216 et seq. with further references.

[25] ICJ Rep. 1980, p. 42; earlier cases described by *E. Schwelb*, The International Court of Justice and the Human Rights Clauses of the Charter, in: The American Journal of International Law 66 (1972), pp. 337, 346 et seq.

[26] Cf., for instance, *BVerfGE* 46, pp. 342, 362.

[27] In particular: *V. Pechota*, The Development of the Covenant on Civil and Political Rights, in: L. Henkin (ed.), The International Bill of Rights – The Covenant on Civil and Political Rights, 1981, pp. 32 et seq.

[28] Charter of the United Nations 1945; Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966; Convention on the Prevention and Punishment of the Crime of Genocide 1948; Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984; Convention on the Rights of the Child 1989; International Convention on the Elimination of all Forms of Racial Discrimination 1966; see also http://www.unhchr.ch/html/intlinst.htm.

[29] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; European Social Charter 1961; American Convention on Human Rights 1969; African Convention on Human and Peoples' Rights (Banjul Charter) 1981.

A. Cassese, supra note 5, para. 16.5, p. 370.

[31] That was the task of the so-called „Badinter Commission" – cf. *I. Seidl-Hohenveldern/T. Stein*, Völkerrecht, 10 th ed., 2000, para. 667a, p. 142.

[32] *A. W. Bradley/K. D. Ewing*, supra note 3, pp. 416 et seq.

[33] Constitution of the Republic of Albania 1998; Constitution of the Republic of Belarus 1996; Constitution of the Republic of Latvia 1998; Constitution of the Russian Federation 1993.

[34] See *G. Fox/B. Roth*, Democratic Governance and International Law, 2000, Part V.

[35] See *F. Fukuyama*, The End of History and the Last Man, 1992.

[36] *D. Held*, Cosmopolitan Democracy and the Global Order: Reflections on the 200 th Anniversary of Kant's "Perpetual Peace", 1995, p. 427.

[37] *T. M. Franck*, The Emerging Right to Democratic Governance, in: The American Journal of International Law 86 (1992), pp. 46 et seq.; *A.-M. Slaughter*, International Law in a World of Liberal States, in: European Journal of International Law 6 (1995), pp. 503 et seq. *JulianeKokott* most recently stated her strong belief in the existence of this right at the central conference of German public law professors at Hamburg in October 2003 (publication forthcoming).

[38] See *R. Burchill*, The Developing International Law of Democracy, in: Modern Law Review 64 (2001), pp. 123 et seq.

[39] The categorization here follows *R. Burchill*, International Law of Democracy and the Constitutional Future of the EU: Contributions and Expectations, Queen's Papers on Europeanisation No. 3/2003, pp. 4 et seq.

B. Bauer, Der völkerrechtliche Anspruch auf Demokratie, 1998, pp. 56 et seq.

[41] *D. Brühl-Moser*, Die Entwicklung des Selbstbestimmungsrechts der Völker unter besonderer Berücksichtigung seines innerstaatlich-demokratischen Aspekts und seiner Bedeutung für den Minderheitenschutz, 1994, p. 286.

[42] ILM 31 (1992), p. 1498.

[43] See *G. Fox/G. Nolte*, Intolerant Democracies, in: Harvard International Law Journal 36 (1995), pp. 38 et seq.

[44] *ECHR* 1976, Kjeldsen, Busk Madsen, and Pedersen v. Denmark, Ref. 00005095/71; 00005920/72; 00005926/72, para. 53.

[45] *ECHR* Handyside v. UK, Series A No. 24 (1979/80) para. 49; Vogt v. Germany, Series A No. 323 (1995) para. 52; Johnston and Others v. Ireland, Series A No. 112 (1986); cf. especially the Separate Opinion of Judge De Meyer at para. 5; *European Commission on Human Rights*, Liberal Party v. UK, No. 8765/79, 1982; Lindsay and Others v. UK, No. 8364/78.

[46] See *R. Burchill*, The Role of Democracy in the Protection of Human Rights – Lessons from the European and Inter-American Human Rights Systems, in: D. Forsythe (ed.), Human Rights and Diversity: Area Studies Revisited, 2003, pp. 224 et seq.

[47] *Commission on Human Rights*, Resolution 1999/57, Promotion of the right to democracy, para. 1; see also Report of the *HRC*, 49 th Sess., Vol. I, Supp. No. 40 - comments on Azerbaijan, para. 304.

[48] *K. Vasak*, Democracy, political parties and international human rights law, in: Israel Yearbook on Human Rights 26 (1996), pp. 21 et seq .

[49] *UN GA*, Res. 45/150, Enhancing the effectiveness of the principle of periodic and genuine elections, 1990, para. 2.

T. M. Franck, supra note 37, p. 83; *B. Bauer*, supra note 40, pp. 51 et seq.

[51] See Parliamentary Assembly, 35 th Sess., Resolution 800, 1983, Principles of Democracy.

[52] Cf. the Copenhagen Concluding Document, which may be found at http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm, and the Charter of Paris, http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm, both dated 1990.

[53] Art. 6 Par. 1, 7 TEU.

[54] See http://www.thecommonwealth.org/whoweare/declarations/harare.html and http://www.thecommonwealth.org/whoweare/declarations/harare95.html.

[55] See I.1., above.

[56] On the various doctrines existing in that respect: *M. Shaw*, supra note 18, pp. 303 et seq., 306; *I. Seidl-Hohenveldern/T. Stein*, supra note 31, para. 680 et seq., pp. 143 et seq.; *M. J. Peterson*, Recognition of governments should not be abolished, in: The American Journal of International Law 77 (1983), pp. 31, 41 et seq.

