

Review Essay - Constitutional Legitimacy: Thoughts on Tobias Herbst's „Legitimation durch Verfassunggebung“

Tobias Herbst, *Legitimation durch Verfassunggebung – Ein Prinzipienmodell der Legitimität staatlicher und supranationaler Hoheitsgewalt*, (Baden-Baden: Nomos, 2003). 318 pages, softback, 59,- EURO, ISBN 3-8329-0283-X

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Over the last two decades the processes of the globalization and the Europeanization changed the image of the state and its constitution.¹ The constitutionalization of the European Union² and other international organizations³ pose new questions. The debate is about the notion of a constitution and whether a “constitutional” document is only applicable to a classical sovereign nation or to supranational or international organizations as well.⁴

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¹ See STEPHAN HOBE, *Bedingungen, Verfahren und Chancen europäischer Verfassunggebung: Zur Arbeit des Europäischen Konvents*, in EUROPARECHT 1 (2003), Dieter H. Scheuing, *Zur Europäisierung des deutschen Verfassungsrechts*, in KREUZER, KARL F., EDS., *DIE EUROPÄISIERUNG DER MITGLIEDSTAATLICHEN RECHTSORDNUNGEN IN DER EUROPÄISCHEN UNION* 87 (1997); Ulrich Haltern, *Internationales Verfassungsrecht? Anmerkungen zu einer Kopernikanischen Wende*, in 128 ARCHIV DES ÖFFENTLICHEN RECHTS 511 (2003).

² The EUROPEAN COURT OF JUSTICE (ECJ) has been calling the EEC Treaty a “constitutional” document since years, as in Opinion 1/91: „the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law“, see ECJ 14 December 1991, Opinion 1/91, (1991) ECR I-6079: *European Economic Area*; similar ECJ 23 April 1986, Case 294/83, (1986) ECR 1339, at nr. 23: *Parti écologiste “Les Verts” v. European Parliament*.

³ See Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 529 (1998).

⁴ See Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revised?*, 36 COMMON MARKET LAW REVIEW 703 (1999); Ingolf Pernice, *Der Europäische Verfassungsverbund auf dem Wege der Konsolidierung*, 48 JAHRBUCH DES ÖFFENTLICHEN RECHTS 217(JöR) 2000; Udo Di Fabio, *Eine europäische Charta, Auf dem Weg zur Unionsverfassung*, JURISTENZEITUNG (JZ) 2000, 73; Markus Kotzur, *Die Europäische Verfassung - Theoriebildung, Inhalte und Legitimationsfragen*, in 163 SPEYERER ARBEITSHEFTE 123, 127 (2003); or the German critical article from Dieter Grimm, *Braucht Europa eine Verfassung?* JZ 581 (1995); Haltern (note 2) criticizes the “global constitutionalism” because of the different symbolic und esthetic functions of constitutions and international treaties, p. 556. Or see for the inter-

Increasingly supra- and international organizations as the European Union gain an official authority also towards the individual citizen. With the WTO's agreement on the multilateral trade negotiations of the Uruguay Round,⁵ for example, or the 11th protocol to European Convention on Human Rights⁶ with its new possibilities to the enforcement of individual rights, these organizations gain more rights than the classical law of nations gives to international organizations. Insofar their founding treaties partly fulfill functions national constitutions fulfilled up to now.

This change poses the question of legitimacy of the official power and the treaty ("constitutional") document itself. This question of legitimacy in a general approach detached from the classical sovereign state stands in the center of Tobias Herbst's doctoral thesis.

