Authoritative Constitution-Making in the Name of Democracy?

Andreas Braune

Abstract As various historical examples from the French Revolution to the Arab spring show, founding a democratic polity is a tricky task. In a highly politicized situation, which is at the same time prone to violence, the constituent power of the people is easily misused or dangerously fragmented. The usurpation of power by a particular group, the re-establishment of an authoritarian order or even civil war may be the unintended consequences. On the other hand, democratic constitutions know provisions for states of exception which allow to cope with such situations with authoritative means in order to preserve the constitutional order. Why should they then be banned to create one? That might suggest that authoritative constitution-making could be an effective alternative to democratic constitution-making for the establishment of a well-ordered polity. This hypothesis is formulated on the basis of Aristotelian political philosophy, the theory of constitutions as rational precommitments and some aspects of the political theories of John Rawls and Jean-Jacques Rousseau. Even though it is formulated in terms of normative political theory, it is primarily meant to be an empirical hypothesis.

1 Paradoxes of Constitutionalism and Democracy

The history of the relation between constitutionalism and democracy is full of paradoxes and antinomies. Even though constitutional democracies are today widely regarded as the normatively most satisfying form of government, there already lies a deep paradox in the denomination ‘constitutional democracy’. On the one side, the term democracy stands for the government of, by and for the people, which is rooted in the people’s sovereignty to govern itself (as opposed to being governed by someone else). Yet sovereignty implies unrestrained self-rule. If a people is not free to choose freely from all alternatives open at a given moment, it is not sovereign in the literal meaning of the term. On the other hand, it is exactly this notion of restraining...
the sovereign – be it the demos or a sovereign prince – which is essential to constitutionalism. Horizontal and vertical separation of powers, institutional arrangements to slow down decision making, a bill of rights and judicial review of legislation are core features of modern constitutionalism and at the same time restraints on the demos which prevent it from doing as it pleases, from being sovereign. Conversely, “if the sovereign can change the law at will, then law cannot possibly bind or restrict the sovereign.” (Holmes 1995, 145) Being sovereign entails being legibus solutus, as early modern thinkers such as Bodin and Pufendorf emphasized. What follows for a democratic political order is a sort of zero-sum game between democracy and constitutionalism. In that zero-sum game the scope of majority rule or “the extent of equal political liberty” is dependent on “the degree to which the constitution is majoritarian. […] Whenever the constitution limits the scope and authority of majorities, […] equal political liberty is less extensive.” (Rawls 1971/1999, 197) This is the reason why proponents of radical democracy formulate fundamental objections against constitutionalism and regard its tools as essentially anti-democratic. 1

In political and constitutional theory, this paradox is (seemingly) dissolved by the notion that constitutions represent a restraint on the sovereignty of the demos which it imposes on itself (just as 19th century monarchs did when they ‘accepted’ or enacted a constitution restraining their power and sovereignty). They are not imposed on the demos by some heteronomous agent but are an expression of the autonomy of the people (see e.g. Bellamy 2007, 90). In opposition to sovereignty as the ability to do as one pleases, the term autonomy refers to the ability to give oneself (auto) rules (nomoi) which one is inclined to abide to in the future. The constitution then appears to be a manifestation of the will of the demos, as self-imposed precommitments, as Stephen Holmes called it. Hence the only democratically legitimate source of constitutions lies in the constituent power of the people, both at the moment of the foundation of a polity as well as during its constitutional existence. While the constituent power of the people is widely uncontested when it comes to the founding of a polity, 2 the continued existence of the constituent power of the people after that act raises the same dilemma as just described: If the demos as constituent power has the right to alter or amend the constitution at will, why should it feel bound to that constitution at all? “In relations between an individual and himself the power to bind entails the power to loose. Legally, what you freely promise yourself, you can freely fail to deliver. The same rule must logically apply to collectivities. What we the people give ourselves, we the people can take away.” (Holmes 1995, 146) The constitution is therefore nothing more than a convention of the demos which it might follow during a certain period of time, but which it can reject at any time, too. Not legally, but legitimately with recourse to its constituent power (see Michelsen 2017).

