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Constitutionalism

Past, Present, and Future

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Preface

The modern constitution is rightly regarded as one of the great civilizing achievements of our time. Two hundred years after its emergence at the periphery of the Western world it has become the generally accepted pattern for establishing and legitimizing political rule. Virtually all states in the world have now a constitution. But from the beginning the constitution was an endangered achievement. The vast majority of constitutions that were enacted with much hope for a better future sooner or later failed. Most countries have had more than one constitution. The United States is a rare exception. Its constitution, which had been preceded by a number of constitutions in the former colonies, was not only the first one, it is also the oldest one still in force.

Constitutions are an endangered species in yet another way. Once the modern constitution had been invented and become an object of yearning for many peoples, it became possible to use the model for purposes other than those originally combined with it. There were and are many constitutions which have been enacted not to limit government in the interest of equal freedom of the citizens, but to camouflage the authoritarian or even totalitarian character of the state. Among the constitutions currently in force, the number of those that are nor taken seriously or are disregarded as soon as their provisions enter into conflict with interests of the ruling class or the elected majority is not small.

It is true that safeguards like constitutional review, which also was an American exception for about 150 years, are now the norm and have greatly enhanced the relevance of constitutional law. But even constitutional courts do not always and everywhere guarantee compliance with constitutional law. Today, a number of constitutional courts find themselves under political pressure, and some were, from the very beginning, so organized or their judges so appointed that those in power had nothing to fear from them.

The modern constitution is finally endangered because the circumstances under which it emerged have changed considerably. The object of constitutionalization was public power, and public power was until recently identical with state power. The state, in turn, could be clearly distinguished from civil society. Today we are facing an erosion of these preconditions of modern constitutionalism. Internally, the borderline between private and public is being blurred. Private actors share public power without being submitted to the requirements of the constitution. Externally, the identity of public power and state power is dissolved. There are now institutions that exercise public power on the international level with direct effect in the states. Whether or not they can be constitutionalized remains an open question.

The essays contained in this book deal with these questions. They explore the history of modern constitutionalism, the characteristics that must exist if the constitution may be called an achievement, the appropriate way to understand and apply constitutional law under changed circumstances, the remaining role for national constitutions

in times of internationalization and globalization as well as the possibility of supranational constitutionalism.

Many of these essays have influenced the German and European discussion on constitutionalism, but only a few of them were available in English. Therefore, I am extremely grateful for the opportunity to be able to present my work on constitutionalism in the form of some selected articles, old and new, to an English speaking audience in a series that has rapidly gained primary importance and attention in the field of constitutional theory.

Martin Loughlin from the London School of Economics was the driving force behind the project. I relied on his advice as to the selection of articles; his final editing gave me confidence that the text will not estrange the native speakers. Dev Josephs translated the articles written in German with great ability and accuracy. A grant from the Volkswagen-Stiftung made the translation possible. To all I am deeply indebted.

The function of the constitution as an anticipatory self-restaint of a society in view of future temptations is often symbolized by Odysseus tied to the mast of his ship in order not to yield to the songs of the sirens while passing their island. This is why an old mosaic image of this scene bedecks the cover of the book.

Dieter Grimm (Berlin)
DECEMBER 2015

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PART I

INTRODUCTION

1

The Origins and Transformation of the Concept of the Constitution

I. ORIGINS

1. The Development of the Legal Concept of Constitution

Every political unit is constituted, but not every one of them has a constitution. The term 'constitution' covers both conditions, but the two are not the same.[1] The term has two different meanings. Constitution in the first sense of the word refers to the nature of a country with reference to its political conditions. Constitution in the second sense refers to a law that concerns itself with the establishment and exercise of political rule. Consequently, the first definition refers to an empirical or descriptive constitution and the second a normative and prescriptive concept. Used empirically, constitution reflects the political conditions that in fact prevail in a specific region at a given time. In the normative sense, constitution establishes the rules by which political rule should be exercised under law.

Whereas constitutions in the empirical sense have always existed, the constitution in the normative sense is a relatively modern phenomenon. It emerged towards the end of the eighteenth century in the course of the American and French Revolutions and has propagated throughout the world over the last 200 years. This does not mean that before the emergence of the normative constitution legal rules relating to political rule and binding on the holders of the ruling function did not exist. But not every such form of rule can claim to have a constitution within the sense that emerged as a consequence of the late eighteenth-century revolutions and which have since characterized the term. Rather, a distinction must be drawn between *legalization* and *constitutionalization*. The constitution represents a specific type of legalization of political rule that is linked to historical conditions which did not always exist and which could also disappear over the course of history.[2]

[1] For the history of the term 'constitution', see Heinz Mohnhaupt and Dieter Grimm, *Verfassung: Zur Geschichte des Begriffs von der Antike bis zur Gegenwart* (Berlin: Duncker & Humblot, 2nd edn, 2002).

[2] See further, Ch. 2 of this volume; Dieter Grimm, *Deutsche Verfassungsgeschichte 1776-1866* (Frankfurt am Main: Suhrkamp, 3rd edn, 1995), p. 10 et seq.

For a long time, an object for a law specializing in setting norms for political rule was lacking. Until society had become functionally differentiated, it had no system specializing in the exercise of political rule to the exclusion of other systems.[3] Rather, tasks of rulership were distributed among numerous mutually independent bearers in terms of their object, function, and physical location. Closed political units could not be formed under these circumstances. Authority to rule related primarily to persons and not territories. The holders of such authority did not exercise it as an independent function, but rather as an annex to a specific status as head of a family, landowner, or member of a social class or corporation. Under these circumstances, what is today distinguished as private and public was still intermingled, and this did not permit any autonomous public law.[4]

That does not mean that the authority to rule was not subject to legal constraints. On the contrary, it was subject to a tight web of legal ties that were valid largely from tradition and often based on divine will. Consequently, they not only took precedence over codified law but could not be amended by it either. However, these rules did not represent a constitution in the sense of a law specifically relating to the establishment and exercise of political rule. Just as ruling authority was a dependent annex of other legal positions, legal norms referring to rule were part of the general law. The numerous studies devoted to the 'constitution' in the ancient and medieval worlds do not lose their validity on that account.[5] But they should not be confused with the normative text that seeks to regulate rule and is enacted by a political decision: this was an innovative product of the revolutions of the late eighteenth century.

An object capable of being subject to a constitution did not take form until the religious schism destroyed the basis of the medieval order and, in the course of the religious civil wars of the sixteenth and seventeenth centuries, a new form of political rule emerged on the European continent. This was based on the conviction that civil war could only be resolved by a superior force that possessed both the authority to create a new order independent of disputed religious truth and the power to restore peace on this basis. Guided by this conviction, and starting in France, rulers began to unite the dispersed powers and condensed them into a comprehensive public power relating to a territory. This power included the right to make laws without any limitation imposed through a higher-ranking, divinely derived law. What was once a legal commandment retreated to the moral sphere, where it lacked the force of legal obligation.

[3] Cf. Niklas Luhmann, *Theory of Society* (Stanford: Stanford University Press, 1997); Niklas Luhmann, *Die Politik der Gesellschaft* (Frankfurt am Main: Suhrkamp, 2000), p. 69 et seq.; Niklas Luhmann, Metamorphosen des Staates' in his *Gesellschaftsstruktur und Semantik*, vol. IV (Frankfurt am Main: Suhrkamp, 1995), p. 101 et seq.

[4] On the order of the Middle Ages, see: Otto Brunner, *Land and Lordship. Structures of Governance in Medieval Austria* (Philadelphia: University of Pennsylvania Press, 1992); further, Helmut Quaritsch, *Staat und Souveränität* (Frankfurt am Main: Athenaeum, 1970), p. 107, esp. pp. 184, 196 et seq; Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (London: Methuen, 3rd edn, 1974).

[5] Cf. Fritz Kern, *Recht und Verfassung im Mittelalter* (Tübingen: Wissenschaftliche Buchgesellschaft, 1952).

New terminology soon emerged to describe this new phenomenon: that of the state as the political unit, and of sovereignty for its plenary power.[6] The primary significance of this new phenomenon was not its outward but its inward independence, which found expression in the right of the ruler to make law for all others without being subject to legal constraints.[7] Naturally, the emergence of the state and sovereignty was not an event but a process that commenced at different times in the various regions of continental Europe, proceeded in different forms and at different speeds, and produced differing results, without anywhere coming to an end. Rather, intermediary powers persisted and which contested the ruler's sole possession of public power. In particular, the absolute state allowed the feudal system to continue to exist, and thus the landowner–peasant relationship was largely left unchanged.

Regardless, the modern state with its extensive military powers, its own civil service, and its own revenues independent of the consent of the estates emerged as a structure that could become the object of a uniform regulation. If this era did not bring forth a constitution in the modern sense, this was because the state had emerged as an absolute princely state for the reasons described above. The bearer of all powers was the monarch, who claimed these powers on the basis of his own right and who saw himself subject to no legal limitation in its exercise. Although an object capable of being subject to a constitution was no longer lacking, there was no need for a constitution: absolute rule is characterized by the absence of legal constraints.

However, there was in this regard also a gap between the idea and the reality. The princely power that emerged soon awakened a need for legal constraints. In the favourable event that the ruler was absent or weak, this frequently manifested itself in so-called forms of government, bodies of law intended to secure the rights of the estates against the princely power. Although these forms of government were only seldom able to prevail against state-building forces,[8] their function was gradually adopted by so-called fundamental laws, treaties, or electoral capitulation.[9] Generally established by way of contract, the ruler could not unilaterally cancel them. To this extent, they took precedent over the law set by the prince. However, these too must not be mistaken for constitutions. They left the prince's traditional authority to rule untouched and compelled him solely to waive certain exercises of rule in favour of the contractual

[6] See the entry on Staat und Souveränität' by Hans Boldt, Werner Conze, Görg Haverkate, Diethelm Klippel, and Reinhart Koselleck, in Otto Brunner, Werner Conze, Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe*, vol. VI (Stuttgart: Klett-Cotta, 1990), pp. 1–154.

