Treaty and Constitution. A Comparative Analysis of an Uneasy Relationship

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A Comparative Analysis of an Uneasy Relationship

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"Constitution" may mean different things. Traditionally, in a legal context, the term regularly has been used in relation to a state\(^1\). However, it has been claimed that that restriction of the concept is obsolete and that it is appropriate to use it also for certain International Organisations\(^2\). In this sense, it has been claimed that to speak of a Constitution of the European Union is not just a mere play of words - although "constitution" in the European context means something quite different from the "constitution" of a national state\(^3\). In the present context, and for reasons that will become apparent, it is appropriate to use the term in this larger sense.

Constitutions may be made by a single act of one constituent power or by treaty. Constitutions made by treaty may be different, in certain ways, from constitutions made by a single act of one constituent power. I am here interested in the respective stability - in legal terms - of constitutions of different origins. The question of the stability of a constitution is the question of the ease it can be reversed \textit{i.e.} can be terminated by legal or by

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extra-legal but legally recognized means. I am also interested in the possibilities to exchange, for a given state or other organisation, one foundation of a constitution for another, and thereby possibly to increase stability. I shall first discuss the different methods of enacting a constitution. I shall go on to discuss the implications of these methods on the respective stability - in legal terms - of the constitutions thus enacted. And I shall conclude by discussing ways to increase the stability of such constitutions by exchanging their foundations.

I. How a constitution comes about

1. Single act constitutions

Constitutions may be made by a single act of one constituent power (single act constitution) which, in a democratic society, would have to be the people⁴. Such constitutions may be federal or unitary. On unitary single act constitutions, nothing more need to be said here. A federal single act constitution may be enacted, depending on the genesis of the federation, in

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⁴ The idea of "the people" as constituent power goes back to the "social contract" (J. Locke; cf. E.S. Corwin, 'The "Higher Law" Background of American Constitutional Law’ 42 HarvLR 149, 365 [1928/20], at 385, 397; Hannah Arendt, On Revolution [Penguin Books London 1990], 178) and further back to Roman ideas on popular sovereignty (Corwin, ibid., 152, referring in n. 8 to Ulpian Dig. I, 4, 1; Inst. I, 2, 4). Consequently, Arendt, ibid., at 145, distinguishes between "a constitution that is the act of government and the constitution by which people constitute a government". 
one of two ways. Federations can develop out of either a unitary state or a group of formerly more or less independent states. Accordingly, federalism, seen as a process\(^5\), may have as point of departure either such a group or a unitary political community, in other words, may be integrative or devolutionary federalism\(^6\). Federal constitutions growing out of a formerly unitary state regularly are single act constitutions, enacted by the constituent power of the whole\(^7\). Prime examples of such a constitution are the Austrian constitution of 1919\(^8\) and, in our time, the Belgian constitution as amended\(^9\).

But also constitutions between formerly independent or only loosely confederated states can be single act constitutions created by a single constituent power comprising the whole future federation. In this case, the formation of a single constituent power of the future federation must predate


\(^7\) Cf. on a comparative level Lenaerts (*supra* n. 6), at 237 et seq.


\(^9\) The federalization of Belgium was completed by an act of the Belgian parliament of May 5th, 1993, inserting *inter alia* Arts. 59quater to 59septies into the constitution.
the creation of the federation itself. The formation of such a constituent power is basically a political act which gains legal importance only if that power eventually ordains a constitution that becomes effective. A federal constitution has been set up in this way in 1848 when the new constitution of the Swiss Confederation was erected and in 1949 when the German Basic Law was enacted. Both these constitutions contain provisions for their own ratification under which a majority of the constituent parts of

10 This is well demonstrated by the attempt, in 1848, to enact a German constitution: although the German people as a single constituent power elected a constitutional convention (cf. E.R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. II, 3rd ed. 1988, at 606 et seq.), the formation of this constituent power did not gain permanent legal importance because the constitution the convention enacted (ibid., at 814 et seq.) never became effective (ibid., at 851 et seq.).

11 Cf. Federal Constitution of the Swiss Confederation of September 12, 1848, preambula, in H. Kötz, *Quellenband zur neueren schweizerischen Verfassungsgeschichte. Vom Ende der Alten Eidgenossenschaft bis 1848*, Bern 1992, p. 447: The Swiss Confederation, wishing ... to maintain and to increase unity, force and honour of the Swiss nation ...

12 On the emergence of a German people as constituent power cf. infra text accompanying n. 112 et seq.


14 Art. 144 (1) BL: "This Basic Law requires the enactment by the legislatures of two thirds of the German Länder ...". Art. 2 of the Transitory Provisons of the Swiss Constitution: ... the Diet which will decide whether the new federal constitution has been adopted.
stitution regards the constituent parts of the future federation as having a single constituent power; otherwise it would not be possible to explain the binding force of the majority decision on the dissenting minority. Both constitutions were indeed enacted by a majority of the constituent parts, and not unanimously\textsuperscript{15}, and the binding force of these decisions was accepted by the outvoted minority.

2. Treaty-constitutions

Constitutions may be made by treaty\textsuperscript{16} (treaty-constitution). Again, such constitutions may be federal or unitary. There are different ways in which such a constitution may come to be. Possibilities include, on the one hand, the conclusion of a formal treaty under international law between the constituent parts of the future state. Such a treaty may be ratified (if at all) by the respective legislative organs of the future constituent parts of the state to be

\textsuperscript{15} In the German case, the Bavarian Landtag did not accept the bill that eventually became the Basic Law but declared that Bavaria would be part of the FRG anyway. In the Swiss case, 15 1/2 out of 22 cantons had voted for the adoption of the constitution; cf. A. Kötz, Neuerer de schweizerische Verfassungsgeschichte. Ihre Grundlinien vom Ende der Alten Eidgenossenschaft bis 1848, Bern 1992, at 608 et seq. The canton of Obwalden made a declaration similar to the Bavarian one; cf. ibid., at 609.

created or by their respective constituent powers. On the other hand, the future constituent parts of a state to be created may enact identical concurrent constitutions. Such an enactment will hardly be purely coincidental but will rest on some kind of understanding between them i.e. on an informal treaty.

a) Constitutions made by formal treaty

aa) An example for a unitary constitution set up by formal treaty is the Union Treaty of 1707 between the Kingdoms of England and Scotland. The treaty was negotiated between the English and Scottish parliaments (through commissioners) and ratified by them. Although the term "constitution" was not used, it is clear that it was meant to be the basic law of Great Britain. In particular, the treaty provided that the two kingdoms "shall ... for ever after be united in one kingdom" (Art. I), that the United Kingdom "be represented by one and the same Parliament" (Art. III). And the English Union with Scotland Act 1707 provided in Sec. 4 that "the said articles ... are hereby for ever ratified approved and confirmed".

bb) An example for a federal constitution set up by formal treaty - rather:

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18 6 Anne c 11.
by a series of formal treaties - is the German imperial constitution of 1871\textsuperscript{19}. These Treaties were ratified by the competent legislatures of the contracting parties in the procedures respectively required for constitutional amendments\textsuperscript{20}, and finally codified in an "act on the Constitution of the German Empire" of 16 April 1871\textsuperscript{21}. Here, name and contents of the treaty made it clear that it was to be a constitution.

b) In particular: The European Treaties

aa) Yet another example are the European Treaties. There is a certain similarity\textsuperscript{22} to the German imperial constitution in that the EC/EU was set up not by one treaty but again by a series of treaties some of which have

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\textsuperscript{19} On 15 November 1870, the North-German Federation concluded a treaty with Baden and Hesse on the foundation of a German Federation and its constitution (in E.R. Huber, \textit{Dokumente zur deutschen Verfassungsgeschichte}, vol. II, 3rd ed. 1986, at 326). On 23 November 1870, it concluded a treaty with Bavaria on the latter’s accession to the constitution of the German Federation (\textit{ibid.} at 329). And on 25 November 1870, the North-German Federation, Baden and Hesse on the one hand and Württemberg on the other hand concluded a treaty on the latter’s accession to the first mentioned treaty (\textit{ibid.} at 336). The mutual consent to these treaties was the content of a further compact of 8 December 1870 (\textit{ibid.} at 351).