1See e.g. Wolin (2016). Turner (2015) tries to reconcile radical democracy with constitutionalism.
2However, there is another paradox associated to this situation: If the demos is constituted only through the act of constitution, as the French conception of the nation suggests, the question is raised who the demos is before that act. And if the demos does not exist before the act of constitution, how can it then be regarded as the agent of constitution?
I do not want to discuss that dilemma any further in this paper. I rather would like to come back to the rather uncontested observation that for *legitimately founding* a polity it is necessary to do this in the mode of the *pouvoir constituant* of the people. Because this is exactly what I wish to do: to contest that assumption. I will do this by exploring deeper into the nature of the act of founding by constitution-making and by referring to a specific theory of state and constitution which can best be termed as neo-idealistic. We will then see that giving a constitution in a democratic manner bears several risks for its failure and that there are certain hints that the recourse to non-democratic means of constitution-making might reduce these risks. The major argument is part of a normative theory of state and constitution and goes as follows: While the order to be established has to meet the demands known for constitutionally structured democratic polities (separation of power, rule of law & basic freedoms, some sort of majority rule, judicial review of legislation and executive action), the mode of constituting the constitution does not necessarily need to be democratic. There is some sort of output-legitimacy in constitution-making: If a democratic constitution is successfully established and applied, it is of few importance how that constitution came into being. Constitution-making can thus make use of means which are normatively incommensurable with the normative order the constitution is supposed to establish, *given* the recourse to these means increases the chances of a successful foundation of a constitutional democracy compared to the use of more democratic means.

Constituting the constitution consists of two distinct steps: its drafting and its implementation. The heavy normative weight of popular sovereignty suggests that constitutions need both be drafted and implemented democratically. The paradigmatic forms of these two steps consist, first, in the election of a constitutional assembly under universal suffrage with the mandate to draft a new constitution and, second, in the acceptance of that new constitution by a popular referendum. Both acts articulate the will of the people as sovereign and as constituent power. However, even if the implementation of a new constitution does not take the form of a popular referendum, a constitution for a democratic polity is necessarily implemented democratically. For its actual and practical implementation consists in the holding of democratic elections to its directly elected branches of government. If it is conducted peacefully and under a sufficiently high participation rate, the first parliamentary election under a new constitution can usually be seen as a tacit acceptance of the new constitution with (almost) the same implementory force as a popular constitutional referendum. While it can be regarded as successfully adopted by the demos at this moment (and the constitution-making process as formally terminated), the new constitution is not fully practically implemented yet. For the success of a democratic constitution is not discernable at the first election establishing the new political power.

---

3In fact, this mode of constitution-making through representation is already non-democratic, because “der verfassunggebende Willen des Volkes kann nicht repräsentiert werden, ohne daß die Demokratie sich in eine Aristokratie verwandelt.” (Schmitt 1928, 80). (Representing the constituent will of the people leads to the transformation of democracy into aristocracy. [my translation]) To be drafted democratically in the actual sense, it would be necessary to draft it on the *agora* by all citizens.
and ‘loyal opposition’, but at the first democratic, peaceful and constitutional *change in power* and the transformation of the old powerholders into a new loyal opposition. Only then has a democratic constitution proven to be a success. Hence, the practical implementation of a democratic constitution cannot be but democratic. Otherwise, it is not fully implemented (yet). The primary importance of distinguishing between the *drafting* and the *implementation* of a constitution lies in the possibility to open the drafting-phase for authoritative elements while a constitution can still gain democratic output-legitimacy during and after the implementation phase by making democratic use of it.