[7] Cf. Quaritsch (n. 4), pp. *39*, *333*.

[8] Fritz Hartung, *Staatsbildende Kräfte der Neuzeit* (Berlin: Duncker & Humblot, 1961).

[9] Cf. Gerhard Oestreich, 'Vom Herrschaftsvertrag zur Verfassungsurkunde' in Rudolf Vierhaus (ed.), *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze* (Göttingen: Vandenhoek and Ruprecht, 1977), p. 45; Heinz Mohnhaupt, 'Die Lehre von der "Lex fundamentalis" und die Hausgesetzgebung europäischer Dynastien' in Johannes Kunisch (ed.), *Der dynastische Fürstenstaat* (Berlin: Duncker & Humblot, 1982), p. 3; John W. Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 2nd edn, 1961).

parties. The *hierachicalization* of legal norms does not by itself produce a *constitutionalization*.

Accordingly, the modern, normative constitution does not owe its emergence to an organic development of these older approaches. Rather, it was the revolutionary disruptions of 1776 and 1789 that helped to bring about a new solution to the permanent problem of legally constraining political rule, a solution that remains valid to this day. The break from the mother country in America and the overthrow of the absolute monarchy in France created a vacuum of legitimate rule that had to be filled. Naturally, revolutionary disruptions alone cannot adequately explain why a constitution was considered necessary for this purpose. The upheavals could simply have resulted in the replacement of the overthrown rulers by others, as had occurred in the countless violent eruptions that preceded these revolutions. Even if the conditions under which a new person or dynasty was appointed to rule had been formulated at this time, the upheaval would still not necessarily have led to constitutionalism.

This is affirmed by the case of England. The English revolution of the seventeenth century did not bring forth the constitution in the modern sense—even though a breach with traditional rulers occurred. In the English revolution, the nobility and the bourgeois classes united against the Stuart dynasty when it attempted to expand its rule according to the continental model without being able to rely on the reasons that justified this expansion on the continent. Thus, the Glorious Revolution did not seek to change, but rather to preserve the existing order. Accordingly, this did not result in a change in the system of rule, but merely a change in the dynasty, and the normative document that accompanied this transition, the Bill of Rights of 1689, was a contract between Parliament and the new monarch that affirmed the old rights.[10] For just one brief moment after Cromwell had abolished the monarchy, a constitution in the modern sense was imposed in 1653,[11] but it became obsolete through the restoration of the old regime after his death.

2. *The Conditions for the Emergence of Constitutionalism*

The emergence of the constitution as a lasting achievement of the great revolutions of the eighteenth century is due, above all, to two circumstances. The first is that the discontent of American and French revolutionaries was not limited to the person of the ruler, but encompassed the system of rule. Admittedly, the two countries differed greatly as to the degree.[12] Unlike the French, the English monarchy, to which the colonies were subject, had not become absolute. On the

[10] See further Ch. 3 of this volume.

[11] 'Instrument of Government' in Samuel R. Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution, 1625-1660* (Oxford: Oxford University Press, 1968), p. 405.

[12] Cf. Jürgen Habermas, 'Natural Law and Revolution' in his *Theory and Practice* (Boston: Beacon Press, 1963); Dieter Grimm, 'Europäisches Naturrecht und amerikanische Revolution' (1970) 3 *Ius commune* 120.

contrary, the importance of Parliament had steadily grown. Additionally, class barriers had become permeable, and the feudal and guild bonds of the economy had largely fallen away. At that time, England was considered the freest nation in the world, and even remnants of the older order had not found their way to the American colonies. Under these circumstances, the colonists were concerned not with better laws but with better security of their rights, which Parliament had withheld from them without their consent. It was this refusal of the mother country that drove them to issue a Declaration of Independence.

By contrast, France had an especially strong absolutism. Furthermore, the physiocratically guided attempts at modernizing the economic system had failed. The more the feudal system lost its internal justification, the more vociferously it was defended against dissolution tendencies and criticism. In addition to the traditional bourgeoisie of guild-affiliated tradesmen, promoted by the needs of the absolute monarchy a new bourgeoisie based on higher education and economic power had emerged. This was unable to find a place in the prevailing legal and social order commensurate with its societal importance and economic strength since the traditional legal order prevented it from fully developing its economic potential. Thus, the French Revolution, unlike the American, did not seek merely to change political conditions; it primarily aimed to eliminate the estates-based, feudal social order, which had been unattainable under the old regime.

These revolutionary forces were also able to invoke ideas of a just order that virtually demanded to be transformed into positive law. These ideas, which had already formed before the revolutions, became templates for action. After the schism had undermined the transcendent legitimation of political rule, theories of natural law had emerged to take the place of divine revelation.[13] To determine how the rule of persons over other persons could be justified, the social philosophy of that era imagined a state of nature in which everyone was by definition equal and free. Under this prerequisite, rule could only be established through an agreement of all. Whatever form this agreement took, it was thus certain that the legitimation principle of political rule was the consent on the part of the ruled and the only question remaining concerned the form of rule that would be acceptable to rational beings.

The social-contract theorists saw the reason for the willingness to exchange freedom and equality for the state in the fundamental uncertainty of freedom in a state of nature. The establishment of an organized compulsory force was thus viewed as an imperative of reason. Naturally, the question then arose as to the extent to which each individual must surrender his natural rights in order to enjoy the security guaranteed by the state. Under the influence of the religious civil wars, the answer originally was that the state could only guarantee

[13] Cf. Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien: zugleich ein Beitrag zur Geschichte der Rechtssystematik* (Aalen: Scientia-Verlag, 5th edn, 1958); Wolfgang Kersting, *Die politische Philosophie des Gesellschaftsvertrages* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1994); Diethelm Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts* (Paderborn: Schöningh, 1976).

life, limb, and property when all natural rights were first ceded to it. But in this form social-contract theory did not lead in a constitutional direction, even though it assumed the consent of all those subject to rule. Rather, in its original formulation it served to justify absolute rule, which is irreconcilable with constitutionalism.

Following the resolution of the religious civil wars, however, the plausibility of this position declined and was gradually displaced by the idea that the enjoyment of security did not necessitate the surrender of all natural rights to the state on the part of the individual. Rather, it was deemed sufficient to cede the right to assert one's own legal claims by force to the state while other natural rights could remain with the individual as natural and inalienable rights without thereby risking social peace. Soon, even releasing the individual from the bonds of state care, the feudal and guild order, and church oversight of virtue and making him self-reliant became seen as a necessity. For some, this followed from the nature of humanity, which could only fulfil its destiny as a rational and moral being through freedom. For others, freedom was the prerequisite for a just reconciliation of interests between individuals and for material prosperity, which depended on the free development of all forces and encouragement of competition.

This formalized the problem of justice. The state no longer derived its *raison d'être* from the assertion of a general welfare of which it had knowledge and with which it was entrusted, which all subjects had to obey and from which no one could claim freedom. Rather, freedom itself became a condition of the general welfare. The just social order derived from the free activities of individuals, and the state was reduced to the task of securing the prerequisite for realizing the general welfare, namely, individual freedom. This task could not be resolved by society through its own efforts because the equal freedom of all precluded any individual right to rule; it required the maintenance of the monopoly of force established by the absolute state. But provision now had to be made to ensure that it could not be utilized for any purposes other than those of securing and coordinating freedom.

Provided with this content, the social-contract doctrine no longer supported the absolute, princely state and the estate-based feudal social order which the monarchs had never fundamentally called into question, but acquired a trajectory opposed to both. The existing conditions appeared unnatural in the light of social and philosophical teachings. Those who wished to overcome them could feel justified, by claiming the authority of a higher law over the applicable law. Resistance to the monarchy was based precisely on this justification, after the claim to 'good old law' in America and the call for reform of the estate-based, feudal, and dirigiste law in France had been in vain. It was precisely this appeal to natural law, which challenged the legitimacy of the positive law and abrogated obedience to it, that constituted the step from resistance to revolution that was to bring forth a new order.

Although the substance of later constitutions which expressed this new ideal of order were to a great extent shaped in the post-absolutist theories of social

contract, the social contract could not be equated with the constitution. The social contract was merely an imaginary construct that defined the conditions for legitimate rule and thus enabled a critique of political orders that did not conform to it. It claimed to constitute the standard for formulating just law, but was not positive law itself. It was only the revolutionary situation that provided the opportunity to implement the ideas of social philosophy in positive law. The main reason this occurred may be found in three characteristics of these ideas.

The first characteristic was the fundamental premise of social-contract theories that under the conditions of a state of nature, in which all persons were by definition equally free, rule could only originate through a contract of all individuals with each other. In philosophy not more than a regulative idea from which the requirements of a just social order could be derived and the legitimacy of concrete orders could be tested, this premise itself became now the legitimating principle of political rule. In this connection, the Americans had little difficulty in seeing this principle already realized in their founding history in the form of the covenants of the first settlers, on which they now built,[14] whereas the French adopted only the consequence of social-contract theory: the necessity for rule to be legitimized by subjects without having to forge a real contract.

In both cases the result was the same. The transcendentally or traditionally derived principle of monarchical sovereignty—realized in its pure form in France and attributed to the 'King in Parliament' in absolutism-resistant England—gave way to a rationally justified democratic principle, though admittedly with different emphases. In France, the country of origin of the state and sovereignty, this was understood as a type of popular sovereignty. In America, where the concept of sovereignty had remained as alien as in the mother country, it was interpreted more as self-government in the context of the colonial experience. However, these differing perceptions in no way changed the fact that rule under democratic principles could no longer be regarded as original but only as derived right, conferred on office-holders by the people and exercised on their behalf.