\textsuperscript{20} Cf. e.g. Huber (\textit{supra} n. 10), vol. III, 3rd ed. 1988, at 745 \textit{et seq.}

\textsuperscript{21} Reichsgesetzblatt 1871, p. 63, and in Huber (\textit{supra} n. 19), at 384.

\textsuperscript{22} Further similarities are highlighted by K.E. Heinz, "Das Bismarck-Reich als Staatengemeinschaft - ein Beitrag zu den Lehren von Bundesstaat und Staatengemeinschaft", Staatswissenschaften und Staatspraxis 1994, 77, at 79.
\end{flushright}
been concluded simultaneously whereas others were concluded consecutively. The system based on the European Treaties has developed into something akin to a state system based on a constitution, a development aptly described as the constitutionalization of the European treaties. And it is a development far from being spent. It might well lead to a "constitution" in exactly the meaning this concept has in the context of the nation state. Basically, such a development would not affect the contractual origin of the "constitution".

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23 Treaty establishing the European Coal and Steel Community (1951); Treaty establishing the European Community (1957); Treaty establishing the European Atomic Energy Community (1957); Convention on certain institutions common to the European Communities (1957); Treaty establishing a Single Council and a Single Commission of the European Communities (1965); Single European Act (1986); Treaty on European Union (1992); and the different Accession Treaties.


25 Cf. *e.g.* J.H.H. Weiler, "The Transformation of Europe", 100 Yale LJ 2403 (1991), at 2413 *et seq.*; Lenaerts (*supra* n. 6), at 208 *et seq.* But cf. J.H.H. Weiler/ U. Haltern/ F. Mayer, "European Democracy and its critique. Five Uneasy Pieces", EUI Working Paper RSC No. 95/11, p. 8, who ask "[w]hy should the subjects of European law in the Union ... feel bound to observe the law of the Union as higher law ..."

bb) But there are some strands in legal opinion which can only be explained by seeing the European treaties not as treaties but as a single act constitution. So it has been claimed, by the Court of Justice of the EC, that Community law is "an autonomous legal order"\(^{27}\). The type of autonomy the Court has in mind can be deduced from its Opinion 1/91. There\(^ {28}\), the Court of Justice declares that some provisions of the European Treaties - "the very foundations of the Community" - could not be changed at all\(^ {29}\), not even by the procedure laid down in the treaties for their amendment\(^ {30}\), e.g., in Art. N (1) of the Maastricht Treaty, which provides basically for an amendment by the Member States working together\(^ {31}\). As the exclusion of any possibility to amend certain provisions of a fundamental instrument can


\(^{30}\) A different reading of Opinion 1/91 (*supra* n. 28) may be possible. Cf. Schilling (*supra* n. 13), n. 12.

\(^{31}\) Bieber (*supra* n. 29), at 344, claims that Art. N of the Maastricht Treaty includes a substantive element clarifying the substance of possible amendments. But this is true, if at all, only in the case of Art. N (2) and not in the case of Art. N (1) of the Maastricht Treaty.
only be the content of a historically first constitution\(^\text{32}\) the Court obviously
cconsiders the European Treaties as such, thereby transcending their con-
tractual origin.

Similarly, the philosophy of some European law scholars is specifically
based on the assumption of a Community legal order, set up by an autono-
mous Community power\(^\text{33}\). They consider the European Treaties as
constituent acts of the Community and as similar to a constitution in its
proper sense\(^\text{34}\). The consent of the Member States’ legislatures to these

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\(^\text{32}\) Cf. Th. Schilling, *Rang und Geltung von Normen in gestuften Rechtsord-
at 150 et seq., considers an argument permitting some kind of entrenched
legislation by the legislature, at least in some disguise, as not obviously
mistaken. Bieber (*supra* n. 29), at 344 and 347, has no qualms to consider
amendments to the European Treaties as unamendable.

\(^\text{33}\) Cf., e.g., Th. Oppermann, *Europarecht* (Beck München 1991) § 525.
According to F.E. Dowrick, "A Model of the European Communities’ Legal
System", 3 YEL 169 (1983), at 220 et seq., 224, "to the question - wherein
lies the obligatory quality of EC law? - several answers must be given." He
does not include the answer that it is derived from the national constitutions.
And cf. J. Bengoetxea, "Institutions, Legal Theory and EC Law", 77 ARSP

\(^\text{34}\) Cf. Oppermann (*supra* n. 33), § 525. According to Dowrick (*supra* n.
33), at 180, the EC system’s Kelsenian basic norm could be formulated:
"that the prescriptions of the Rome Treaty of 1957 ought to be obeyed".
That is fair enough. But the *Grundnorm* does nothing to explain the coming
into being of a legal system. Rather, it presupposes the existence of a legal
system *i.e.* a historically first constitution to be obeyed according to the
treaties is seen, consequently, as a kind of constituent act meant to be definitive\textsuperscript{35}, facilitated by (but not contingent on) national constitutional provisions providing for the transfer of sovereign rights to international organisations\textsuperscript{36}. This view of things equates, as is sometimes admitted\textsuperscript{37}, the conclusion of the European Treaties with the \textit{creatio ex nihilo} of a historically first constitution \textit{i.e.} a single act constitution.

But this view of things cannot be based on any valid data. The whole procedure of the conclusion of the European treaties indicates that the European constitution as enacted and amended from time to time is enacted and amended not by a single act of a constituent power but by treaty\textsuperscript{38}.

c) Constitutions made by informal treaty

An example for a constitution set up by the enactment of identical concurrent constitutions (based on an informal treaty) is presented by the Grundnorm.

\textit{Grundnorm.}

\textsuperscript{35} "eine Art definitiv gemeinte konsentierte ‘Verfassunggebung’": Oppermann (\textit{supra} n. 33), § 525. H.-P. Ipsen, \textit{Europäisches Gemeinschaftsrecht} (J.C.B. Mohr Tübingen 1972) § 2/26 \textit{et seq.}, had spoken, even more darkly, of a "Gesamtakt staatlicher Integrationsgewalt", an integrated (or whole) act of state integration power(s).

\textsuperscript{36} Oppermann (\textit{supra} n. 33), § 526.

\textsuperscript{37} Oppermann (\textit{supra} n. 33), § 527.

\textsuperscript{38} Cf., in more detail, Schilling (\textit{supra} n. 13) sub B 1 b bb.
American Constitution of 1787\textsuperscript{39}. However, it is again very much disputed whether the constitution was indeed created by treaty or by a single act. So we must discuss first if it is possible, and may be helpful to the discussion here proposed, to consider the American constitution as thus created.

The draft of the American constitution was agreed upon by the Philadelphia Convention on September 17, 1787. According to Art. VII of the proposed new constitution, "[t]he ratification of the convention of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same". The new constitution was than in fact ratified according to its Art. VII and, eventually, accepted by all thirteen states that had made up the U.S. under the Articles of Confederation\textsuperscript{40}.

An analysis of the question whether the U.S. constitution was ordained by a single constituent power or by separate such powers of the individual states must be based on the rather ambiguous ratification procedure devised for the federal constitution. This procedure diverged from single act procedures for the ratification of national constitutions\textsuperscript{41} in this aspect that

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\textsuperscript{39} Another example might be the Acts of Union (Ireland) 1800, which were passed by the British and Irish Parliaments without there being a formal treaty between Great Britain and Ireland; cf. O. Hood Phillips/ P. Jackson, Constitutional and Administrative Law, at 65.

\textsuperscript{40} But cf. infra n. 43.

\textsuperscript{41} On which cf. text accompanying supra n. 11 \textit{et seq.}
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the new constitution, if adopted according to its self-imposed requirements, would not automatically be binding on the whole nation\textsuperscript{42}, \textit{i.e.} the thirteen states having made up the U.S. under the Articles of Confederation, but only on those parts (being nine states or more) that ratified it (so-called rule of nine)\textsuperscript{43}. Insofar, it corresponded to the procedure regularly adopted to this day\textsuperscript{44} for the ratification of multilateral international instruments. But it also diverged from the regular procedure for the ratification of such an instrument at least\textsuperscript{45} in this aspect that the constitution was not to be ratified by the institutions respectively competent according to the constitu-


\textsuperscript{43} Indeed, Rhode Island became a member of the Union under the new federal Constitution only in 1790. - Madison was completely clear about that point: "no political relation can subsist between the assenting and the dissenting States"; cf. "Federalist 43" (\textit{supra} n. 42), at 225. And cf. \textit{U.S. Term Limits, Inc. v Thornton}, 131 LEd 2d 881, at 926 (Thomas, J., dissenting): "The ultimate source of the Constitution’s authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the Nation as a whole." - For a political evaluation of this rule cf. Samuel H. Beer, \textit{To Make a Nation. The Rediscovery of American Federalism} (The Belknap Press Cambridge 1993) at 331 \textit{et seq.}

\textsuperscript{44} Cf., \textit{e.g.}, the United Nations Convention on the Law of the Sea, Art. 308.