The idea that Europe requires a formal constitution has been an important aspect on European integration discourse for quite a few years now. Today, the project of a "European Constitution"⁷ poses the question of constitutional legitimacy in a current new light. In June 2003 the European Convention concluded its work and presented its "Draft Treaty Establishing a Constitution for Europe"⁸ to the European Council in Thessaloniki.⁹ As the European Council decided on 29-30 September 2003, the Intergovernmental Conference, convened to reach agreement on possible treaty changes, was opened in Rome on 4 October and failed on 12 December 2003 in Brussels. The European Council noted that it was not possible to reach an

national debate J.H.H. Weiler, *A Constitution for Europe? Some hard Choices*, in 40 JOURNAL OF COMMON MARKET STUDIES 563 (2002); J.H.H. Weiler, *The Reformation of European Constitutionalism*, in KREUZER, KARL F., EDS., DIE EUROPÄISIERUNG DER MITGLIEDSTAATLICHEN RECHTSORDNUNGEN IN DER EUROPÄISCHEN UNION 7 (1997) and Jan Klabbers, Päivi Leino, *Death by Constitution? The Draft Treaty Establishing a Constitution for Europe*, 4 GERMAN LAW JOURNAL 1293 (2003).

⁵ For further details see the homepage of the World Trade Organization under <http://www.wto.org>. Most of the WTO agreements are the result of the Uruguay Round negotiations (1986 - 1994), signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements and decisions totalling 550 pages, see the WTO legal texts under http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

⁶ For further information and the convention text see the website of the Council of Europe under <http://conventions.coe.int>.

⁷ The draft treaty establishing a constitution for Europe can be ordered and downloaded from the website of the European Convention: <http://european-convention.eu.int>.

⁸ See the final document: CONV 850/03.

⁹ See European Council, *Presidency Conclusions - Thessaloniki*, 19 and 20 June 2003, available at <http://ue.eu.int/pressData/en/ec/76279.pdf>.

overall agreement on the draft treaty.¹⁰ With this the draft treaty is not dead; the Irish Presidency is requested to hold further consultations to reach a later agreement on the basis of the so far reached results.¹¹

Tobias Herbst begins his examination of constitutional legitimacy with a survey of traditional theory: "The exercise of sovereignty only is legitimate, if done in a constitutional framework – and a constitution itself only is legitimate, if it is given by the constitutional authority. This old rule is valid since the various revolutions in the 18th century and it is still the major principle to measure constitutional legitimacy in a national sovereign state."¹²

The traditional concept of the constitutional authority does not match with the realities of European constitutionalization. Both its important elements are missing; there is neither a single and united people in Europe nor is the European Union to become a sovereign state. But these were the preconditions of the *Verfassungsfähigkeit* (constitutional capability) in the classical approach to the question of legitimacy.

Obviously, there is a lack of a universal theory to assess constitutional legitimacy in a general approach that is applicable both to a sovereign state and to supranational structures. In his dissertation, Tobias Herbst analyses this lacuna carefully and comprehensively and proposes a new concept of constitutional legitimacy, detached from nations and states.

In the first part, Herbst examines the various traditional theories of the constituent authority and analyses their consequences for the legitimacy of national authority (*Hoheitsgewalt*). In the second part, he analyses these consequences to assess the legitimacy of supranational powers. The central aim of Herbst's thesis is to develop a universal theory of legitimization, suitable for national constitutional frameworks as well as for supranational structures. To achieve this goal, the conceptual solution Herbst intends to elaborate on in the part about national constitutions has to fit also for the supranational implementation in the second part. Therefore, the two parts are structured interdependently.

¹⁰ See press release of the European Council, available at <http://ue.eu.int/pressData/en/misc/78397.pdf>.

¹¹ See especially the "editorial and legal adjustment by the Working Party of IGC Legal Experts" to the draft treaty from 25 Nov. 2003, document CIG 50/05, available at <http://ue.eu.int/igcpdf/en/03/cg00/cg00050.en03.pdf>.

¹² HERBST, p. 19.

In the first part, Herbst illustrates the historic roots and basic perception of the constituent process in North America and France in the 18th century. In developing a critical analysis of the theory of the German constitutional lawyer Carl Schmitt¹³ based on these traditions, Herbst highlights the deficiencies of Schmitt's perception of the classical approaches. Based on the results of his historical analysis, the author embarks on a draft of a universal theory of constitutional legitimacy. In the core chapter of his book, where he illustrates this theory, Herbst suggests a new "model of principles."