But even rule instituted by the people does not necessarily lead to a constitution; it arises only under the additional prerequisite that the mandate to rule is not bestowed unconditionally or irrevocably. This is so because otherwise the democratic principle would be exhausted in the first bestowal of the mandate justifying a new form of absolute rule which differed from the old only in that it derives from the grace of the people rather than the grace of God. In this case, establishment of democratic rule requires a constitutional act but does not create a constitution.[15] Such a concept is neither reconcilable with the natural law theory of innate and inalienable human rights nor with an understanding of the mandate

[14] Cf. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* (New York: Norton, 4th edn, 1963), chs. 1–2; Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Lanham: Madison House, 2001); Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), p. 13 et seq.

[15] See further Ch. 2 of this volume.

relationship as finite, revocable, and based on responsibility to the principals. This was foreign to the revolutionaries who understood that sovereignty of the people required an organization that created and maintained this relationship.

The second characteristic flowed from the Enlightenment idea that equal freedom of all individuals was the highest principle of the social order and that the state derived its *raison d'être* solely from its protection. To ensure this protection against domestic malcontents and foreign invaders, the monopoly of force had to be conceded to it, which did not achieve its final form following the overthrow of all intermediate powers standing between the individual and the state until the revolution.[16] In the same breath however, it was necessary to ensure that the state exercised its power only in the interests of maintaining freedom and equality and abandoned all controlling ambitions beyond this purpose. It was no longer called upon to shape a social order on the basis of a material ideal of justice, but had to restrict itself to preserving an independent order that was assumed to be just.

Consequently, the various social tasks were decoupled from political control and entrusted to social self-control by means of individual freedom. State and society parted ways, and a clear distinction between the public and the private became discernable. The exercise of public power in society became an intervention requiring justification. This too demanded rules that restricted the state to its residual tasks and distinguished between societal and state responsibilities as well as organizing the apparatus of the state so as to make abuse of state power unlikely. Finally, the divided spheres of the state and society needed to be reconnected in such a way as to prevent the state from distancing itself from the needs and interests of the people and giving precedence to its own institutional needs or the interests of office-holders.

The third characteristic lay in a change in the notion of public welfare. After the reconstruction of the social order on the fundamental principle of equal individual freedom, welfare was to result from social self-regulation without any act on the part of the state. This did not make the idea of the general welfare obsolete as a basis for socialization and justification of political rule. However, it lost its character as a fixed, substantial quantity. Multiple opinions as to the question of what best serves the general welfare could co-exist, so that any choice based on an absolute truth was no longer permissible. To this extent, the general welfare was pluralized. The unavoidable question as to what is to be considered as the general welfare then needed to be decided in a process of political opinion and will formation. To this extent, the general welfare was proceduralized. It became transformed into the results of a social process whose orderly unfolding was guaranteed by the state.

It was this ongoing need to determine what constituted the general welfare that also required regulation.[17] In this process, two needs emerged. The first

[16] See Dieter Grimm, 'The State Monopoly of Force' in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Dordrecht: Kluwer, 2003), p. 1043.

[17] See Dieter Grimm, 'Gemeinwohl in der Rechtsprechung des Bundesverfassungsgerichts' in Herfried Münkler and Karsten Fischer (eds), *Gemeinwohl und Gemeinsinn*, vol. III (Berlin: De Gruyter, 2002), p. 125.

derived from the proceduralization of the general welfare, and the second from pluralization. Procedurally, the opinion- and will-forming process from which it originates had to be organized. Participatory rights and definitional competence had to be formally established. With respect to pluralization, a demarcation was necessary. As pluralization was a consequence of the transition from truth to freedom, freedom and all its prerequisites had to be excluded from pluralization. This required material definitions that served as indispensible premises for determining the general welfare.

3. Realization of the Constitutional Programme

The task was such that it found its appropriate solution in law. The solution had to originate in a social consensus. But the consensus quickly becomes history and thus is transitory. Only law could make the consensus permanent and binding. The fundamental question then becomes: how is the acting generation able to acquire the legitimacy to bind future generations?[18] The answer lies in the possibility of changing the law. Law also provides a suitable answer to the regulatory problems that the programme of the social-contract theory creates. It achieves its greatest effectiveness in regulatory measures of a demarcating and organizing nature.

But first it was necessary to overcome the problem that ever since law was made positive it was seen as a product of state decision-making and had to bind the state, even in its power of law-making. This problem was resolved by building on the idea of a hierarchy of legal norms which was well known in the Middle Ages and had been preserved in the 'leges fundamentales' and contracts of rule.[19] This became transformed into a novel division of the legal order into two parts. One part was the traditional ordinary law that emanated from the state and was binding on the individual. The other was the new law, which issued from the sovereign and was binding on the state. This latter was subsequently termed the constitution, and the term gained its modern meaning with this innovation.

This construction could succeed only if both parts of the legal order were not only separate but organized hierarchically. Constitutional law had to take precedence over legislation and its acts of application, so that law could be applied to law and thus increase its potentialities.[20] This priority is essential to the concept

[18] See particularly Thomas Jefferson, *The Writings of Thomas Jefferson*, vol. V, 1895 (Whitefisch: Kessinger Publishing, reprint 2009); see also Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), p. 195.

[19] On *lex aeterna, lex naturae, lex humana*, see Thomas Aquinas, *Summa theologica II-II*, qu. 57–79; for the leges fundamentales see n. 9.

[20] Cf. Niklas Luhmann, *Rechtssoziologie*, vol. II (Reinbek bei Hamburg: Rowohlt, 1972), p. 213; Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993), p. 470.

of the constitution.[21] It is distinctive of the constitution, and the constitution cannot fulfil its role where recognition of this priority is lacking. This lack of priority is also what distinguishes the British 'constitution' from those constitutions that emerged from the American and French Revolutions: all provisions of the unwritten English constitution are with reservation of parliamentary sovereignty.

The supremacy of the constitution was enacted at its birth both in America and France. Sieyès, who provided the theoretical basis for transforming the Estates General, instituted for the first time in 300 years, into a National Assembly, discovered the distinction between 'pouvoir constituant' and 'pouvoir constitué' that remains valid today.[22] The former rested with the nation as the holder of all public power. The latter comprised the institutions created by the people through the enacting of a constitution. These acted on behalf of the people under conditions laid down by the people in the constitution and could thus not change it of their own accord if the entire structure were not to collapse. They could only act on the basis and within the framework of the constitution and their acts could only be legally binding when enacted in conformity with the constitution.

Thus, the new aspect of the constitution was neither the theoretical draft of an overall plan of legitimate rule nor the hierarchic legal order. Both these features had existed previously. Rather, the new aspect was the merging of these two lines of development. The theoretically drafted plan was endowed with legal validity, and placed above all acts of the state as a 'supreme law' formulated by the people. By this method, rule was transformed into a matter of mandate and since the constitution was a consequence of mandatory rule, the constituent power of the people was an indispensable part of it.[23] Persons were authorized to rule only on the basis of the constitution and could only demand obedience to their acts of rule when they observed the parameters of their legally defined mandate and exercised their authority in conformity with the law. It was this construction that permitted the constitutional state to be spoken of as a 'government of laws and not of men'.[24]

This limitation of the state to its reduced aims as well as the guarantee of individual freedom and the autonomy of the various social functions which resulted was achieved by fundamental rights. In both France and Virginia—the first American colony to adopt a constitution—these rights were enacted before the provisions governing the organization of the state, while the Constitution of the United States of 1787 initially treated a Bill of Rights as dispensable,

[21] Cf. Rainer Wahl, 'Der Vorrang der Verfassung' (1981) 20 *Der Staat* 485.

[22] Emmanuel Sieyès, 'What is the Third Estate' in his *Political Writings* (Indianapolis: Hackett, 2003), p. 92; James Madison, *The Federalist* No. 49 (1788); cf. Egon Zweig, *Die Lehre vom 'Pouvoir constituant'* (Tübingen: Mohr, 1909); Pasquale Pasquino, *Sieyès et l'invention de la constitution en France* (Paris: Jacob, 1998).

[23] See Ernst-Wolfgang Böckenförde, 'Die verfassunggebende Gewalt des Volkes' in his *Staat, Verfassung, Demokratie* (Frankfurt am Main: Suhrkamp, 1991), p. 96.

[24] *Marbury v. Madison*, 5 U. S. (1 Cranch) 137 (1803).

before adding them in the form of amendments. The French formulation of fundamental rights derived mainly from the philosophy of the Enlightenment, which since the mid-eighteenth century had developed an increasingly detailed catalogue of human rights. The Americans, by contrast, were guided by English catalogues of rights, to which they added nothing of substance. But because of their experiences with Parliament they placed these not only above the executive but also above the legislative branch, elevating them from the level of fundamental rights to that of constitutional rights and thus to basic rights within the meaning of constitutional law.[25]

Since the American Revolution exhausted itself in the political objectives of achieving independence from the mother country and establishing self-government, the existing social order was left largely unchanged. Fundamental rights could therefore be concentrated on deterring state infringements on freedom and they were realized in their negative function. By contrast, the French Revolution aimed not only at changing the political system but also the social system. This comprised the entire legal order, which was of a feudalistic, dirigiste, and canonical nature. Here, fundamental rights were assigned the role of guiding the grand act of replacing an entire legal system. This was the declared reason for the early adoption of the *Déclaration des Droits de l'Homme et du Citoyen* on 26 August 1789. Under these circumstances, fundamental rights could not functionally be limited to that of state prohibitions. They set out binding objectives for state action and could not revert to their negative function until the transformation of the legal order to the principles of freedom and equality had been achieved.[26]

In both countries, the state was organized in such a way that state and society, which were separated under the premise that society was capable of controlling itself, were rejoined by a representative body elected by the people which had the right to make law and the right to raise and appropriate taxes. The state executive was bound by the law enacted by Parliament and a relatively strict separation of powers guarded against the abuse of power. In both countries, the separation of powers became virtually a defining characteristic of the constitution, so that the catalogues of fundamental rights could assert that a land without separation of powers did not have a constitution. But although establishing this basic pattern, America and France went different ways, particularly in the choice between presidential and parliamentary democracy and between a federal and centralized state organization.