\textsuperscript{45} Another aspect, not relevant in the present context, is that there was no formal treaty.
tions of the treaty-making states\textsuperscript{46}, but by conventions within these states, specifically to be elected for that purpose by order of the constitution to be ordained. It is evident that this procedure was the result of a compromise\textsuperscript{47} and that its ambiguity was the consequence of a draw between federalists and anti-federalists\textsuperscript{48}. Not surprisingly, therefore, those two parties deduced opposite positions from this procedure.

One possibility to evaluate this ratification procedure is to look at the effects the ratification of the federal constitution by their respective conventions had on the separate states\textsuperscript{49}. Such a convention, elected by the people specifically to be elected for that purpose by order of the constitution to be ordained. It is evident that this procedure was the result of a compromise and that its ambiguity was the consequence of a draw between federalists and anti-federalists. Not surprisingly, therefore, those two parties deduced opposite positions from this procedure.

\textsuperscript{46} This procedure was consciously avoided: "'A system founded on the Legislatures only, and not founded on the people,' observed Madison, was 'the true difference between a league or treaty, and a Constitution'": Beer (\textit{supra} n. 43), at 314, quoting \textit{The Records of the Federal Convention of 1787} (M. Farrand, ed.), 1911 - 1937, 1966, vol. 2, at 89 (July 23), 93.

\textsuperscript{47} Cf., \textit{e.g.}, Beer (\textit{supra} n. 43), at 335.

\textsuperscript{48} In comparative writings, this word "anti-federalist" can lead to misunderstandings. Whereas, in the American context, it denotes anti-centralists, that is to say states’ rightists, in continental European usage it may well designate centralists. And cf. Heinz (\textit{supra} n. 22) at 90.

\textsuperscript{49} This approach has however been called ahistorical. One of the main arguments for this view has been put in the words of Abraham Lincoln: "'The Union', said Abraham Lincoln in his message to Congress of July 4, 1861, 'is older than any of the states, and, in fact, it created them as States'" (Beer [\textit{supra} n. 43], at 200, quoting \textit{Documents of American History} [H.S. Commager, ed] 7th ed. [Appleton-Century-Crofts New York 1963] at 304). This may indeed be true for the U.S. under the Articles of Confederation (cf. Beer, \textit{ibid.}). But the federal constitution of 1787 is the outcome of a revolu-
cally for that purpose, clearly represented, under democratic state theory and according to the views dominant at the time\textsuperscript{50}, the originary constituent power of the respective state. On this basis it could ordain, as it did, for its respective state, a historically first constitution without being bound by any pre-existing constitution. It follows that a ratification of the federal constitution by such a convention constitutes the setting up of the respective state as part of the Union-to-be, under the condition precedent, however, that at least eight other states would also ratify the constitution. By the act of ratification, executed by its originary constituent power, the ratifying state accepted the text of the proposed federal constitution into its own historically first constitution, upholding by necessary implication its own constitution proper only insofar as compatible with the federal constitution\textsuperscript{51} and granting the latter primacy over the former\textsuperscript{52}. After ratification, the ratifying

\textsuperscript{50} Cf. Arendt (\textit{supra} n. 4), at 178.

\textsuperscript{51} Cf. Beer (\textit{supra} n. 43), at 315 \textit{et seq.}

\textsuperscript{52} This does not mean that the state constituent power tried to create a law superior to its constitution, which clearly would be an impossible feast; it rather means that it set up a hierarchy within the constitution giving the federal constitution precedence over the state constitution proper. For a similar modern case cf. Arts. 91 (3), 94 of the Netherlands Constitution making international treaties superior to the constitution, and cf. A. Cassese, "Modern Constitutions and International Law", 192 RdC 331 (1985 III), 409
state was, under its own constitution, no longer an independent state but part of the Union. Therefore, the federal constitution can be seen as having been set up be the enactment of - insofar identical - state constitutions.

What, then, is the position of the Union in this set-up? Because of the "rule of nine", a "single national constituency" demonstrably was absent. Such a constituency cannot be postulated where this "constituency" was only constituted eventually, a couple of years after the establishment of the constitution, by the accession of the last of the thirteen original states, Rhode Island. That shows that a single constituent power of the Union had either not emerged or was, at least, prevented from acting. A single body to create ex nihilo a new federal constitution did therefore not exist. To put it as starkly as possible: Because of the lack of a "single national constituency", the federal constitution rested exclusively on the authority of the constituent powers of the separate states. Insofar the "compact theory" of the U.S. constitution must be considered as correct.

\footnotesize{\textit{et seq.}}

\footnotesize{53} Cf. \textit{supra} n. 43. But cf., \textit{e.g.}, J. Marshall, quoted by B. Schwartz, \textit{A History of the Supreme Court}, New York et al. 1993, at 55: "Our constitution is not a compact. It is the act of a single party. It is the act of the people of the United States, assembling in their respective states, and adopting a government for the whole nation." And cf. Webster, \textit{infra} n. 122.

\footnotesize{54} Cf. Madison, "Federalist 39" (\textit{supra} n. 42) at 192 \textit{et seq.}; Justice Thomas, \textit{supra} n. 43.}
II. How stable a constitution is

1. Against legal challenges

a) A single act constitution cannot be reversed by legal means. It may be amended out of recognition in perfectly legal procedures. But it still remains, in law, the same constitution. It can be reversed only extra-legally, i.e. by revolution. But this does not apply to a constitution made by treaty. Such a constitution, as a treaty between states, is governed by international law. As such it may be unilaterally denounced only if such denunciation is expressly or impliedly provided for but it may be terminated by

55 Cf. e.g. Merkl (supra n. 24), at 200.

56 But cf. Th. Schilling, "Die deutsche Verfassung und die europäische Einigung", 116 AöR 32 (1991), at 68 et seq., who considers Art. 146 BL as providing for a legal, non-revolutionary transition to a new historically first constitution. But this is not quite correct. Art. 146 BL gives an extraordinarily wide, indeed unrestricted power to the German people to revise the constitution, and provides thereby for the possibility of a legal "revolution". But exactly by reason of this provision the constitution emerging from such a "revolution would not be a historically first constitution. The procedure would be similar to the Totalrevision of the Swiss constitution in 1871 (?) on which cf. ***

57 Art. 56 Vienna Convention on the Law of Treaties (VCT). And cf., on the clausula rebus sic stantibus, Art. 62 (1) VCT. The anti-federalist view of the U.S. constitution which had concluded that a secession would remain legally possible, a possibility known as Madison’s Gap (on which cf. text infra at n. 90), would therefore no longer be arguable today under international law.
consent of all the parties\textsuperscript{58} irrespective of the treaty clauses. If no new constitution is created by these parties, such termination amounts to a dismemberment of the state that had been constituted by the terminated treaty. There is, under general international law, no way to exclude the power of the contracting parties to terminate a treaty by mutual consent. Therefore, the clause in the German imperial constitution of 1871 according to which the contracting princes and free cities concluded an "everlasting federation"\textsuperscript{59} was (or would nowadays be) inoperative under international law. And the same is true for the weaker language in the Treaty on European Union which reports in its preambula the resolution of the Member States' Heads of State "to continue the process of an ever closer union among the peoples of Europe" and which is, according to its Art. Q, "concluded for an unlimited period"\textsuperscript{60}.

b) But there are ways to exclude, by a detour, the factual possibility of the contracting parties to terminate the treaty. This end can be achieved either by merging, under the treaty, all political institutions of the treaty states, making the treaty-constitution a unitary constitution, or by amending the

\textsuperscript{58} Art. 54 VCT and cf. I. Brownlie, Principles of International Law, 4th ed. 1990, at 617 \textit{et seq.}; but cf. Kelsen (\textit{supra} n. 16), at 305.

\textsuperscript{59} \textit{Supra} n. 21, preambula.