In a first step, Herbst analyses Schmitt's approach to the question of constitutional legitimacy and shows that this concept is generally lacking differentiated elements, in so far as it works in a one-dimensional way. According to Schmitt, only a constitution created by the people is legitimate.¹⁴ Schmitt's theory focuses on the link between the will of a people and the constitutional *Dezision* (decision) as the yardstick for constitutional legitimacy.¹⁵ The constitution is legitimate when there is a direct link between the people as an originator and the constitution itself.¹⁶ This is, in constitutional classical theory in general, the most common-held explanation for constitutional legitimacy: that legitimacy flows from the fact that "We the People..."¹⁷ have consented to the constitution, a view commonly referred to as the "consent of the governed" or "popular sovereignty."¹⁸

Herbst criticizes that "originator based"¹⁹ explanation because other relevant aspects are not taken into account, especially when looking at the historical constitutional processes in France and North America. The classical theories of the French and the American Revolution are originally, emphasizes Herbst, much more differentiated as Schmitt makes us believe. In the American Revolution, the creation of constitutional law was firstly a method to protect the people from public authority. The aim was to bind the legislator to a higher rank of law. This is why the constitution stands at the top of the legal hierarchy and is brought up by a constitutional

¹³ CARL SCHMITT, *VERFASSUNGSLEHRE* (1928).

¹⁴ *Id* at 87.

¹⁵ *Id* at 23.

¹⁶ *Id* at 91.

¹⁷ *e.g.* the U. S. Constitution begins with these words.

¹⁸ See Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUMBIA LAW REVIEW 111, 12 (2003), who shows that the concept of "we the people" is a fiction, *Id* at 118, 32.

¹⁹ See HERBST, 88.

convention separated from the legislation.²⁰ By way of this separation of powers, the individual rights of the citizens should be saved from violation. A similar approach can be found in the theory of the French Revolution, first of all in the works of Emanuel Joseph Sieyès²¹, the paramount theorist of the French revolution and “the academic discoverer of the constitutional authority”²². Sieyès comprehends a constitution as a mean to protect the people through the declaration of basic rights and through a separation of powers from the abuse of power, too.

Herbst stresses in his thesis that, from the historical perspective, the major purpose of the creation of a constitution was to secure individual rights. For him, the protection of individual rights is an important aspect of constitutional legitimacy – one of several relevant aspects not sufficiently taken into account in Schmitt’s “originator based” theory. Another important aspect neglected by Schmitt is the issue of decision-making within a people. In reality, there is no consistent general will among millions of men to bring up a consistent constitutional decision. Therefore, it is difficult to act on the assumption of a people as one single originator of a constitution.

Herbst’s new approach to assess the legitimacy of a constitution is based on a model of principles which he elaborates in the core chapter of his work.²³ He substitutes the “rule” of Schmitt’s “constitutional decision” through “principles of legitimacy.” The general difference between “rules” and “principles” is a logical distinction.²⁴ Rules are applicable in an all-or-nothing fashion while principles can be accomplished gradually more or less. In consequence, for Herbst the legitimacy of a constitution is a gradual question depending on how far certain principles can be realized. Those three crucial principles are, firstly, the *Freiheitssicherung* (protection of freedom), secondly, the – what he calls – *Kollektive Autonomie* (collective autonomy) and, thirdly, the *Dauerhafte Konsensfähigkeit* (ability to uphold a durable consensus).

²⁰ See ERIC THOMPSON, POPULAR SOVEREIGNTY AND THE FRENCH CONSTITUENT ASSEMBLY 1789-91 100 (1952).

²¹ See especially the main works “*Qu’est-ce que le tiers état?*” (What is the Third Estate?) and the “*Préliminaire de la constitution*” (Introduction to the Constitution): What is the Third Estate? / Emmanuel Joseph Sieyès. Transl. by M. Blondel and ed., with historical notes, by S. E. Finer (1964).

²² Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland, Band I in, GRUNDBEGRIFFE UND GRUNDLAGEN DES STAATSRECHTS, STRUKTURPRINZIPIEN DER VERFASSUNG* 146(2nd ed., 1984).