[25] See Gerald Stourzh, *Wege zur Grundrechtsdemokratie* (Vienna: Böhlau, 1989), in particular pp. 1, 37, 75, 155; Gerald Stourzh, 'Staatsformenlehre und Fundamentalgesetze in England und Nordamerika im 17. Jahrhundert' in Rudolf Vierhaus (ed.), *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze* (Göttingen: Vandenhoek and Ruprecht, 1977).

[26] Cf. Dieter Grimm, 'Grundrechte und Privatrecht in der bürgerlichen Sozialordnung' in his *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt am Main: Suhrkamp, 1987), p. 192. For the legal content of the French Declaration see Patrick Wachsmann, 'Déclaration ou constitution de droits' in Michel Troper and Lucien Jaume (eds), *1789 et l'invention de la constitution* (Paris: LGDJ, 1994), p. 44.

Well-conceived though it may have been, constitutional law remained in a precarious condition. It not only structured the highest power but also required this power to attain its legitimacy by submitting itself to legal rules. Constitutional law thus differed from statute law in one important respect: whereas the latter was supported by the organized sanctioning power of the state, so that violations could be met with compulsion, the former lacked such protection because it acted on the highest power itself. The addressee and guarantor of regulation are identical. In the event of a conflict, there is no superior power that can assert the constitutional requirements. Therein lies the unique weakness of the highest law.

During the emergent phase of constitutionalism, only America found an answer to this weakness. France had lived under an absolute monarchy for 300 years without any bodies representing the estates; they therefore saw sufficient security in an elected representative body. The American colonists, by contrast, had no such faith in a popular representative body. Due to their experiences with the excesses of the British Parliament and some abuse of power by their own legislative assemblies, particularly during the revolutionary phase, they were aware that the constitution was imperilled not only by the executive, but also by the legislative branch. Consequently, they provided that the judicial system should oversee compliance with the constitutional institutions of federalism, the separation of powers, and the fundamental rights. Consequently, the birth of the constitutional state went along with constitutional review,[27] though for more than 100 years this remained unique to the United States.

The difference between the older legal bonds of political rule and the modern constitution in the form in which it emerged towards the end of the eighteenth century can now be more precisely described.[28] While the older bonds always assumed legitimate rule and limited themselves to the ways in which it was exercised, the modern constitution not only modifies but also constitutes rule.[29] It produces legitimate state power, and only then organizes it in accordance with its purpose. Whereas the older bonds always related solely to individual modalities of an exercise of rule assumed to be all-inclusive, the modern constitution acted in a comprehensive and not an isolated manner. It permitted neither extra-constitutional bearers of ruling authority nor extraconstitutional modalities of exercise. Where the old legal bonds only applied between

[27] This was masterminded by Alexander Hamilton, *The Federalist* No. 78 (1788). It is unsettled whether the possibility of constitutional review was installed in the constitution itself or whether it was a creation of the U. S. Supreme Court in the judgment of *Marbury v. Madison*, 5 U. S. (1 Cranch), 137; cf. David P. Currie, *The Constitution and the Supreme Court* vol. I (Chicago: University of Chicago Press, 1985), p. 66.

[28] Cf. Grimm (n. 2), p. 34; Charles H. McIlwain, *Constitutionalism Ancient and Modern* (Ithaca, NY: 3rd edn, 1966).

[29] This counts independently of whether Isensee is correct in his opinion that the state inevitably preceeds before the constitution: Josef Isensee, 'Staat und Verfassung' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts I* (Heidelberg: C.F. Müller, 2nd edn, 1995), § 13. See also Christoph Möllers, *Staat als Argument* (München: Beck, 2000), p. 256.

contractual parties, modern constitutions pertained to the entire people. Their effect was universal and not particular.

4. The Constitution as an Evolutionary Achievement

Due to these unique characteristics, the constitution has rightly been called an evolutionary achievement.[30] It restored the legal bonds on political rule that had been lost with the collapse of the medieval order under the altered conditions of the modern state, the attendant positive nature of law, and the transition to the functional differentiation of society. By means of the constitution, political rule was structured according to a new legitimating principle of popular sovereignty and made compatible with the need of a functionally differentiated society for autonomy and harmony.[31] By such means, the constitution simultaneously made it possible to distinguish legitimate from illegitimate claims to rule and acts of rule. In fulfilling this function, it might fail or lose its acceptance. But the character of an achievement became apparent in the fact that its function in this case could only be assumed by another constitution, and it cannot be maintained independent of the constitution.[32]

The new instrument of the constitution reflected its originating conditions. In accordance with constitutionalism's aim of legally codifying political rule, it took up the form that political rule had taken on at the time of its emergence. That was the state as it emerged in reaction to the decay of the medieval order first in France and later in other European countries. Under these circumstances, the state emerged as the nation state. In this form, it existed before the constitution emerged. The nation state was thus assumed in the constitution.[33] The consequence of this was that, although fuelled by principles that claimed universal applicability, the idea of the constitution was realized as a particular instrument. From the start, the constitutions of nation states varied the constitutional programme.

Consequently, right from the beginning the constitution was as universal as it was limited. It was universal in the sense that it asserted that public power could only be exercised on the basis and within the framework of its provisions. It was limited in the sense that the public power subject to its provisions was limited to a specific territory which was demarcated from other territories by borders. Every constitution applied only within the territory of the state it

[30] Cf. Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft' (1990) 9 *Rechtshistorisches Journal* 176; Peter Häberle describes it as a 'cultural achievement' in his *Verfassungslehre als Kulturwissenschaft* (Berlin: Duncker & Humblot, 1998), p. 28.

[31] Cf. Niklas Luhmann, 'Politische Verfassungen im Kontext des Gesellschaftssystems' (1972) 12 *Der Staat* 6, 165, 168.

[32] Cf. Luhmann, Politische Verfassungen, ibid., p. 168.

[33] Cf. Ernst-Wolfgang Böckenförde, 'Geschichtliche Entwicklung und Bedeutungswandel der Verfassung' in his *Staat, Verfassung, Demokratie* (Frankfurt am Main: Suhrkamp, 1991), p. 9; Luhmann, *Das Recht der Gesellschaft* (n. 20), p. 478.

constituted, while other rules with the same claim to exclusivity applied in the neighbouring states. The difference between the internal and external marked by state boundaries was the prerequisite for a uniform and universal state power and thus for its constitutionalization. But at the same time, this meant that the effectiveness of the constitution depended on the difference between the internal and external remaining clear and the state border effectively shielded the territory against foreign acts of rule.

As a law referring specifically to the state, the constitution could only make good on its claim to complete legalization of political rule if this was identical with state power. It was thus not without reason that enactment of the constitution in France was preceded by the dissolution of all intermediary powers and the transfer of ruling functions to the state. The melange of public and private elements in older social formations and their remnants in absolutism, which was an obstacle to the constitution, were thus eliminated. On the one hand, society was stripped of all ruling authority and this was the prerequisite for empowering it to control itself by means of the market. On the other hand, the authority to rule was completely deprivatized, but needed to be legally constrained precisely on account of its concentration in the state. On that account, in a constitutional state the principle of freedom applies fundamentally for society, and that of constraint applies for the state.[34] This is not merely a conceivable variant of the constitutional state, but its constituting feature. The constitutional state would be unseated if the state enjoyed the freedom of private individuals or if by the same token private individuals could exercise the state's means of rule.

The altered conditions of legal constraint also affected the nature and degree of legalization. As a component of positive law, legal constraint could neither be an external constraint nor be considered invariant. External constraint was not possible because no pre-political or apolitical source or law existed in the state any longer. Constitutional law was no exception. In this respect, constitutional constraint on politics is always a self-constraint.[35] One must not be misled by the circumstance that the constitution, unlike statute law, was based on the sovereign itself, the people (in America), or the nation (in France). Although the constitution is the wellspring of legitimate state power, the sovereign cannot effect this without being provisionally organized politically or being represented by appropriate bodies.[36]

This point does not affect the fundamental difference between constituent power and constituted power. Rather, this is a difference within the political system. As the first constitutions show, the difference can be structured so that decisions respecting constitutional law can be made both by other institutions and by other processes than decisions respecting legislation. The United States Constitution and the French revolutionary constitutions went especially far in

[34] Cf. Carl Schmitt, *Verfassungslehre* (München: Duncker & Humblot, 1928), p. 126.

[35] Cf. Luhmann, *Die Politik der Gesellschaft* (n. 3), p. 358; Böckenförde (n. 23), p. 90.

[36] Böckenförde (n. 23), p. 96.

this respect.[37] But even where institutions and processes for decisions respecting the constitution are largely identical (as in Germany), the distinction retains its significance. It ensures that the institutions are active in different capacities that may not be conflated, thus stabilizing the primacy of the constitution.

For the same reasons, constitutional law cannot be invariant law. Just as it comes into being through a political decision, it can be modified again by the same type of decision. Even prohibitions of change enshrined in constitutional law, which create a further gradient within constitutional law, are effective only as long as the constitution containing such a prohibition remains in force and is not annulled by contrary resolutions. But this does not harm the legalization function because with the aid of the constitution decisions regarding the premises of political decisions are separated from the political decisions themselves. The primacy of the constitution does not preclude its amendment, but that the constitutional premises are ignored in political decisions as long as they are not amended.