\textsuperscript{60} Cf. judgement of the German Federal Constitutional Court (FCC), BVerfGE 89, 155; English translation in \textit{[1994]} C.M.L.R. 57, at 91, \# 55.
treaty states’ own constitutions in such a way that the treaty states are, by virtue of their own internal law, prevented from terminating the treaty. There are examples for both these ways.

aa) The prime example for the first way is the Treaty of Union of 1707. As no separate political institutions of England or Scotland survived the Union, a termination of that treaty was (and is) not possible. The contracting parties - if one supposes they survived as such - are not able to act in any way and can therefore not agree to terminate the treaty61.

bb) The prime example for the second way is the U.S. constitution of 1787. The federal constitution as part of - insofar identical - historically first state constitutions did not provide the states with a right to secede from the union. Rather, such a secession would have required a constitutional amendment in

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61 Hood Phillips/Jackson (supra n. 39), at 69 et seq., correctly expose that "[t]here is no provision in the Treaty for appointing commissioners to negotiate a revision ...", or, as we may add, a termination. But cf. FCC, BVerfGE 22, 221: The Free State of Coburg and the Free State of Bavaria had merged by treaty of 14 February 1920. Under the treaty, the political organs of Coburg (as well as the state itself) ceased to exist. The FCC, following its former case law (BVerfGE 3, 267, 279 et seq.; 4, 250, 268) held (at 231), that in a law suit concerning the execution of a union treaty, a state having ceased to exist by reason of that treaty must be deemed to be extant. As the state has however no organs left, the local authorities representing the population of the former state have the right to bring an action (ibid.). The decision concerns the question of the execution of treaty obligations but not of the termination of the treaty.
accordance with Art. V of the federal constitution. As the latter was received into the state constitutions on a higher level than the state constitutions proper\(^\text{62}\), the states’ respective constituted powers were excluded from amending the federal constitution. As a termination of the treaty underlying the enactment of the insofar identical state constitutions would amount to such an amendment, it was forbidden to the individual states by their own constitutions. The distinction between a constitution ordained by a single constituent power of the U.S. and a constitution ordained by separate state constituent powers is therefore, in law, without practical consequences\(^\text{63}\). This result coincides with the nationalist view of the constitution but the underlying argument is quite foreign to a supposed national character of the constitution.

cc) Neither the German imperial constitution of 1871 nor the European treaties have been fortified in such a way. Subject to later developments, therefore, the contracting parties in both these cases, although they neither had nor have a right to unilateral denunciation, retained the right to terminate the respective treaty by mutual consent\(^\text{64}\).

\(^{62}\) Cf. *supra* text accompanying n. 52.  

\(^{63}\) But cf. Justice Thomas (*supra* n. 43).  

\(^{64}\) As to the European treaties, cf. *e.g.* judgment of the FCC (*supra* n. 60). M. Heintzen, "Die ‘Herrschaft’ über die Europäischen Gemeinschaftsverträge - Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?",
2. Against extra-legal challenges

A single act constitution, but also a treaty-constitution, may be reversed by revolution. Indeed, this is the most common way fundamentally to amend any constitution\textsuperscript{65} and the only way to reverse a single act constitution\textsuperscript{66}. Such a revolution (revolution in its legal sense) is quite independent of any civil strife, military rebellion, \textit{coup d'Etat}, or similar unrest\textsuperscript{67}. It is characterized exclusively by the circumstance that a constitution of a new or pre-existing political entity is enacted in a way different from that prescribed in the constitution, if any, valid up to the time of such enactment\textsuperscript{68}. An example might be the decision, taken by majority, to revise a treaty-constitution that only provides for its unanimous revision\textsuperscript{69}. A constitution

\textsuperscript{65} Cf. G. Burdeau, \textit{Manuel de droit constitutionnel et institutions politiques}, 20th ed. 1984, at 85: "C'est là un mode d'abrogation des constitutions extrêmement courant."

\textsuperscript{66} Cf. supra n. 56.

\textsuperscript{67} On different types of revolution cf. Friedrich (\textit{supra} n. 5), at 134 \textit{et seq.}

\textsuperscript{68} Cf. \textit{e.g.} A.J. Merkl, "Das Problem der Rechtskontinuität und die Forderung des einheitlichen rechtlichen Weltbildes", in \textit{idem (supra} n. 24), p. 384 at 404 \textit{et seq. Idem (supra} n. 24), at 200 \textit{et seq.}, illustrates the distinction between a revolution in its legal sense and a political revolution.

\textsuperscript{69} Such a decision was at the basis of the Swiss constitution of 1848
ordained revolutionarily in that sense is ordained, by definition, directly by the originary constituent power (but not necessarily by the people); it is the only way that power can be exercised. It follows that the originary constituent power acts by necessity revolutionarily\textsuperscript{70}, \textit{i.e.} in violation of the existing constitutional order. Such a revolution may also be restricted to only a part of the territory and of the population of the state constituted by the

\footnotesize{(decision of the Diet - \textit{Tagsatzung} - of 16 August 1847); cf. Körtz (\textit{supra} n. 15), at 547. Kott, \textit{ibid.}, at 607 and 611, considers these two acts as revolutionary: the adoption, by a majority of the Diet, of the Transitory Provisions (\textit{supra} n. 14) and the subsequent adoption of the constitution itself by the same means. And cf., on the American Constitution of 1787, the introductory remarks by G. Wills to his edition of \textit{The Federalist Papers by Alexander Hamilton, James Madison and John Jay}, New York \textit{et al.} 1982, at vii: "The Constitutional Convention, meeting in Philadelphia to amend the Articles of Confederation, first rebelled against its own orders, and then invited the country to rebel against its own government. ... [T]he second move ... asked the Continental Congress to surrender its role as superintendent of the amending process under the Articles. It asked the state legislatures to turn authority over to ratifying conventions newly elected for one purpose, to adopt or reject an entirely new form of government. And it did this with a proviso - that only nine states would be needed to form the union ... So much for the Articles’ pledge that its ‘union shall be perpetual’.”}

\textsuperscript{70} And cf. John Locke, \textit{Second Treatise on Civil Government} (Everyman’s ed. 1924), c. 19, 224, quoted from Corwin (\textit{supra} n. 4), at 390: "[T]he community retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators ..."; Universal Declaration of Human Rights, Preambula, para. 3: "... if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression...", and cf., on this last source, M. Geistlinger, \textit{Revolution und Völkerrecht}, Vienna \textit{et al.} 1991, at 359 \textit{et seq.}
constitution if a constituent power of that part sets up a separate constitution. It is this possibility of a separation by revolution that is here of interest.

3. In particular: The question of separation

a) The right of self-determination

Although such a separation is by definition unconstitutional (if a separation is provided for under the constitution, it does not happen by revolution), the peoples’ power to secede is recognized in international law, to some extent, as the peoples’ right to self-determination. However, it is quite clear that this right of self-determination by revolution is granted, by positive international law, only to dependent peoples i.e. peoples under colonial rule, whereas international law is not interested in the question whether a state’s constitution allows for secession or not. Indeed, whilst the expediency of

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71 Arts. 1 (2), 55 UNC, and cf. e.g. Brownlie (supra n. 58), at 595 et seq.; A. Verdross/ B. Simma, Universelles Völkerrecht. Theorie und Praxis, 3rd. ed. Berlin 1984, at §§ 509 et seq.

72 Cf. e.g. Nguyen Quoc D./ P. Daillier/ A. Pellet, Droit international public, 4th ed. Paris 1992, at p. 497, n. 346; Verdross/Simma (supra n. 71) at § 512, who however claim the same right for peoples discriminated against by the state in which they live; and cf. the delegation of the Federal Republic of Germany which declared that the right of self-determination is given to all peoples and not only to peoples under foreign domination; BGBl. 1980 II, p. 1483.