²³ See HERBST, 103, 19.

²⁴ For the general distinction between rules and principles see RONALD DWORKIN, *Taking Rights Seriously* 24 (1977).

The protection of freedom and individual rights – the first principle²⁵ – has, historically, always been a central aim of a constitution. For Herbst, it is still the central precondition for constitutional legitimacy. In his view, a constitution can protect freedom mainly through the separation of powers and the guarantee of basic rights. The more the constitution can reach this aim, the more legitimate it is from the point of view of this principle.

The second principle in Herbst's model is probably the most controversial point in his approach. His *Kollektive Autonomie*²⁶ (collective autonomy) seems to be used as a disclaimer for what has been in classical theory the need of sovereignty. The adjective "collective" should state that the specific problems of decision-making in a multi-personal collective are part of the inner structure of this principle itself. According to this principle, the constitution is the more legitimate, the more those agree upon it, who are permanent subjects of the powers deriving from the constitution. Such an agreement can be reached through suitable procedures in the act of the creation of the constitution. According to Herbst's concept there is no need for an entire agreement between the will of the citizens and the constitution. In his view, such an agreement is impossible to reach in a traditional polity. The legitimacy principle of collective autonomy stands under reserve of the possibilities (*unter dem Vorbehalt des Möglichen*). It has, Herbst emphasizes, only to be optimized within the frame of legal and actual restrictions.²⁷ Therefore a sovereignty of the collective of those who are permanent subjects of the constitutional powers is not needed, due to the author.

The third principle in Herbst's model is the ability to a *Dauerhafte Konsensfähigkeit* (ability to uphold a durable consensus).²⁸ This is a consequence of the fact that the constitution aims to establish a system that should last permanently or at least for the next generations.²⁹ If the constitution should last permanently, it requires the ability to uphold a durable consensus. It is not sufficient to temporarily reach a broad approval. Therefore, a constitution has to take into account the individual cultural experiences and attitudes of the citizens. Herbst refers in his second part –

²⁵ See HERBST, 104.

²⁶ See HERBST, 106.

²⁷ See HERBST, 284.

²⁸ See HERBST, 110.

²⁹ BARNETT *supra* at note 19,122 analyses the question whether younger generations are bound by the constitutional consent of their forefathers.

while analyzing the question of a single European People³⁰ – to the homogeneity³¹ of the people in Europe. And points out that this question is relevant to measure the quality of a collective constitutional will. But also states that a possible lack of homogeneity³² – as it is part of measuring the third principle – does not affect the general applicability of his principle of the ability to uphold a durable consensus to measure constitutional legitimacy.³³

In Herbst's approach those three principles of legitimacy do not stand separately, but interlinked with each other. For example, the protection of freedom can be a corrective for a deficiency of collective autonomy.

Subsequently, in the second half of the first part Herbst applies his model of principles to several classical questions of constitutional legitimacy occurring in a national state, for example, the legitimacy in the process of changing a constitution or procedural question. He gives an overview over the different methods³⁴ of the representative or plebiscitary creation of constitutional law.

Then, in the second part of his book the author analyzes the legitimacy of the creation of constitutional law in a supranational organization. His starting point for this is obviously his own model of principles laid out in the first part.

But before applying this model to the process of European constitutionalization, he responds to the well known objections to this project. First, he analyses the term "constitution" and then looks at the objections of missing sovereignty and the lack of a single European people. Subsequently, Herbst analyses the legitimacy of the existing European Primary Law and then of a European Federal State which could emerge in the future.³⁵ In his presentation Herbst does not refer to the volume of

³⁰ See HERBST, 217, who refers mainly to ANGELA AUGUSTIN, *Das Volk der Europäischen Union* (2000); to the question of the European Identity see ARMIN VON BOGDANDY, *Europäische Verfassung und europäische Identität*, in JZ 2004, pp. 53.