Additionally, the legal constraint of politics by the constitution cannot be a total constraint.[38] Since all law within the state is politically created, total legalization would be equivalent to a negation of politics. Politics would be reduced to executing the constitution, and thus ultimately become administration. Yet the constitution should not make politics superfluous, but should channel and rationalize it. Consequently, it can never be more than a framework for political action. It defines the constraints under which political decisions can command binding force, but determines neither the input into constitutional channels nor the results of constitutional processes. But it remains a comprehensive regulation to the extent that it does not permit any extraconstitutional powers nor any extraconstitutional procedures. The result can only claim to be binding when the constitutionally legitimated actors act within the constitutionally established bounds.

The constitution fulfils its function as 'the fundamental legal order of the state'[39] by removing those principles of social coexistence that rest on a broad consensus across all opponents from the ongoing political debate. They serve this debate as a standard and a boundary, while procedural rules are established for the sphere ceded to debate. By providing and symbolizing a stock of commonalities in this manner with which adherents to differing convictions and holders of diverging interests are in agreement, the constitution describes the identity of the political system and contributes to the integration of society.[40]

[37] Cf. Title VII of the French constitution of 3 September 1791 and Art. V of the American Constitution, with the consequence that the American Constitution was revised seldom and the French one was replaced by a new constitution at the first moment of a need for change.

[38] Cf. Dieter Grimm, 'Politik und Recht' in Eckart Klein, *Grundrechte, soziale Ordnung und Verfassungsgerichtsbarkeit, Festschrift für Ernst Benda* (Heidelberg: C.F. Müller, 1995), p. 96; also Dieter Grimm, *Die Verfassung und die Politik* (München: Beck, 2001), p. 21.

[39] See Werner Kägi, *Die Verfassung als rechtliche Grundordnung des Staates* (Zürich: Polygraph Verlag, 1945).

[40] Cf. Hans Vorländer, *Verfassung und Konsens* (Berlin: Duncker & Humblot, 1981); Hans Vorländer (ed.), *Integration durch Verfassung* (Wiesbaden: Westdeutscher Verlag, 2002).

This is particularly significant for those societies in which the integrating power of other community-building institutions tends to decline due to the constitutionally guaranteed individual freedom.

In formal legal terms, the constitution performs its function by erecting greater hurdles for changes to the principles and ground rules than it does for ongoing political decisions. This decouples the alteration of the principles and processes for ongoing political decisions from these decisions themselves. This separation creates differing discourses and time horizons for both, which has numerous advantages. The political debate becomes civilized because the controversies can be waged against the background of a fundamental consensus on which the opponents are in agreement. This promotes the waiver of violence in politics. The minority need not fear for their lives and can continue to pursue their own ends. At the same time, ongoing politics is relieved of having constantly to find principles and choose procedures, which would overtax it in view of the constant pressure of reaching decisions on complex matters. The content of the constitution is no longer the object, but the premise of political decisions.

Finally, the constitution organizes the political process in a chronological sense. The principles that ensure identity have the chance of remaining valid over a longer term. Greater confidence may be placed in their stability than in ongoing political decisions. Short-term adaptations to changing situations and needs are thereby facilitated. They find support in principles with long-term validity, which diminishes disillusionment. In this way, the constitution ensures continuity in change. These advantages of constitutionalism all flow from the differentiation of levels between the principles for political decisions and the decisions themselves. The constitution is a *fundamental* order for precisely this reason. To be sure, there are no binding standards for this delineation. But if constitutions are formulated in such a way as to level this difference, their function is threatened.[41]

Besides, the constitution shares those limitations to which the medium of law is generally subject. As the fundamental legal order of the state, it is not a description but the epitome of norms that the political system must uphold. It does not depict social reality but makes demands of it. The constitution thus distances itself from reality and from this it gains the ability to serve as a standard for behaviour and assessment in politics. Thus it cannot be resolved in a one-time decision as to the nature and form of the political unit or in a continuing process. Rather, as a norm it becomes independent of the decision to which it owes its political validity and provides support for the process that it assumes as a prerequisite.[42]

[41] Cf. Dieter Grimm, 'Wie man eine Verfassung verderben kann' in his *Die Verfassung und die Politik* (n. 38), p. 126.

[42] For the decisionistic version see Schmitt (n. 34), p. 20, for the procedural see Rudolf Smend, *Verfassung und Verfassungsrecht* (München: Duncker & Humblot, 1928), p. 78. For the normativity of the constitution see especially Konrad Hesse, *Die normative Kraft der Verfassung* (Tübingen: Mohr, 1959).

On the other hand, the constitution as the epitome of legal norms is not self-executing. It cannot guarantee its own realization. Whether and to what extent the constitution succeeds in making good on its normative ambition over time depends largely on extra-legal actions. The place where these are to be looked for is the empirical constitution. This is not replaced by the normative constitution. Nor do the two stand in parallel and remain unrelated; rather, they interact. The legal constitution is influenced by the empirical one not only at the moment of its enactment but also during its application, and the legal constitution in turn acts upon the empirical constitution. Whenever the political process leaves the constitutionally stipulated track, the empirical constitution usually emerges from behind the legal one as the cause of the failure. This is what Lassalle meant when termed the social power relationships the true constitution.[43]

Where it succeeds, on the other hand, the political process runs according to the rules of the legal constitution. This is not to say that the social power relationships that influence the empirical constitution are eliminated or neutralized. Every normative constitution is confronted with all types of power relationships. Constitutions that grant social subsystems like the economy, the media, etc. autonomy through the medium of individual freedom even permit the formation of powerful societal actors. The legal constitution, however, prevents social power from directly being implemented in applicable law or other collectively binding decisions. Rather, social power must submit to a process in which certain rules apply that were formulated under the premise that they produce results that are generally acceptable. The original constitutions in France and the United States provide examples for both success and failure.

II. DEVELOPMENT OF THE CONSTITUTION

1. *The Spread of Constitutionalism*

As this reconstruction with regards to the originating nations of constitutionalism shows, the modern constitution was not a random product of history. This is not to say that its emergence was inevitable, but that it could not have emerged under any arbitrary conditions. It was linked to a concatenation of different prerequisites that did not exist in all times and places. Just as they were not always present in the past, there is no guarantee that they will be preserved in future. In the course of social change, they too can alter or disappear. What effect this would have on the constitution depends on whether these prerequisites are determinative for its emergence only, or also for its continued existence. The end of the constitution would be heralded only if conditions key to its existence

[43] Ferdinand Lassalle, *Über Verfassungswesen* (Berlin: G. Jansen, 1862), which highlights the problem of constitutional law and constitutional reality.

cease to obtain. If despite this it survives, it would only be as an obsolete form without its original meaning, or as a term for something different.

For the time being, however, the constitution is a success story. Even though the prerequisites that nurtured its breakthrough in America and France in the last quarter of the eighteenth century did not exist everywhere, it provoked uproar in the rest of Europe and gave rise to widespread constitution movements. The constitution was the great issue of the nineteenth century. Such high expectations were attached to it that innumerable people were prepared to risk their careers, their property, their freedom, and even their lives for it. The nineteenth century can be described as the century of constitutional struggle. Revolutions determine its periodization. Multiple waves of revolution churned through numerous European countries at the same time, and only a few countries, above all Britain, remained entirely unmarked by constitutional struggles. When the long nineteenth century ended with the First World War, constitutionalism had prevailed virtually throughout Europe and in many parts of the world subject to European influence.[44]

The twentieth century, which began with such constitutional promise, brought grave setbacks over its course through the rise of dictatorships of various descriptions. But at the end of the century, the constitutional state was more unchallenged than ever. Fascist dictatorships, military dictatorships, and finally the apartheid regime and socialist party dictatorships fell almost without exception, often through military defeats, sometimes through revolutions, in many cases through implosions. Even though the struggle was not being fought explicitly for the constitution, as was the case in the nineteenth century, new or renewed constitutions were the invariable outcome.[45] The setbacks and experiences with ineffective or marginally effective constitutions also heightened awareness of the need to have its own means of assertion. This led to constitutional jurisdiction being propagated universally in the second half of the twentieth century, after its modest beginnings following the First World War.[46]

This generalized overview shows that the constitution, after coming into being as the product of two successful revolutions, no longer depends on revolution in each case of emulation. The German constitutional development in the nineteenth century confirms this view. Although several constitutions in individual German states were preceded by revolutions, none of these were successful in the sense of resulting in a break with the existing rule. Constitutions only came into being when the traditional ruler, for whatever motive, agreed

[44] For an overview for Europe, see Dieter Grimm, 'Die verfassungsrechtlichen Grundlagen der Privatrechtsgesetzgebung' in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/1 (München: Beck, 1982), pp. 17–173.

[45] Cf. Douglas Greenberg (ed.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993); Peter Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (Berlin: Duncker & Humblot, 1992).

[46] Cf. Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

to restrictions on his power.[47] The first pan-German constitution, the Imperial Constitution of 1871, lacks all revolutionary background. It was the result of the agreement by treaty of sovereign princes to found a new state which had to be given a form.

Nonetheless, major discontinuities remain the most frequent reason for creating constitutions.[48] In many cases, though, it is not triumphant revolution but catastrophic collapse that impels constitution. This is also true for the German constitutions of the twentieth century; the Weimar Constitution, the Basic Law, and the constitution of the German Democratic Republic (GDR). After the collapse of the Socialist Unity Party of Germany (SED) regime, the GDR set out on the path towards creating a constitution before such efforts were rendered moot by the resolution to reunify under the umbrella of the Basic Law. Constitutional renewals without such breaks, such as in Switzerland in 2000, are exceptions. Here, the attempt did not succeed until the revolutionary-sounding-term 'new creation' was abandoned and replaced with the term 'revision' ('*Nachführung*'), which implied continuity.[49]

Once the constitution had been invented and developed its popularity, it also became possible to copy the form without having to adopt the meaning. Form and function became separable. France itself provided the first example under Napoleon. Although considering repeal of the constitution to be awkward, he was not prepared to bind himself to it. Many of the constitutions that subsequently followed the American and French prototypes were pseudo- or semi-constitutions. The German constitutions granted by rulers in the nineteenth century fell short of the constitutional project as it had taken shape in the American and French Revolutions.[50] The same applies for many constitutions in today's world. The label 'success story', however, is still justified, because even those who would prefer to rule without constraint wrap themselves in at least the appearance of constitutionality so as to exploit the gain in legitimacy that a constitution promises.