73 Nguyen et al. (supra n. 72), ibid.
the separation of Québec from Canada is very much in doubt nobody appears to doubt the power of the people of Québec to secede by popular vote from Canada. But this power is not derived from international law but from democratic state theory, and it can be peacefully exercised only with the toleration by the Canadian authorities which is not required by international law.\footnote{Such a requirement is considered not even by W.M. Reisman, "Humanitarian Intervention and Fledgling Democracies", 18 Fordham Int’l LJ 794 (1995), who considers democracy a right guaranteed by international law and the doctrine of humanitarian intervention to allow outsiders to "commit themselves to doing what is necessary to sustain it" (at 805).}

This refusal, by international law, to grant the right of self-determination to peoples other than those under colonial rule does not diminish those peoples’ power, as an extra-legal question, to revolt and, if they are part of a larger state, to secede\footnote{Indeed, this power is implied when the ILC, Yearbook 1980, vol. II Part Two, at 30, considers in Art. 15 (2) of the Draft articles on State responsibility "[t]he act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State ..."}; neither does the lack of a constitutional permission. Furthermore, if the revolution and secession are successful \emph{i.e.} if a new entity emerges from those facts that fulfills the three criteria of statehood - population, territory, autonomous organization \footnote{Cf. \emph{e.g. Brownlie (supra n. 58)}, at 72 \emph{et seq.}} then it is a state\footnote{Nguyen \emph{et al. (supra n. 72)} at p. 526, n. 368.}
constitution of which is valid under international law\textsuperscript{78} irrespective of the recognition, under international law, of a right of self-determination of the seceding people\textsuperscript{79} and of a constitutional permission.

b) Separation and treaty denunciation

If the constitution of the state the separation from which is in question is made by treaty, and if the people seeking separation is at the same time the people of one of the contracting states, the question of the power to secede from that state closely resembles, and coincides with, the question of the right unilaterally to denounce the treaty which is, according to Art. 56 VCT, the exception rather than the rule. Certainly, the two questions must be distinguished conceptually: Whereas the second is a question of international law, the first is a question of the inalienable right (or power) of peoples as the ultimate sovereign powers to decide freely on their own futures\textsuperscript{80}, a right (or power) which is nearly by definition not recognised by constitutional law and which is recognised by international law only in exceptional cases. But as a separation from a state constituted by treaty will

\textsuperscript{78} Merkl (\textit{supra} n. 68), at 415.

\textsuperscript{79} It is arguable that there are certain limits to the states’ discretion in recognizing a new state; cf. Nguyen \textit{et al.} (\textit{supra} n. 72) at p. 532 \textit{et seq.}, n. 371. But these limits, it appears, would not apply to the case under discussion.

\textsuperscript{80} Cf. \textit{supra} n. 70.
be at the same time a denunciation or, if not lawful as such, a breach of the treaty by which the constitution was enacted, it is necessary to discuss the relation between, on the one hand, the peoples’ power of self-determination including the power to secede from a state and, on the other hand, the rule of public international law against the unilateral denunciation of a treaty generally expressed in the maxim "pacta sunt servanda"81.

aa) As the exercise of the people’s power of self-determination amounts to a revolution, this is, in its most general form, the question of what happens to treaty obligations of a state in the case of a revolution within82 that state. The classic rule has been that such obligations are not affected by a revolution as the state as subject of international law is not so affected83. For a certain type of revolution, however, the so-called classic rule has been shown to be in contradiction to state practice84. This type of revolution has

81 For certain exceptions from this maxim in favour of recently independent states cf. Geistlinger (supra n. 70), at 437.

82 Merkl (supra n. 68), at 421, denies that a revolution happens "within" a state.

83 Cf. e.g. W. Fiedler, Staatskontinuität und Verfassungsrechtsprechung, Freiburg et al. 1970, at 39. And cf. Merkl (supra n. 68), at 419 et seq., who accepts the rule but denies its foundation. For criticism, cf. Geistlinger (supra n. 70), at 90 et seq. A certain paradox created by this rule is shown by the commentary "Revolutions, Treaties, and State Succession", 76 The Yale Law Journal 1669 (1996-7), at 1673 et seq.

84 Geistlinger (supra n. 70), at 151 et seq. These findings are explicable
been defined as "the rebellion of individuals or a group of individuals ... against a régime which does not represent a régime of law and therefore disregards human rights ...". In the case of such a revolution (social revolution), it is claimed that contrary to the classic rule "[p]ublic international law grants the ... people the right to pick and choose [which pre-revolutionary international rights and obligations shall remain in force] (clean slate rule)". Thus, international law privileges social revolutions over other ones. It follows that in the case of a social revolution leading to the separation of a people from a state constituted by treaty, there is no contradiction between the extra-legal power of self-determination on the one hand and the international law rule against the unilateral denunciation of treaties on the other: that rule does not apply in the case of a social revolution. Rather, in such a case, the revolutionary people has the right, under international law, to choose between maintaining the treaty constituting the state from which it seceded or to denounce it. Of course, the very fact of separation by revolution amounts to a denunciation of that treaty.

only if the foundation of the "classic rule" is indeed different from the identity of pre- and post-revolutionary state, as Merkl, *ibid.*, maintains.

85 Geistlinger (*supra* n. 70), at 440.


87 But cf. Nguyen *et al.* (*supra* n. 72) at p. 510, n. 355.
bb By contrast, it appears that in the case of a revolution other than a social revolution the rule against the unilateral denunciation of a treaty does apply and that, therefore, there is a discrepancy between the power of self-determination and that rule in this sense that the said rule prohibits the exercise of that power or, inversely, that the exercise of that power is in breach of the said rule. This discrepancy is not surprising. Indeed, the exercise of the extra-legal power of self-determination by way of a revolution in its legal sense is, by definition, a violation of the existing constitutional order. There only remains the question whether the violation of the international law rule against the unilateral denunciation of treaties adds anything to that other violation. The answer must be in the negative. It is only a question of form whether a constitution has been enacted by treaty or by a single act. If the contents of a constitution are violated by a given act, e.g. a secession not provided for under the constitution, from the viewpoint of that constitution it does not matter in which way it had been enacted. Neither does it matter from the viewpoint of international law. It certainly may not lead to the denial of statehood if the seceding state fulfills the three criteria thereof. And whether other states will exercise their discretion to recognise the newly seceded state will as certainly not depend on the fact that the constitution of the state the new

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88 Cf. supra text after n. 70.

89 Kelsen (supra n. 16), at 282 et seq.
state seceded from had been enacted by treaty. Indeed, it could hardly be otherwise: if it were, a treaty-constitution would be protected, against a revolution, to a higher degree than a single act constitution. But there could not be any reason for such a differentiation.

c) Practical discussion

aa) The distinction between the extra-legal power to secede from a treaty-constitution and the (lack of a) legal right unilaterally to denounce that treaty has been disregarded in the discussion of the way to draft the American constitution, especially in the discussion on Madison’s Gap90. The one question was whether the constitution to be ordained for the U.S. could forever bind the constitutional powers of the individual states. The answer was yes, correctly, and the means to achieve this aim was to have the constituent power of each individual state i.e. its people (if only indirectly through constitutional conventions) vote on the constitution, and not the legislatures of the individual states91.

The other question was whether the constitution to be ordained could be ordained in such a way as to exclude the possibility of secession by a decision of the people itself (acting through a constitutional convention). To

90 Beer (supra n. 43), at 313 et seq.

91 Cf. supra n. 46 and text sub II 1 b bb..
this, no answer in law was ventured. But a power to secede was vigorously maintained by the states’ rightists, in particular in the Southern states. "The southern commitment to the union remained uncertain from 1787 until 1861. From the 1820’s on ‘southerners repeatedly threatened to secede’” Secession became a reality in 1860-61 when the Southern states, after having convened new conventions and acting on the basis of these conventions’ decisions, finally seceded from the Union. This was within the sovereign power of the people of each individual state even if they had no right to do so as the people’s power to decide its own future by setting up a separate state under a new constitution outside the U.S. federal structure could not be curtailed by any legal means. For the people as the truly sovereign power within the state, all the characteristics claimed for the UK Parliament do apply, and particularly the one that it cannot bind itself (or its successor)

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92 But states’ rights arguments were used by northern and southern states alike; cf. P. Finkelman, "States’ Rights, Federalism, and Criminal Extradition in Antebellum America: The New York - Virginia Controversy, 1839-1846", in *German and American Constitutional Thought* (H. Wellenreuther, ed.; Berg Publishers New York 1990) 293, at 299 et seq. As to the differences in the way these arguments were used in the North and the South see *ibid.*