[57] 165 LNTS 19 (December 26, 1933).

[58] ILM 31 (1992), p. 1485.

[59]*R. Burchill*, supra note 39, p. 14; *R. Rich*, Recognition of States: The Collapse of Yugoslavia and the Soviet Union, in European Journal of International Law 4 (1993), pp. 36, 46.

That is the way the United Nations Development Programme paints the picture. See *UN Secretary-General*, Agenda for Development, UN Doc. A/48/935, 1994, para. 120; *UNDP*, Human Development Report, 1990, p. 1.

[61] See *European Commission*, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, 8 May 2001, COM (2001) 252 FINAL; Council Regulation 975/1999, 29 April 1999, OJ L 120/1; Council Regulation 976/1999, 29 April 1999, OJ L 120/8; Declaration on Human Rights, Conclusion of the Luxembourg European Council, 28-29 June 1991.

[62]*T. M. Franck*, supra note 37, p. 48.

[63] This was already assumed by *I. Kant* in his famous treatise on eternal peace ("Zum ewigen Frieden", Erster Definitivartikel).

[64]*T. M. Franck*, supra note 37, p. 89.

[65] Cf. *K. Bollen*, Political Democracy: Conceptual and Measurement Traps, in D. Beetham (ed.), Defining and Measuring Democracy, 1994, pp. 5 et seq.

[66] See for the Copenhagen Document: supra note 52, No. 5-7; Vienna Declaration and Programme of Action (12 July 1993) UN Doc. A/CONF.157/23, para. 8; *Commission on Human Rights*, Ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy, UN Doc. E/CN4/RES/1995/60.

[67]*D. Willoweit*, Deutsche Verfassungsgeschichte, 4 th ed., 2001, § 41, p. 377, § 42, p. 383.

[68] Cf. the wording of these documents in: Jahrbuch des öffentlichen Rechts 1 (1951), pp. 1 et seq., 262 et seq.

[69]*D. Willoweit*, supra note 67, § 42, pp. 385 et seq.

R. Geiger, Grundgesetz und Völkerrecht, 3 rd ed., 2002, § 10, pp. 37 et seq.

[71]*H. P. Ipsen*, Über das Grundgesetz (1949), in: H. P. Ipsen, Über das Grundgesetz, 1988, pp. 1, 20; *H. Schneider*, Fünf Jahre Grundgesetz, in: Neue Juristische Wochenschrift 1954, p. 937.

[72]*H. H. Klein*, Kontinuität des Grundgesetzes und seine Änderung im Zuge der Wiedervereinigung, in: J. Isensee/ P. Kirchhof, supra note 1, Vol. VIII, 1995, § 198 para. 56 et seq., pp. 589 et seq.

[73] Cf. *M. Kloepfer*, Zur historischen Legitimation des Grundgesetzes, in: Zeitschrift für Rechtspolitik 1983, pp. 57, 59.

[74]*H.-P. Schneider*, supra note 12, § 158 para. 26/27, pp. 16 et seq.

[75]*U. Steiner*, Verfassungsgebung und verfassungsgebende Gewalt des Volkes, 1966, pp. 93 et seq.

[76]*R. Mußgnug*, Zustandekommen des Grundgesetzes und Entstehen der Bundesrepublik Deutschland, in: J. Isensee/P. Kirchhof, supra note 1, Vol. I, 2 nd ed., 1995, § 6 para. 33 et seq., pp. 230 et seq.

[77]*R. Geiger*, supra note 70, § 10, pp. 37 et seq.

[78]*R. Mußgnug*, supra note 76, § 6 para. 85 et seq., pp. 248 et seq.

[79]*H. P. Ipsen*, supra note 71, p. 21; *M. Kloepfer*, supra note 73, p. 58.

“ This Basic Law shall cease to apply on the day on which a constitution freely adopted by the whole (!) German people takes effect. “

[81]*D. Willoweit*, supra note 67, § 46, p. 469.

[82]*H. H. Klein*, supra note 72, § 198 para. 56 et seq., pp. 589 et seq.

[83]*H. Huba*, Das Grundgesetz als dauerhafte Gesamtdeutsche Verfassung, in: Der Staat 30 (1991), pp. 367, 376.

[84] Cf. *R. Mußgnug*, supra note 76, § 6 para. 100 et seq., pp. 255 et seq.; *H .P. Ipsen*, supra note 71, p. 21; *H. Schneider*, supra note 71, p. 937; *H. H. Klein*, supra note 72, § 198 para. 18 et seq., pp. 567 et seq.

[85]*M. Heckel*, Die Legitimation des Grundgesetzes durch das deutsche Volk, in: J. Isensee/P. Kirchhof, supra note 1, Vol. VIII, 1995, § 197 para. 69, pp. 522 et seq.

[86]*J. Isensee*, Deutschlands aktuelle Verfassungslage, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 49 (1990), pp. 39, 51 et seq.

[87]*R. Scholz*, in: T. Maunz/G. Dürig (eds.), Kommentar zum Grundgesetz (looseleaf), Art. 146 para. 13, speaks of a „postponed“ realization of the right to (constitutional) self-determination; *H. H. Klein*, supra note 72, § 198 para. 22, p. 569, calls this process a “successive enrichment of legitimacy”.

[88] Cf. to the latter one: *M. Kloepfer*, supra note 73, p. 59 versus *H.-P. Schneider*, supra note 12, § 158 para. 37, pp. 22 et seq.

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