The existence of pseudo- or semi-constitutions gives rise to terminological difficulties. What deserves to be called a 'constitution', and what does not? There is no generally valid answer to this question, which can only be answered by looking at what one wishes to learn. If the aim is to compare constitutions so as to identify differences and form classifications, or to study constitutional history, national or comparative, it is not helpful to prematurely narrow the object

[47] Cf. Grimm (n. 2), pp. 43, 142.

[48] Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992). See particularly the term 'constitutional moments', which also established itself in Germany. In Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 775, the terms 'new beginning scenario' in contrast to 'federalism scenario' are mentioned. Cf. also Ulrich K. Preuß, *Revolution, Fortschritt und Verfassung: zu einem neuen Verfassungsverständnis* (Frankfurt am Main: Fischer-Taschenbuch-Verlag, extended new edition, 1994).

[49] Cf., for the history of the revision attempts, René Rhinow, *Die Bundesverfassung 2000: eine Einführung* (Basel: Helbing und Lichtenhahn, 2000), p. 1.

[50] Cf. Grimm (n. 2), p. 110; Ernst-Wolfgang Böckenförde, 'Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert' in his *Recht, Staat, Freiheit* (Frankfurt am Main: Suhrkamp, 1991), p. 273.

of study. If, on the other hand, the aim is to study the outlook for success of constitutionalism in the various regions of the globe and its chances of survival in the twenty-first century, including its capability of being transferred to supranational units, it is worthwhile adhering to a *demanding concept of constitution*,[51] as is delineated in the history of the development of modern constitutionalism, so as not to prematurely take the name for the substance.

In view of how the content of a constitution can vary, the functional concept deserves to be emphasized above the material concept. The following internally interrelated features derive from the arguments of the first part:

1. The constitution must lay claim to being normatively valid. Constitutional texts without a willingness to make them legally binding do not meet this criterion.
2. The legal constraint must relate to the establishment and exercise of political rule. It is not sufficient to constrain subordinate instances while the highest remain free.
3. The legal constraint must be comprehensive in the sense that extraconstitutional forces cannot exercise rule, nor can binding decisions issue from extraconstitutional processes.
4. The constitutional constraints must act to the benefit of all persons subject to rule, and not only privileged groups.
5. The constitution must form the basis for the legitimation of political rule. A basis of legitimacy existing outside the constitution is not permissible.
6. The legitimacy to rule must derive from the people subject to rule. Legitimation through truth instead of consensus undermines the constitution.
7. The constitution must have priority over the exercises of ruling power. A constitution at the disposition of the ordinary legislature is not sufficient.

The following discusses the question as to whether constitutions which claim to meet these criteria remain able to fulfil this claim in view of altered conditions for realization. The alterations referred to here are large-scale tendencies that affect constitutionalism itself, and not just individual constitutions or individual constitutional norms. Among these are first the transition from the liberal state to the welfare state, which impinges above all on the limiting function of the constitution. These also include the emergence of new actors, instruments, and processes not taken into account by the original constitutions, which blur the boundary between public and private that is constitutive for the constitution. Finally, there is the process of internationalization and globalization, whose corollary is denationalization, which also obliterates the constitutionally fundamental boundary between internal and external.

[51] Cf. Brun-Otto Bryde, *Verfassungsentwicklung: Stabilität und Dynamik im Verfassungsrecht der Bundesrepublik Deutschland* (Baden-Baden: Nomos, 1982), p. 33.

2. *The Constitution in the Welfare State*

The term 'welfare state' stands for a number of complexes that differ according to time and place whose common denominator is that they represent a response to the deficits of liberalism that are generally characterized as failures of the market. This affects the constitution insofar as it was the expectations placed on the market that created the need for limitation of the state which was then satisfied by the constitution. By contrast, the social problems that arise as a consequence of market failure could not be resolved by limiting the state. On the contrary, the re-materialization of the question of justice demanded state activism. If the aim of a just social order was to be upheld, the state could no longer restrict itself to the guarantee function defined in the constitution; it needed once more to actively create an order.

The responses to this were varied. In part, liberalism petrified dogmatically. In opposition to the intention, limitation of the state through fundamental rights were not viewed as means for achieving prosperity and justice but were elevated to an end in themselves, and the liberal understanding of freedom including its constitutional equivalent: the purely state-deterrent function of fundamental rights was defended without consideration of social consequences. The French July Monarchy provides the best example for this attitude: it was able to prevail because the political participation rights had been limited to a small circle of extremely wealthy individuals in the constitution of 1830. The revolution of 1848, which in Germany was still mainly a revolution in favour of establishing a constitutional state and making protection of fundamental rights effective,[52] thus bore primarily social characteristics in France.

The opposing reaction consisted of the radical rejection of liberalism that manifested itself in the socialist and fascist states in the latter half of the twentieth century. As much as these two directions differed in their substance, they differed hardly at all with respect to their consequences for constitutionalism. Both legitimated political rule not through consensus, but through 'truth'. Individual freedom could not stand before it. Instead, an elite that claimed the knowledge of truth as their own derived from this the right to assert it using the power of the state without consideration of differing convictions. The basis for the constitution as a means of legitimation and limitation of power was thus eliminated and the mechanisms that served to fulfil these functions became nuisances.

Still, the great majority of these states also had constitutions. Fascist states usually allowed the old constitutions to stand, but they suspended important parts or replaced them with other provisions. In socialist states, new constitutions were usually created which in their form resembled those of constitutional nations but these could not fulfil the key functions of constitutionalism.[53]

[52] Cf. Dieter Grimm, 'Grundrechtliche Freiheit 1848 und heute' in his *Die Verfassung und die Politik* (n. 41), p. 91.

[53] Cf. Giuseppe de Vergottini, *Diritto costituzionale comparato* (Padova: CEDAM, 2nd edn, 1987), pp. 576, 791. In particular for Germany cf. Heinrich Herrfahrdt, *Die Verfassungsgesetze des nationalsozialistischen Staates dem Text der Weimarer Verfassung gegenübergestellt* (Marburg: Elwert, 1935); Ernst Rudolf Huber,

Since law was not autonomous but had only an instrumental role in view of the legitimation deriving from truth, these constitutions did not limit the ruling power. Insofar as they contained passages limiting rule, these were not accorded priority. Where they adopted the model of separation of powers, this was subverted by unity parties with authority to act on the state apparatus. In this way, the claim to truth resulted in a form of neoabsolutism that was much more radical than the monarchical absolutism of the sixteenth to nineteenth centuries.

The third type of response was to open the constitution to social issues. Before it came to this, however, extensive social legislation had developed below the constitution, which, particularly in Germany, climaxed with the introduction of social security insurance.[54] Although this represented a break with the liberal social model, which was determinative of the emergence of constitutionalism, no obstacles arose from the constitution. This was due not only to the lack of a catalogue of fundamental rights in the Imperial Constitution of 1871. The concept of fundamental rights prevailing in the German Empire would not have permitted recourse to fundamental rights because they had been deemed not applicable to the legislature.[55] Also, there would have been no institution available that could have kept the legislature within the bounds of the fundamental rights. Thus, characteristically, social legislation became a constitutional problem only in the United States: the nation that had from the beginning secured the primacy of the constitution institutionally as well as through judicial review.[56]

Before a solution by means of constitutional interpretation was arrived at there, the idea of the social state had already been adopted in constitutional provisions in Europe.[57] In the Weimar Constitution of 1919, the new legitimation principle of popular sovereignty was joined with an equally new social provision. Although the Weimar National Assembly retained the catalogue of classical rights of freedom and equality that had taken shape in the revolutions, it added to this a considerable number of fundamental social rights and subordinated economic freedom to the principle of social justice. However, as constitutional theory continued to deny that fundamental rights applied to the legislature,[58] their significance was reduced to requiring that the administration

Verfassungsrecht des Großdeutschen Reichs (Hamburg: Hanseatische Verlags-Anstalt, 1939); Uwe Bachnick, *Die Verfassungsreformvorstellungen im nationalsozialistischen Deutschen Reich und ihre Verwirklichung* (Berlin: Duncker & Humblot, 1995).

[54] Cf. Michael Stolleis, 'Die Entstehung des Interventionsstaates und das öffentliche Recht' in his *Konstitution und Intervention* (Frankfurt am Main: Suhrkamp, 2001), p. 253.

[55] Cf. Dieter Grimm, 'Die Entwicklung der Grundrechtstheorie in der deutschen Staatsrechtslehre des 19. Jahrhunderts' in his *Recht und Staat* (n. 26), p. 333.

[56] Cf. Currie (n. 27), pp. 136, 208; Cass Sunstein, 'Constitutionalism after the New Deal' (1987) 101 *Harvard Law Review* 421.

[57] Cf. Dieter Grimm, 'Die sozialgeschichtliche und verfassungsrechtliche Entwicklung zum Sozialstaat' in his *Recht und Staat* (n. 26), p. 153.

[58] Cf. Christoph Gusy, 'Die Grundrechte in der Weimarer Republik' (1993) *Zeitschrift für neuere Rechtsgeschichte* 163.

have a legal basis for infringing on fundamental rights. Under these circumstances, fundamental social rights, which were all designed to be mediated by law, entirely lost their normative force. They were regarded as nothing more than points in a political programme.