93 Finkelman (*supra* n. 92), at 297 (Footnote omitted).

94 Cf. Justice Thomas (*supra* n. 43).

95 Cf. *e.g.* Dicey (*supra* n. 1), at 64 *et seq.* Some practical exceptions have been made out in the context of grants of independence to formerly dependent territories; cf. Hood Phillips/Jackson (*supra* n. 39), at 70 *et seq.*
Thus, whilst it would have been impossible for the contracting parties \textit{i.e.} the individual states, according to the federal constitution accepted into their own constitutions, to terminate the treaty-constitution of the U.S. by mutual consent, and \textit{a fortiori} impossible for a single state unilaterally to denounce the treaty-constitution, as an extra-legal question it remained possible for the people of each of the states to secede from the U.S. by revolution.

bb) The example of the Southern states’ secession from the U.S. should be compared to other cases in which separation has not (yet?) happened. To start with the Treaty of Union of 1707, there is no possibility to terminate that treaty by mutual consent and there certainly is no right to secede. But assuming that there still is a separate people of Scotland, this people, as constituent power, must as certainly have the power to secede. The Treaty of Union could no more bind them than a single act constitution could. The above assumption, however, raises the additional difficulty to ascertain whether there is a people of Scotland as a constituent power. This can only be done once a revolution in its legal sense against the Union Treaty had been successful \textit{i.e.} once a historically first constitution of Scotland has been adopted as such. That means that the existence of a people of Scotland can

only be postulated with certainty once they have seceded from Great Britain. Sometimes, as here, circular thinking is inevitable.97

cc) The European Treaties may be of greater practical interest. Although these treaties can be terminated by mutual consent of the contracting states, these states have no right unilaterally to denounce the treaties if not in application of the clausula rebus sic stantibus. It follows that the constitutional power of the Member States, i.e. their legislatures and governments, have no legal means by which unilaterally to leave the EC/EU. The question is whether these treaties can be considered as a constitution in this sense that the constituent power of a single Member State may use its sovereign power to set up a state outside the EC/EU.

There are two apparently contradictory positions of international law to consider. One, international law does not provide for the possibility that a state, by recourse to its constituent power, denounces a treaty it could not denounce otherwise.98 The situation under consideration is not revolutionary in a social sense; it presupposes that the state in question, but for its desire

97 A. Kaufmann, "Über den Zirkelschluß in der Rechtsfindung" (1973) in idem, Beiträge zur Juristischen Hermeneutik sowie weitere rechtspolitisch-sche Abhandlungen, Köln et al. 1984, 65, at 72 et seq., even claims that the vicious circle is part of the essence of legal thinking.

98 Save in the case of a social revolution on which cf. supra text accompanying n. 84 et seq.
to denounce the treaty, continues to exist and to function as before. Two, international law provides for the possibility to recognize a secession, if effective, even if the constitution of the state from which the secession took place was enacted by treaty so that it appears that in such a case a unilateral denunciation of a treaty may be effective. But this contradiction is only apparent. International law does not recognise, in the second case, a right to secede (save in the case of a social revolution). It only recognizes the effects of a factual revolution that had been effective even if its result has been a secession. And it is this principle of effectiveness\(^9^9\) that finally must guide the answer to the question raised.

According to position one, if the European treaties were just treaties like any others, they could not be denounced unilaterally by a Member State even by recourse to its constituent power. But the European treaties are not just international treaties like any others. Even if they cannot be considered as a single act constitution and therefore as the basis of all the law in force within its territory including the Member States’ constitutions, they must be considered as a treaty-constitution or at least as something akin to such a constitution. It has been validly exposed that even if the individual traits of the European treaties can be found in other international treaties, there is no other treaty that grants to an international organisation competences of an

\(^{99}\) On which cf. e.g. Nguyen \textit{et al.} (\textit{supra} n. 72) at p. 530, n.370.
importance at all comparable to the competences granted to the EC/EU.\footnote{100}

The question then is whether the European treaties are, because of their peculiarities, amenable to reversion by revolution. Basically, any group of norms which prevents a people from exercising its inalienable right to determine its own future is so amenable; the politico-legal function of a revolution is just that: to free a constituent power (a people) from legal bonds which cannot be terminated by other means. The European treaties undoubtedly contain such bonds. It must suffice to mention the four liberties of the common market effectively preventing a Member State’s people from self-determination, in particular from dissociating itself from the other Member States of the EC/EU. The European treaties therefore are amenable to reversion by revolution and, by the same token, to secession.

In a democratic society, it would have to be the people that decides on secession. If effective, a secession decided by popular vote would be recognized under international law even if the constitution of the organization from which the secession took place had been enacted by treaty. It may be allowed to speculate on the effectiveness of an eventual secession from the EC/EU. If the constituent power of a Member State \( \text{i.e.} \) its people should unilaterally denounce the European Treaties \( \text{i.e.} \) if it should "secede" from the EC/EU, in view of all the economic and political
consequences this would entail, there probably would be nothing to stop it. Such a "secession" therefore probably would be effective. According to the effectiveness principle, the state the people of which had put it outside the EC/EU therefore would have to be recognized, under international law, as being outside the EC/EU. A unilateral denunciation of the European treaties not open to the constitutional powers of a Member State is therefore in effect open to its people.

4. Summing up

To sum up: A treaty enacting a constitution may not be unilaterally denounced if it does not expressly or impliedly provide for such a possibility. It may however be terminated by mutual consent of the contracting parties. Termination by mutual consent can be avoided either by appropriate provisions in the constitutions of the individual contracting states or by integrating all their political organs. But such avoidance inevitably leaves still open the possibility of a (unilateral) secession, inter alia by the people of one of the contracting states, from the state constituted by the

101 The German chancellor’s dire warnings against a war which might break out in Europe if integration did not proceed - in particular: if the monetary union was not achieved according to schedule - have a different scenario in mind i.e. the complete break-down of the EC/EU. - In law, it may be an open question whether such a "secession" as contemplated in the text could be considered as an internal affair of the EC/EU so that a recourse to force would not be prohibited by Art. 2 Nos. 3, 4 of the UN Charter.
treaty-constitution. Such a secession, if it is not provided for in the treaty-constitution, is a revolution in its legal sense and as such in violation of the treaty-constitution and of the international law rule against the unilateral denunciation of treaties. Still, as an extra-legal action, it may be effective. It may be at the basis of a new legal order and it may be recognized under international law.

III. How a constitution may be stabilized

1. Posing the question

The only way effectively to prevent a secession from a state constituted by a treaty among states having their own peoples is to merge those peoples\textsuperscript{102}. Once the different peoples of the contracting states have been merged into one, the social substratum of a revolutionary secession is missing, at least for the time being. But there may be further repercussions of such an event: the merger into one people of the peoples of a state created originally by a treaty-constitution may somehow influence the right of the contracting parties to terminate that treaty by mutual consent. It is this possibility of a repercussion I propose to discuss here.

\footnote{\textsuperscript{102} Cf. \textit{e.g.} S.H. Beer, "Federalism and the Nation-State: What can be learned from the American experience?" [quoted from the manuscript]: "In the cause of modern political development, states have created nations at least as often as nations have created states."}
The American case offers an interesting example. Here, the adoption of the XIIIth through XVth amendments in the aftermath of the Civil War shows that the constitution was not considered shaken by the civil war which left the constitution apparently unimpaired. But it had this consequence that the nationalist theory of federalism gained the upper hand; it is today near-universally accepted. Such acceptance implies the adoption of the U.S. constitution by one single people of the U.S. which had only emerged, as such, after the civil war ans as a consequence thereof. As that constitution had originally been adopted by treaty, this implication presupposes that the very basis of the constitution has been exchanged *i.e.* that the constitution must now be considered as having been enacted in a procedure and by a constituent power different from the ones by which the constitution had originally been enacted. Such a presupposition might be considered as pure fiction. But it is a fact that the nationalist theory became universal after the Civil War, and this fact makes it necessary to consider whether the said presupposition could be accomodated in law.

2. The replacement og one foundation of a constitution by another

Such an accomodation is indeed possible. It is rather simple theoretically to construct a model that allows for the replacement of one procedure for the enactment of a constitution, and of one constituent power, by another, in particular for the subsequent enactment, by a single act of one people as
constituent power, of a constitution originally enacted by treaty. First, this people as originary constituent power of the whole must be formed (if it does not already exist, without however having acted), and second this power then must adopt the text of the existing treaty-constitution as its own constitution.