**2 The Art of Constitution-Making as Law-Making**

So let us now take a closer look at the act of constitution-making itself, the act of drafting a constitution. What are its characteristics? What sort of action is it? From a judicial point of view, it is not an *illegal* act in the term’s literal meaning, but an *extra*-legal act. It is not illegal because at the moment the demos acts as a founding constituent power, it is not bound to preexistent legal norms. It is an extra-legal action because it creates a new “political order *ex nihilo*” (Preuss 2006, 365) and gives it a new legal form. This is the reason why legal positivists are troubled with this sort of action because it is not reducible to judicial categories or explicable within a legalist framework. The constitution does not derive from or is not dependent on other positive legal norms. For legal theorists with an eye for the difference between law and the political, such as Carl Schmitt (see Kennedy 2004), it was therefore clear that constitution-making by the sovereign is not a legal, but a *political* act. The constitution represents the expression of the political will of the people. It gives the ontological mode of being it wishes for itself a legal form (see Schmitt 1928, 20–25). Schmitt – in his unique Schmittian parlance – spoke of a “existentielle Totalentscheidung” (ibid., 24) of the demos. If it wills so, it can give a slave-owner society a constitutional form, as the framers of the US-constitution at least partially did with the constitutional compromise of 1787. In that perspective, making a constitution is a political act just as any other majoritarian decision of the people. It may establish rules which demand highly qualified majorities for its modification, but these decisions remain political in nature just as any other majoritarian decision (now, however, more or less bound to the principle of legality and constitutionality).

Contrary to this view of legal theory, political theorists of a certain strand refuse to regard constitution-making as a political act. For Hannah Arendt, acting politically means speaking and acting together with others on issues of common interest *within a polity which is already constituted*. It is a distinctively Aristotelian view (see Aristotle, 1326a1) which puts constitution-making *outside* the realm of actual politics. Arendt follows Aristotle and “the Greeks” when she underlines that “the laws, like the wall around the city, were not results of *action* but products of *making*” (Arendt 1958, 194, my emphasis) and hence products of *homo faber* and not the *zoon politicon*. Designing a constitution is *poiesis*, not *praxis*. “Before men began
to act, a definite space had to be secured and a structure built where all subsequent actions could take place, the space being the public realm of the *polis* and its structure the law; legislator and architect belonged in the same category.” (ibid. 194–195) Hence constitution-making is a *pre-political* action in that view. Acting politically is something different from creating a constitution. Framers and politicians and their actions are of distinct quality (see Elster 2000, 172). While only citizens of a polity are – in virtue of their citizenship – entitled to act politically, framing the constitution is not necessarily their task. The lawmaker, i.e. the constitution-maker or the legislator as a framer “was someone who had to do and finish his work before political activity could begin. He therefore was treated like any other craftsman or architect and could be called from abroad and commissioned without having to be a citizen.” (Arendt 1958, 194) The legislator is supposed to set up the institutions and a stable framework for political action. The quest for the good political order becomes a matter of an appropriate design of its fundamental laws: “Law is a form of order, and good law must necessarily mean good order.” (Aristotle, 1326a1) What follows is the assertion that political and constitutional stability in a polity are the results of a well-designed constitution (see Weingast (2006), Rasch and Congleton 2006). Conversely, badly designed constitutions fail to secure that stability (as has long and falsely been asserted for the Weimar constitution). Constitution-making in that view becomes an art or a craft which can – as any other art or craft – be done with more or less ability, competence and preciseness. A skillful legislator knows to work with the ‘material’ he finds in the future polity: its size, temper, culture, history (including its constitutional traditions where there are some) and geographic circumstances etc. He creates fundamental laws whose ‘spirit’ (Montesquieu) is in accordance with that of the inhabitants of the polity.