The Basic Law removed the basis for this interpretation in Art. 1(3), but rather than enumerating social and economic rights, it professed a general avowal of the social state. However, for the German Federal Constitutional Court this serves as the foundation for a socially enriched understanding of the liberal fundamental rights.[59] Building on the assumption that equal individual freedom is the goal of fundamental rights and limitation of the state is merely a means, this has today culminated in the concept of the protective duty that the state has with respect to all dangers to freedoms guaranteed by fundamental rights that cannot be assigned to the state itself but which obtain as a consequence of the acts of private parties or social developments. These protective duties derived from the classical fundamental rights, just like their equivalents in the form of post-liberal fundamental rights or state objectives, are an attempt to adapt the constitution to problems that were not yet identifiable at the time it was enacted or were created by the constitution itself.[60]

The importance of this adaptation of the constitution to altered conditions becomes particularly clear when one considers that today, at least in economically developed nations, the social question of the nineteenth century no longer represents the greatest challenge for constitutionalism. Rather, a demand for security has emerged which is determined in particular by the dangers entailed in scientific and technical progress and its commercial exploitation. It is in this area that the duty to protect is most often applied.[61] A general protection against risk is expected from the state that goes far beyond the traditional state task of protection against imminent threats, which was generally acknowledged also under liberalism. The state responds to this by placing greater priority on prevention, which remains related to recognized legally protected interests but is divorced from impending violation. It focuses instead on recognizing and sealing off sources of danger before a concrete danger can emerge.[62]

This adaptation of the constitution to the altered realization conditions of individual freedom is not without cost to its normative power. It pays a price in both its limiting effect and its degree of certainty. Obligations to protect fundamental rights demand that the state act in the interests of freedom. By definition, this action focuses on threats to freedom that originate from society

[59] Cf. Ernst-Wolfgang Böckenförde, 'Grundrechtstheorie und Grundrechtsinterpretation' in his *Staat, Verfassung, Demokratie* (n. 23), p. 115; Konrad Hesse, 'Bedeutung der Grundrechte' in Ernst Benda et al (eds), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland* (Berlin: De Gruyter, 2nd edn, 1994), p. 139.

[60] Cf. Ch. 8 of this volume; Johannes Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten* (Berlin: Duncker & Humblot, 1992).

[61] Cf. Rudolf Steinberg, *Der ökologische Verfassungsstaat* (Frankfurt am Main: Suhrkamp, 1998); Georg Hermes, *Das Grundrecht auf Schutz von Leben und Gesundheit* (Heidelberg: C.F. Müller, 1987).

[62] Cf. Erhard Denninger, 'Der Präventionsstaat' (1988) 21 *Kritische Justiz* 1.

rather than the state itself. As a result protective duties in favour of specific fundamental rights are generally fulfilled by limiting other fundamental rights. This results in a considerable increase in the number of encroachments on fundamental rights and, since their root lies in conflicts of fundamental rights of equal priority, the only solution is to balance these in the light of specific circumstances, which is always associated with a loss of certainty.

The duty to protect fundamental rights does not only lower the limits for legislative action. It also raises them insofar as the legislature may no longer remain passive vis-à-vis certain problems. However, that does not obviate the question as to whether the increased state activity itself can once again be regulated by constitutional law. The answer to this was an expansion of the reservation of statutory powers, through the extension of the concept of intervention that controls the reservation of statutory powers as well as also extending it to all significant decisions in the non-intervention area. The central role of laws enacted by parliament for the functioning of the constitutional system is expressed here. Democracy and the rule of law depend on it. The effect of the reservation of statutory powers is that the state's action programme emerges from a democratic process of opinion and will formation. The principle of administrative legality subordinates the state's executive branch to democratically formulated will and renders the behaviour of the state predictable for the citizens. Finally, it enables the courts to test the legality of state actions and correct illegal acts.

However, the welfare-related tasks of the state are much less amendable to control than its regulatory tasks. Though this does not apply for quantifiable social benefits that are linked to specifiable prerequisites, it certainly does for active state tasks. The reason is that unlike preservation or restoration of order, these tasks are of a prospective nature. They do not only affect individual perpetrators but generate a large pool of affected individuals and do not only depend on the availability of resources but on numerous factors over which the state has limited or no influence. The laws that regulate these activities must therefore often restrict themselves to setting a goal for state administration and otherwise enumerating aspects that should be considered or must be ignored in pursuing these goals.[63]

The weakness of legal control is particularly apparent in preventative state activity. As the possible sources of harm are much more numerous, varied, and obscure than the actual harm, the prevention state develops a great demand for information. Unlike the prosecution of an actual deed or prevention of a manifest danger, this can no longer be limited according to the deed or the event causing harm. The only factor that can be specified is what risks are considered so great as to justify state observation and gathering of information even when these affect persons who offer no grounds for this on a large scale. In this sphere, the activity of the state expands in time as well as physical scope and is

[63] See Niklas Luhmann, *Zweckbegriff und Systemrationalität* (Frankfurt am Main: Suhrkamp, 1973), p. 257.

decoupled from reasonable grounds for suspicion. Legal control of this diverse activity is virtually impossible. Legal regulation gets a chance only with regards to the use of revealed information.

One should not be deceived by energetic legislative activity on the part of the parliament. Not only are most bills drafted by the executive branch, but the enacted texts often have only a weak controlling force on the administration. Although the constitutional principle of legality of state action still applies, the binding content of laws is lean. The graceful structure of the rule of law thereby becomes fragile.[64] To the extent that legal control of the administration falls away, the administration is forced to control itself. Where it controls itself without being constrained by statute, the courts cannot review whether the administration has adhered to the law. Although the fundamental rights have also responded to this gap by requiring that the loss of material binding forces be compensated by procedural structuring, it would be mistaken to expect procedural law to serve as a fully fledged replacement for material law.[65]

3. The Constitution in the Cooperative Party State

The legally binding character of the constitution concerns the power of the state. Private persons are not the objects, but rather the beneficiaries of its provisions. To this extent, the constitution is based on the delineation between the state and the private sphere. Actors or forms of action that do not conform to this division pose problems for the constitution. This first became apparent with political parties.[66] Unlike organs of the state, these were not created by the constitution; they are free social associations, which nevertheless aim to gain influence within the state. Although not anticipated when the constitution was conceived, parties emerged as a necessary consequence of fundamental constitutional decisions, particularly the pluralization of the common good rooted in the freedom of the individual and the equal participation in the formation of the will of the state through the election of representative bodies. Consequently, political parties are not illegitimate, even where they are not recognized in the constitution.

Though parties have little need of constitutional recognition, their existence has a considerable impact on the constitution. To be sure, the constitution predates parties. However, its institutions, bodies, and processes have changed with

[64] Cf. Helge Rossen-Stadtfeld, *Vollzug und Verhandlung* (Tübingen: Mohr Siebeck, 1999); Horst Dreier, *Hierarchische Verwaltung im demokratischen Staat* (Tübingen: Mohr, 1991); Rainer Pitschas, *Verwaltungsverantwortung und Verwaltungsverfahren* (München: Beck, 1990); Dieter Grimm (ed.), *Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts* (Baden-Baden: Nomos, 1990).

[65] Cf. Karl-Heinz Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation* (Tübingen: Mohr Siebeck, 2000); Karl-Heinz Ladeur, *Postmoderne Rechtstheorie: Selbstreferenz – Selbstorganisation – Prozeduralisierung* (Berlin: Duncker & Humblot, 2nd edn, 1995); Oliver Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik* (Tübingen: Mohr Siebeck, 1999); Helmut Willke, *Ironie des Staates* (Frankfurt am Main: Suhrkamp, 1992).

[66] Cf. Dieter Grimm, 'Die politischen Parteien', in *Benda* (n. 59), p. 599.

the emergence of parties, without this always becoming apparent in the letter of the constitution. The reason is that their activities are not limited to preparing for elections in the social sphere. Rather, they also dominate political operations after the election. This does not mean that they displace the constitutionally mandated state bodies and processes, but certainly the membership of such bodies is appointed by the parties and the content of the processes determined by them. In formal terms, the political process operates within the constitutionally mandated boundaries, but in material terms it is transferred to the preceding party operations.

This has often been analysed in connection with the evolution of parliamentarism.[67] The election today concerns less persons than parties on which the individual deputies depend more and more. In a parliament structured along political-party lines, deliberation, and decision, which in the original idea belonged together, become separated. Parties establish their positions internally prior to plenary debate. The latter is no longer conducted with the intent to convince or persuade, but only to present the various party positions to the public. That is why it can be conducted by few speakers before empty benches. It has no influence on the decision. Although under the constitution the representatives are free, they are in fact compelled to toe the party line. Only the opposition maintains an interest in serious oversight of the government.

The principle of separation of powers as the central constitutional mechanism for preventing the abuse of power is also affected. Since democratic legitimation demands that all holders of public power be subject to election, but the election takes place between parties and the elected bodies are legitimately composed of party representatives, it is ultimately always the parties that select the individuals to fill state or state-controlled positions. As the input structure for the apparatus of the state, they are 'upstream' of its internal organization, and thus qualify it. In all cases, political parties are visible behind the separated powers. But this cannot be regarded simply as misconduct, even though it contradicts the original intention. Rather, precisely because of their democratically indispensable mediating function, parties cannot be firmly attributed to either side of the system boundary between the state and society. To a certain extent they escape the constitution constructed to reflect just this distinction.