Concerning the second part, such a "replacement" of a treaty-constitution by a single act constitution enacted by an originary constituent power indicates a revolution in its legal sense. But as such a revolution is an extra-legal act, there is not, and there cannot be, any prescription in law of the ways in which the originary constituent power may act. An originary constituent power may as well act by developing, over time, a custom and an opinio juris\(^{103}\). Concerning the first part, an originary constituent power of the whole has to emerge (if it does not already exist). Such emergence is an eminently political event depending on the historical circumstances in any individual case\(^{104}\). It cannot lightly be presumed.

3. Comparative discussion of such replacements

a) This, then, may be the explanation of the U.S. development. The states’

\(^{103}\) This is amply demonstrated by the way the UK constitution came to be. Cf. e.g. on parliamentary sovereignty Dicey (supra n. 1), at 39 et seq.

\(^{104}\) And cf. supra text at n. 10.
rights interpretation of the constitution\textsuperscript{105} clashed with the nationalist theory of federalism as expounded by President Lincoln\textsuperscript{106}. The exercise of the sovereign power of the peoples of the Southern states resulting in the latters’ secession from the Union led to civil war. The civil war and the Northern states’ victory prevented the secession of the Southern states from becoming finally effective. As a consequence of the North’s victory, however, the respective peoples of the individual states merged into one single people of the United States. For this merger we must rely on literary evidence\textsuperscript{107}. Basically, apparently, it was the result of the experience of war. The federal constitution, originally adopted by the separate constituent powers of the states, eventually got adopted, in the aftermath of the civil

\textsuperscript{105} Cf. \textit{supra} text accompanying n. 94.

\textsuperscript{106} Cf. \textit{supra} n. 49. However, it would be one-sided to declare that simply "carrying states’ rights arguments to their ultimate conclusion" was the cause of that war, as seems to be implied by Finkelman (\textit{supra} n. 92), at 297. Rather, it was that fact combined with the other one that the states’ rights argument was heavily disputed.

\textsuperscript{107} Cf., \textit{e.g.}, the remarks of W. Whitman, quoted by Beer (\textit{supra} n. 43), at 377: "the victory had been won by ‘the People ... there had form’d ... a ... Union will ... capable at any time of busting all surface bonds and breaking out like an earthquake’", and cf. \textit{Missouri v Holland}, 252 U.S. 416 (1920), \textit{per} Justice O.W. Holmes: "It was enough for them [the begetters of the U.S. constitution] to ... hope that they had erected an \textit{organism}; it has taken a century and has cost their successors much sweat and blood to prove that they created a \textit{nation}" (my italics); Schwartz (\textit{supra} n. 53) at 126. But cf. n. 43.
war, by the emerging constituent power of the U.S. as a single national constituent power developing a custom and a corresponding *opinio juris*. For the adoption of the existing constitution by this new constituent power, there are valid factual indications. The civil war was fought over the two conflicting views of the body or bodies politic originally ordaining the constitution and was lost by the party advocating the anti-federalist view. As a consequence, the anti-federalist view came into disuse and practically became obsolete.\(^{108}\)

On a day-to-day basis this adoption of the federal constitution by the constituent power of the U.S. as a whole had effects neither on the federal government nor even on the distribution of powers between federal and state governments; the text of the constitution, in fact, had not changed. What had changed, however, was the composition of the originary constituent power of the U.S. The single nationwide constituent power, required by nationalist theory\(^{109}\), had finally be achieved. It is only due to the fact that the treaty by which the U.S. constitution had originally been enacted could in any case not be terminated by mutual consent of the contracting parties that the subsequent adoption of the constitution by the one people of the U.S. as constituent power has no effects at this level, either. But the example shows

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\(^{108}\) But cf. Justice Thomas (*supra* n. 43).

\(^{109}\) Cf. *supra* n. 49 and Beer (*supra* n. 43), at 313.
nonetheless the way in which the merger of the peoples of a federal state into one people may influence the stability of the federal constitution.

b) The British case might serve as a counter-example. It is an open question whether there is today one British people. In 1707, there was clearly not, as the queen expressed it so well after the ratification of the Treaty of Union was completed: "... I desire and expect from all my subjects of both nations, that so it may appear to all the world, they have hearts disposed to become one people ..."\textsuperscript{110}. The ever-recurring question of the devolution of Scotland might indeed indicate that there still is no single people of Great Britain. But as there is in any case no possibility to terminate the Treaty of Union this is of importance only on the extra-legal question of the originary constituent power \textit{i.e.} the question whether there is a Scots people that could secede from the Union\textsuperscript{111}.

c) In the German case, a German people existed, as an ethnic group, since time immemorial. As a politically relevant group trying its collective hand at constitution making it existed since 1848 at the very latest\textsuperscript{112}. Even if

\textsuperscript{110} R. Chandler, The History and Proceedings of the House of Commons, 1741-4, iv 59 (my italics).

\textsuperscript{111} In the similar case of the Union with Ireland, history delivered the proof of the continuing existence of an Irish people.

\textsuperscript{112} Cf. \textit{e.g.} L. von Stein, "Zur preußischen Verfassungsfrage" (1852), in \textit{idem, Gesellschaft - Staat - Recht} (E. Forsthoff, ed.), Frankfurt \textit{et al.} 1972,
the constitution of 1871 was not enacted by the constituent power of the German people but rather by a treaty among its princes and free cities there can be no doubt that without popular support, the German unification would not have been possible\textsuperscript{113}. After the German people was united under one constitution\textsuperscript{114}, it adapted this constitution to more modern needs disregarding its monarchic and contractual origin. The constitution which had provided for a federal organisation based on monarchic ideas became the framework for a commonwealth constituting itself nationally\textsuperscript{115}. Therefore, the question must be asked whether this adaptation of the constitution amounted to its adoption, at an indefinite point in time, by the whole German people as constituent power.

From such an adoption, it would follow that the constitution was not any longer ruled by the international law on treaties but by that on constitutions so that the clause in the preambula of the treaty-constitution on the "everlasting federation" did not hurt itself anymore on the applicable interna-

\textsuperscript{115} E.-W. Böckenförde, "Der Zusammenbruch der Monarchie und die Entstehung der Weimarer Republik", in: \textit{idem, Recht, Staat, Freiheit}, 1991, p. 306 at 307 \textit{et seq.}; and cf. Huber (\textit{supra} n. 20), at 778 \textit{et seq.}

\textsuperscript{114} And cf. Heinz (\textit{supra} n. 22) at 91.

\textsuperscript{113} Huber (\textit{supra} n. 20), at 725 \textit{et seq.}, 788 \textit{et seq}. But Heinz (\textit{supra} n. 22) at 79, speaks of the ethnic differences [\textit{volksmäßige Unterschiedlichkeiten}] between the individual German states.

\textsuperscript{115} Huber (\textit{supra} n. 20), at 725 \textit{et seq.}, 788 \textit{et seq}
tional law. An attempt to terminate the treaty having originally enacted the constitution (and to abolish *uno actu* the constitution itself) therefore, although perfectly legal before such an adoption, would have been, after it, a counter-revolution (or better, maybe, a coup d’Etat) against the revolution which supposedly had made the original treaty-constitution into a constitution enacted by the German people as such. Two facts appear validly to indicate that such a revolution had indeed taken place: the unanimous view of the German publicists according to which the German empire was based not on a treaty but on a constitution, and, *ex post*, the developments after the revolution of 1918.

aa) The revolution of 1918\(^\text{116}\) terminated the German imperial constitution of 1871. This termination did not lead to a breaking up of Germany\(^\text{117}\) but eventually to a new constitution enacted by a national convention\(^\text{118}\) elected by popular vote\(^\text{119}\) and therefore by a single constituent power comprising the whole German people organized in German territory. This development lends further credence to the thesis that there existed, already under the imperial constitution, one German people as a single constituent


\(^{117}\) But there were regional efforts aiming at separation; cf. *ibid.*, at 1128 *et seq.*

\(^{118}\) *Ibid.*, at 1204.