³¹ To the question of homogeneity and basic consensus, see Anne Peters, *European Democracy after the 2003 Convention*, 41 CML REV. 37, 73 (2004).

³² Herbst quotes Jürgen Habermas, *Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm*, in DIE EINBINDUNG DES ANDEREN, 191 (1999), here, see Herbst 223, fn. 782. Besides that he does not correspond to a wider debate and the critics to Habermas.

³³ See HERBST, 225, Herbst admits that an enclosing examination to the question of a European people and its homogeneity cannot be reached in his assessment, see *Id.* at 226.

³⁴ See HERBST, 154.

³⁵ See HERBST, 247.

writings³⁶ on the European constitution outside the German debate. The thesis does not follow the question, whether a constitutional document is in general applicable to supranational and international organizations. The complexity of this debate would overextend his work. So Herbst concentrates on the question of legitimacy. He focuses the general debate only in so far as it contributes to this task.

In analyzing the legitimacy of “constitutional” law in a supranational organization Herbst uses a normative³⁷ perception of a constitution which does not necessarily imply a national state³⁸ – a concept which has recently been described as a “postnational”³⁹ perception of a constitution.⁴⁰ Therefore, Herbst’s three legitimacy principles can be applied to a polity beyond the nation state as well. He defines a constitution as a legal basis of an association of persons who are subject to official authority (*eines mit Hoheitsgewalt ausgestatteten Personenverbandes*). This association does not necessarily have to be sovereign.⁴¹

Consequently, the European Primary Law already in existence can be understood as constitutional law of the European Communities. The Union Treaty, in contrast, can not be labeled as a constitution because no official authority can be derived from the existing European Union. This will be different after the entering into force of the new “Draft Treaty Establishing a Constitution for Europe”: the European Union will establish an own, single authority in the succession⁴² of the Communities through the new constitutional document.

In adapting Herbst’s model of principles to the existing Primary Law of the European Communities, several lacks of legitimacy become obvious. Firstly, as to the protection of freedom: there are deficiencies in the scope of the guarantee of indi-

³⁶ Just see Weiler, *supra* at note 5, 563, 79 or Klabbers, *supra* at note 5), 1293, who predict that a European Constitution in the form of the draft treaty leads to “the end of European integration”, see *Id.* at 1305.

³⁷To the normative perception of a constitution in general, see PETER HÄBERLE, VERFASSUNGSLEHRE ALS KULTURWISSENSCHAFT 620 (2nd ed., 1998); Ingolf Pernice, *Die Europäische Verfassung, in Tradition und Weltoffenheit des Rechts*, in HANS-JOACHIM CREMER, EDS FESTSCHRIFT FÜR HELMUT STEINBERGER 1319 (2002). Even Sieyès uses a normative perception of a constitution, as described by Karlheinz Merkel, *Die Verfassungsgebende Gewalt des Volkes, Grundlagen und Dogmatik des Artikels 146 GG* 206 (1996).

³⁸ See HERBST, 169.

³⁹ To the expression “postnational” see JÜRGEN HABERMAS, DIE POSTNATIONALE KONSTELLATION, POLITISCHE ESSAYS 65 (1998).

⁴⁰ See Pernice *supra* at note 5, 217.

⁴¹ See HERBST, 178.

⁴² See Art. IV-3 para. 1 of the draft treaty.

vidual rights, in the European Parliament's right to checks and balances and in the system of competences because of its final, not sectoral structure. Secondly, as to the collective autonomy: the European Treaties, which are based on international law, are mainly negotiated between the European governments, while the national parliaments only have a right to agree or oppose. This lack of collective autonomy is, however, less significant in those member states that are holding a referendum about the treaties. And thirdly, as to the ability to uphold a durable consensus: according to Herbst, it is impossible to speak about a durable consensus, as the structure of the European institutions is in a permanent change.