One must not conclude from this that the constitution has failed in the face of political parties. However, in many respects it can assert its claim to comprehensively regulate the exercise of public power only indirectly or to a lesser extent. Although the free mandate guarantee does not prevent party discipline, it secures those representatives who do not wish to obey it a temporarily unassailable position, thus creating the prerequisites for party-internal plurality and discussion. Nor can the formation of political will within parties be entirely disconnected from the processes provided in the constitution. As their result must pass through parliamentary processes if they are to become generally binding,

[67] Cf. Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (München: Duncker & Humblot, 1923).

intra-party consultation must also relate to this process. Internal party discussions cannot be conducted without regard to criticism from the opposition or reaction from the public. Since these must be anticipated, opponents and the public are in a sense virtually present. Minority rights subsequently adopted in the constitution compensate at least in part for the majority's lack of willingness to exercise oversight.

As the constitution cannot prevent breaches in the system of separated powers on the level of persons, the line of defence shifts to the functional level. There, constitutional means can be used to at least establish parameters to help ensure that, despite the dominance of parties in the choice of persons, the functionaries chosen in this process may not behave in a manner which places their party loyalties above the objective logic of the respective remits. The constitution achieves this primarily through the protection of a party-neutral civil service, the binding legal obligations on the administration, and the independence of the judiciary. These make party-political coercion of the holders of public office and utilization of the chain of directive authority for party purposes illegal.[68] In this way, the constitution endows those who wish to act appropriately in their role and resist any pressure with a strong legal position. The preservation of distance from political parties does not then depend on a particular moral effort of individuals; it is institutionally guaranteed by the system.

The boundary between the state and private spheres, which is constitutive for constitutionalism, is further undermined by the fact that the state is increasingly dependent on the cooperation of private entities to meet its welfare-related tasks.[69] Shaping social order and securing the future are largely beyond the specific government methods of command and compulsion. In some cases, the use of imperative means is de facto impossible because the objects of regulation are not subject to decree. Research results, economic growth, or shifts in mentalities cannot simply be mandated. In some cases this is legally impermissible because basic rights secure the decision-making freedom of social actors. The constitution would not sanction investment requirements, obligations to employ individuals or compulsory consumption. In some cases, this may be possible and permissible but not opportune, because the state lacks the information needed for formulating effective imperative programmes or because the costs of implementing imperative law are too high.

In these areas the state has long since gone over to applying indirect means of motivation, incentives and deterrents (usually financial in nature) that are intended to prompt actors to voluntarily comply with those requirements of general welfare identified by the state. In doing so, the state abandons the position of rule granted to it in the interests of the general welfare, and puts itself

[68] Cf. Dieter Grimm, 'Politische Parteien' in *Benda* (n. 66), p. 636; Dieter Grimm, 'Nach der Spendenaffäre: Die Aussichten, den Parteienstaat rechtlich einzugrenzen' in his *Die Verfassung und die Politik* (n. 38), p. 158; Luhmann, *Die Politik der Gesellschaft* (n. 3), p. 253; Luhmann, *Das Recht der Gesellschaft* (n. 20), p. 468, emphasizing that the decisive line of separation of powers runs between politics on the one hand and administration and judiciary on the other.

[69] Cf. Dieter Grimm, 'Verbände' in *Benda* (n. 66), p. 657.

on the same level as private actors. To this extent, it makes the realization of public ends dependent on private acquiescence. This grants private actors a veto power with respect to the state, which significantly increases their chances of asserting their own interests over those of the general welfare. Generally, this veto power is not expressed through refusal, but through a willingness to cooperate which of course the state must repay through concessions of its own in the guidance programme.

The state has responded to the new situation by creating negotiating systems in which public and private interests can be reconciled. In this situation, the process of state decision-making with respect to the needs of the general welfare is sometimes followed by negotiations with private parties causing the general problem on the extent to which the objective can be attained without requiring an excess of money or consensus-building. But sometimes the state also limits itself to defining a problem that requires a solution in the interests of the general welfare but then leaves the solution to a negotiation process. This leads either to agreements between state and private actors about the content of a statute or to the state waiving regulation in return for private promises of good behaviour.[70] The law then functions solely as a threat to increase the willingness to make concessions. The advantage for the private side is less stringent requirements, whereas the state receives information relevant for guidance or saves the implementation costs.

Although agreements of this type remain informal in nature, they can only achieve the desired effect when both sides feel bound by them. Particularly on account of this bond, this approach can no longer be understood in categories of influence, but only in categories of participation. However, this undermines key rationality standards that the constitution implemented in the interests of legitimacy of rule.[71] For one thing, private actors now exist that are no longer limited to general citizen status as voters, participants in public discourse, and representatives of their own interests, but participate directly in the state decision-making process without being subject to the democratic legitimation and responsibility matrix that applies for every holder of public power. For another, the decision-making instances and processes defined in the constitution are debased to the extent that the state detours into negotiation systems.

The central legislative instance, the parliament, is most affected. It is not involved in the negotiations. On the state side, these are always conducted by the executive branch. If the negotiations result in draft legislation, only a parliamentary resolution can enact it as valid law; however, the parliament is in a ratification situation similar to the ratification of an international treaty. It can only either accept or reject the negotiation result; it cannot modify this. Unlike international treaties, however, parliament's scope for action is limited in fact, but not in law. This restriction does not appear any less imperative, however,

[70] Cf. Arthur Benz, *Kooperative Verwaltung* (Baden-Baden: Nomos, 1994).

[71] Cf. Ernst-Wolfgang Böckenförde, 'Die politische Funktion wirtschaftlich-sozialer Verbände und Interessenträger in der sozial-staatlichen Demokratie' in his *Staat, Verfassung, Demokratie* (n. 59), p. 406.

because every attempted modification would put the overall result at risk. If a waiver of regulation is negotiated, parliament plays no role at all. It is true that a waiver of regulation by the government cannot prevent the parliament from taking legislative action on its own initiative but if it succeeds the majority would have to disavow the government that it supports, and this is highly unlikely.

The marginalization of parliament also means the loss of all those advantages that the parliamentary stage of the legislative process confers. Above all, this means public debate, in which the necessity, ends and means of a proposal, is justified and subjected to criticism, and which enables the public to adopt a position and influence the process. This is particularly important for those groups whose opinions are not solicited in the preparatory phase. By contrast, if negotiations result in draft legislation that must undergo a parliamentary process, parliamentary debate can certainly take place, but it lacks the force needed to link the social with the state discourse. Because the negotiating result is fixed, debate no longer provides a forum that permits the public to serve effective notice on neglected interests or to assert other opinions.

These weaknesses persist in the content of the law or its informal substrate, the voluntary commitment of private actors. It will generally not attain the level of acceptance that engenders legitimacy. After all, negotiations are not conducted with all affected parties, but only those with veto powers. Their interests, which have their basis not only in their strength as accumulated in the pre-state phase, but in the procedure provided by the state, are more likely to be taken into consideration. This rewards those social power positions which constitutional regulation wanted to neutralize with respect to law-giving. In reality, privileges emerge where the constitution mandates strict equality. To the same extent, the importance of elections declines, because they are no longer the only means of distributing political weights in the law-making process. Ultimately, judicial protection also fails if the object of judicial review and the standard for administrative review are lacking.

In spite of the democratic and due-process attrition which the constitution suffers through the practice of negotiation, summarily prohibiting it would probably have little impact, as it has structural causes that are largely immune to constitutional prohibitions. On the other hand, it creates broad gaps in the constitutional rationality of legislative action. These are due less to a lack of willingness to adhere to a constitution than to growing structural obstacles for the implementation of a more demanding constitutional model. Even if the negotiating arrangements were constitutionalized,[72] this would in no way eliminate their unique character, which is above all their informality. Rather, one

[72] For suggestions, see Winfried Brohm, 'Rechtsgrundsätze für normersetzende Absprachen' (1992) *Die Öffentliche Verwaltung* 1025; Matthias Herdegen and Martin Morlok, 'Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdung der Verfassung?' in (2003) 62 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7 and 37.

must get used to the fact that the constitution can fulfil its normative intent to only a limited extent, without the prospect of any compensation for the losses.

4. *Constitutionalization Beyond the State*

The constitution emerged as the constitution of a state. Its purpose was to juridify public power, which at the time of its emergence and long after was synonymous with state power. Although every state was surrounded by other states, the borders between the states acquired their significance as the boundaries of state power. The border could change, usually as a result of wars, and this changed the area to which state power applied. In the extreme case of annexation, a new state power replaced the old. None of this in any way altered the fact that only one state power existed in the territory of any state and this state power did not need to share its ruling authority with anyone. Above this level, the relations between states were regulated by international law. But there was no supranational public power able to assert this against the states.

The identity of public and state power was the prerequisite that enabled the constitution to fulfil its claim to comprehensively juridify political rule. In this sense, the boundary between the interior and exterior is constitutive for the constitution.[73] This boundary has not disappeared; it retains its traditional significance in relationships between states: state power is limited to the territory of the state and cannot be extended to the territory of another state without the latter's consent. But political organizations have emerged on the level above the states which, although they owe their existence to international treaties, are not restricted in their actions to the inter-state sphere. They act on the internal affairs of the states and in some cases exercise public power with claims to direct validity within the states although they cannot be seen as a union of different states to form a super-state, which would shift, but not relativize, the boundary between the interior and the exterior.

The most advanced example of this is the European Union. Member states have assigned to it a number of sovereign rights, including rights to enact legislation, which are exercised by the Union in its own legal system, apply directly in the member states, and take precedence over national law. Although EU law cannot be enacted without the approval of member states, which in this process are subject to the requirements of their own national constitutions, the integrity of national constitutions is preserved only for so long as the principle of unanimity applies whose scope has, however, been continuously circumscribed. By contrast, the Union possesses no means of compulsion and must depend on member states for enforcing community law and its applying acts. To date, the transfer of sovereign rights has not extended to the monopoly of power. Although the Union can define objectives insofar as its regulatory competence

[73] For the importance of national borders, see Udo Di Fabio, *Der Verfassungsstaat in der Weltgesellschaft* (Tübingen: Mohr Siebeck, 2001), p. 51.