\(^{119}\) *Ibid.*, at 1066 *et seq.*
power.

b) During the empire, it became the near universal\textsuperscript{120} conviction of German publicists\textsuperscript{121} that a termination of the imperial treaty-constitution by mutual consent was not possible because the founding treaty had created, as a "constitutive" treaty, a new legal order to which the contracting parties submitted and which they committed themselves to observe in future as binding. According to this view, there were not only contractual rights and obligations among the contracting parties, but there was a new legal order, a constitution, a law above them to which they had to submit\textsuperscript{122}. On the other hand, after the revolution of 1918 many publicists claimed that the empire had not changed its character - the derivation of its legal order from

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\textsuperscript{120} But cf. M. v. Seydel, \textit{Commentar zur Verfassungs-Urkunde für das Deutsche Reich}, 1897, at 22.
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\textsuperscript{121} The relevant literature has been compiled by Ebers, \textit{Die Lehre vom Staatenbunde}, 1910. And cf. Heinz (supra n. 22) at 80.
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\textsuperscript{122} Ebers (\textit{supra} n. 121), at 287 and cf. J. Binding, ***, at 162 \textit{et seq.} [Kel1, 284]; Jellinek (\textit{supra} n. 16) at 253 \textit{et seq.}, who, at 255, quotes, with approval, D. Webster, \textit{Works III}, p. 468: "The constitution, Sir, is not a contract, but the result of a contract, meaning by contract no more than assent. Founded on consent it is a government proper. Adopted by the agreement of the people of the United States, when adopted, it has become a Constitution. The people have agreed to make a Constitution; but when made, that constitution becomes what its name imports. It is no longer a mere agreement." Critical Kelsen (\textit{supra} n. 16), at 282, n. 1.
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the sum of the state legal orders - till the revolution\textsuperscript{123}.

It has correctly been stated that the theory of the treaty which somehow becomes a constitution would be a legal mystery\textsuperscript{124} if the treaty was not already a constitution. For the present purposes, the importance of the academic views quoted lies not in that theory\textsuperscript{125} but in the fact that they deny the contractual nature of the constitution and consequently the possibility of terminating that treaty by mutual consent. As these views were developed during the empire, they can be seen as an indication of the adoption of the treaty-constitution by the people\textsuperscript{126} which would indeed produce the legal consequences \textit{i.e.} the exclusion of the possibility to terminate the treaty-constitution by mutual consent that a mere legal mystery could not. Against this interpretation it should not be objected that it clashes with the academic views uttered after the revolution of 1918: these views concerned a legal system already of the past; the interpretation of its developments was therefore not any longer of practical relevance.

So it is at least arguable that the German people exercised, during the

\begin{footnotes}
\item[123] Cf. the sources quoted by Merkl (\textit{supra} n. 68) in n. 22 through 38.
\item[124] Kelsen (\textit{supra} n. 16), at 282, n.1.
\item[125] Declared to have been erroneous by Heinz (\textit{supra} n. 22) at 89.
\item[126] Heinz (\textit{supra} n. 22) at 89, maintains that the effects of that erroneous theory on the further evolution of the empire must not be underestimated.
\end{footnotes}
empire, its constituent power by adopting the preexisting treaty-constitution as its own. If one is prepared to accept this argument, the German imperial constitution offers another example of the tacit adoption by the people of a constitution originally made by treaty, and an example which is possibly unique in that legal consequences flowed from this adoption: it stabilized the imperial constitution by preventing its termination by mutual consent of the contracting parties.

By contrast, nothing similar appears to have happened under the European Treaties. First, it does not appear that a European people has emerged which could have adopted the treaties, by custom and opinio iuris, as a European constitution. This does not mean that there are any insurmountable difficulties for such an emergence as is frequently claimed. It does only mean that a European people as constituent power has not yet emerged in fact.

And second, an adoption of the European treaties in the way of an adoption of customary law cannot be shown either. The search for indications of such an adoption must start with the academic thesis of a "constitutionalisa-

\[127\] Cf. e.g. Grimm (supra n. 2) at 588 et seq. But cf. J.H.H. Weiler, "The State 'über alles'. Demos, Telos and the German Maastricht Decision", in Festschrift für Ulrich Everling (Nomos Baden-Baden 1995), 1651 at 1655 et seq.
tion" of the European Treaties. This thesis rests on the case law of the Court of Justice, and on the acceptance of this case law by the courts of the Member States. The relevant case law of the Court of Justice equating the European Treaties to a historically first constitution can be seen as a subsequent development possibly indicating the ultimate adoption of those treaties as a constitution. In this context, it is not the legal merits of that case law which are of interest but its value as indicator of a custom and an opinio juris of the originary constituent power, i.e. in a democratic society the European people at large. Clearly, the views of an august and rather secluded body like the Court of Justice can be but a weak indicator for such an opinion. In accordance with the "constitutionalisation" thesis, at least the support of the courts of the Member States would be needed to make those views a valid indication.

The courts of the Member States including their superior courts do accept the case law of the Court of Justice to a very large extent. But nearly all of

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128 Cf. supra n. 25.


130 Weiler (supra n. 25), at 2428, equates the results of the Court of Justice’s "Heroic Period" in the 1960s and early 1970s to something "which would normally require something akin to a constitutional convention".
the latter balk at the Court of Justice’s claim that the European Treaties are a constitution in this sense that the EC/EU is an autonomous legal order.\(^{131}\) Indeed, in their most recent decisions, some of the Member States’ constitutional courts underscore the international character of the European Treaties.\(^ {132}\) This being so, for the question here discussed the second limb of the "constitutionalisation" thesis is missing. The relevant case law of the Court of Justice does not have the support of the superior courts of most of the Member States. And no other indications for a European originary constituent power’s having ultimately adopted the European Treaties as a constitution come to mind. The contrary: the fact that the European Treaties continue to be amended by treaties, and provide for future such amendments, is a clear indication against any such development. The minor rôle attributed

\(^{131}\) Cf., e.g., for the UK House of Lords, Regina v. Secretary of State for Transport ex parte Factortame Ltd [1990] 3 C.M.L.R. 375, 380, per Lord Bridge of Harwich: "Under the terms of the Act of 1972 it has always been clear ..."; M. Akehurst, "Parliamentary Sovereignty and the Supremacy of Community Law", 60 BIYL 351 (1989), 356; for France Commissaire du Government Frydman, La Semaine Juridique 48 (1989 II) 21371; for Germany judgment of the FCC (\textit{supra} n. 60) - former acceptance of the thesis of the autonomy of Community law by the FCC (cf., e.g., BVerfGE 22, 293, 296) is no longer quoted by that court -; Schilling (\textit{supra} n. 32), 182; for Spain Tribunal constitucional, Declaracion D 1-7-1992, XXXIII Jurisprudencia Constitucional 460 (1992) 471.

\(^{132}\) Cf., e.g., on the Maastricht Treaty, judgment of the FCC (\textit{supra} n. 60), 98 (# 82). The expression "federation of member-States" used in the English translation is not a fortunate translation of the German "mitgliedstaatlicher Verbund".
to the European Parliament in the preparation of the draft of amending treaties in Art. N (1) (2) of the Maastricht Treaty cannot be an indication for the European people’s having adopted the treaties as a constitution. Nor can such an adoption directly, without reliance on indications, be ascertained: it cannot be claimed that there is, among the people(s) of Europe, a custom and an *opinio juris* which would consider the European Treaties as an autonomous constitution of Europe. Whilst there are some who take this view, there are at least as many others who do not share it. This is not sufficient to create a custom in favour of the view discussed. Subsequent developments under the European Treaties therefore do not premise a claim to originary autonomy of Community law.

IV. Conclusion

Constitutions may be reversed by revolution. Treaty-constitutions may also be terminated by mutual consent of the contracting parties. A secession and a unilateral denunciation are, as a rule, not permissible under international law but will be recognized if effective. The only possibility to prevent a secession is to take away the social substratum of a secession *i.e.* to merge the peoples of the state from which the secession would take place. Such a merger allows the people, as constituent power, to adopt the treaty-constitution as its own. Such an adoption may be made in the forms of the creation of customary law. If the treaty-constitution provides for its
indissolubility, it is only such an adoption which can give legal force to such a clause; as long as the treaty-constitution simply remains a treaty, it can be terminated by mutual consent.

There are historic examples for such developments. Although they have to be qualified, in legal theory, as revolutions, they allow for the organic evolution of organizations founded by treaty but becoming, over time, something more closely knit. It is not the question whether the treaty may be a constitution; in the sense of the concept used here it invariably is. But it is the question whether such a treaty can be considered a constitution in the political sense of the term, as the basic law of one people ordained by the constitutional power of that people. Under certain conditions, it can, and it was the aim of this article to elucidate these conditions on a comparative basis.