Herbst points out that these lacks do not make the European Communities illegitimate, but he stresses that the legitimacy level could strongly be raised through a charter of fundamental rights, an improved system of control for the European Parliament, mandatory Europe-wide referenda, an intensified participation of the national parliaments and a consolidation of the European institutional structure.⁴³

Herbst concluded his theses several months before the European Convention concluded its work and the draft treaty establishing a European Constitution was put on the table of European governments. Therefore, his work is neither a stocktaking nor an analysis of the Convention process. But comparing the outcome from the European Contention with Herbst's principles shows clearly that most of his requirements are met. Only the absence of a mandatory Europe-wide referendum about the constitutional treaty⁴⁴ and the missing parliamentary control rights towards the European Council or the Council of Ministers⁴⁵ still create a lack of legitimization.

In an overall appreciation, one has to acknowledge that Tobias Herbst embarked on an ambitious undertaking, seeking to develop a universal solution to the question of constitutional legitimacy. He tries to find an easy answer to a quite complex question. His obvious intention to find a straight-forward solution proves to be, however, also the only problem of his approach.

The model of principles to measure the legitimacy of a constitution that Herbst elaborates is a fresh and indeed substantive contribution to the debate. It gives an overview over the different aspects of this topic. Herbst has found a new methodo-

⁴³ See HERBST's summary, 291.

⁴⁴ The ratification of the constitutional treaty will be done with the method of Art. 48 Union Treaty. Following changes act upon Art. IV-7 of the draft treaty.

⁴⁵ See Art. I-20 to Art. I-23 of the draft treaty.

logical approach to deal with constitutional legitimacy. This makes his thesis an interesting piece of academic work.

But his attempt to find a new answer is partly too simplistic. It seems that the attained outcome affected the way to reach it. Especially, the entire abnegation of sovereignty for the constitutional authority is not convincing or probably just not explained detailed enough. It is common sense that the national states gave up a part of their original sovereignty and conferred⁴⁶ it to the European level. The question of constitutional legitimacy could in general be answered with a concept of “scaled sovereignty”. The European citizens are sovereign, as they have to be as the highest source of legitimacy.⁴⁷ Who else could be sovereign? But the novelty of the postnational constellation is that this sovereign acts not in one permanent formation or role.⁴⁸ The citizens are part of their national structure and, at the same time, part of the supranational association where they respectively give their legitimization to a public authority. Sovereignty in a supranational context can still be understood as an instrument which can differ between justified power and illegitimate and unacceptable power.⁴⁹

Herbst’s total abnegation of sovereignty for the constitutional authority has the problem that he defines no one else to “hold”⁵⁰ this sovereignty or gives no consequent analysis why to reconceive sovereignty in the postnational context in general.⁵¹ On the other hand, covering this wide international debate about sovereignty could have overextended Herbst’s work.

Recapitulating, Herbst has brought out an important new approach to the question of constitutional legitimacy. His thesis is self contained and very accurate. His writing makes a great reading – not only in terms of substance but also in style. The part in which he analyses the French and the American Revolution especially is almost thrilling to read and gives, in a quite short paragraph, an excellent overview

⁴⁶ This is now emphasized in Art. I-1 of the draft treaty.

⁴⁷ Herbst would deny this thought because of its “originator based” point of view.

⁴⁸ See Kotzur *supra* at note 5, 138, who calls the idea of an “unbound” *pouvoir constituant* as a single homogeneous people a “myth”,

⁴⁹ See Utz Schliesky, *Souveränität und Legitimität*, 254 FRANKFURTER ALLGEMEINE ZEITUNG, 1 Nov. 2003, 7.

⁵⁰ With sovereignty understood as the highest source of legitimacy, the individual stays the normative point of origin, see Hobe *supra* at note 2, 8.

⁵¹ Herbst does not cover or analyze the international debate about sovereignty and constitutional pluralism. Just see Neil Walker, *Late Sovereignty in the European Union*, in N. WALKER (ED.) SOVEREIGNTY IN TRANSITION 3 (2003).

over the historical circumstances. And certainly also the upcoming constitutional questions are illustrated in a detailed and comprehensive fashion.

Herbst's model of principles is, despite the small discrepancies, a step forward in the debate and paves the way for further discussion on constitutional legitimacy.