The introduction of a non-political and possibly external legislator as a framer of the constitution is thus a central element of Aristotelian political theory. It *describes* this action as apolitical because political action takes place only *after* the basic laws of the polity are constituted. At the same time, this strand of political theory also *judges* this sort of constitution-making as normatively preferable. The existence of rule of law as constitutionality is preferable to its absence, because it is regarded as a safeguard against the domination of men over men and the appropriate form for a polity of free and equal citizens. “He therefore that recommends that the law shall govern seems to recommend that God and reason alone shall govern, but he that would have man govern adds a wild animal also.” (Aristotle 1287a) (Constitutional) Law is seen as the neutral set of rules which regulate social and political interaction within the polity and which guarantee the free and equal status of its citizens. If (groups of) citizens are entitled to make these laws, they can impose their particular interests on others which is destructive of political equality. In the Aristotelian view, the sovereignty of law has to replace the sovereignty of the people because its unchecked rule tends to be despotic and to suppress minorities: This is the case when “the multitude is sovereign and not the law; and this comes about when the decrees of the assembly over-ride the law. This state of things is brought about by the demagogues;”

---

4Critical on that interpretation: Förster (2009), 251–272.
for in the states under democratic government guided by law a demagogue does
not arise […], but where the laws are not sovereign, the demagogues arise. […] A
democracy of this nature is comparable to the tyrannical form of monarchy, because
their spirit is the same, and both exercise despotic control over the better classes, and
the decrees voted by the assembly are like the commands issued in a tyranny.” (ibid.,
1292a) Even though this opposition between the ‘multitude’ which is “sovereign
not as individuals but collectively” on the one hand, and ‘the better classes’ on the
other hand reminds us of the aristocratic fear of the tyranny of the majority (from
Tocqueville over Mill to Hayek), the important argument for the art of constitution-
making is the following:

We can find two different types of law in modern democratic societies: First, there
are those laws which are ‘decrees of the assembly’ in Aristotle’s terms and which he
would not call laws. They are products of the legislative branch of government and
hence instruments of politics. In a constitutional polity they have to be formulated
in accordance with the constitution and the principles of rule of law, but can – at
the same time – be an expression of the political will of the democratic majority. If
majorities change, they can alter these laws and ‘make politics’ through new parlia-
mentary legislation in various fields of policy. Second, there are the basic laws of the
polity which constitute the different branches of government, regulate their interac-
tion and secure the general status of the polity’s citizens as free and equal persons
(usually, through a Bill of Rights). Rousseau calls these laws “fundamental laws”5
because they determine “the relation of the whole to the whole, of the Sovereign to
the State.” (Rousseau 1763/1782, 2/12) In a constitutional polity they are higher-rank-
ing than political laws and describe the framework of constitutionality the latter
have to respect. These fundamental laws are neutral, apolitical and at best not depen-
dent on shifting political majorities. For if they were, political factions could mold
institutional design to their advantage, suppress minorities and hence usurp power
and behave despotically – a despot being someone “who usurps the sovereign power”
and “who sets himself above even the laws.” (ibid. 3/10) If the political majority can
alter the basic laws at will, it can transform the political order in a way which perpet-
uates its power position and hence abolishes the democratic competition between
the majority and its loyal opposition. This is not only observable in Poland or Turkey
these days, but does for instance also play a role when the majority has the right to
tailor electoral constituencies. Rousseau follows that “he, therefore, who draws up
the fundamental laws has, or should have, no right of [political] legislation.” For
“the legislator occupies in every respect an extraordinary position in the State. […] This office, which sets up the Republic, nowhere enters into its constitution. […] He
who holds command over men ought not to have command over the laws, he who
has command over the laws ought not any more to have it over men; or else his laws
would be the ministers of his passions and would often merely serve to perpetuate
his injustices.” (ibid. 2/7)

5He also calls them political laws. However, I wish to distinguish between basic and political laws
in the way described here, underlining the neutral and apolitical character of fundamental laws.
The difference between these two types of laws – constitutional laws and political laws – is taken into account when changes of constitutional law require highly qualified majorities while absolute majorities are sufficient for passing political laws. The difference is also present in the terminological difference between legislator and legislature, the first being the actor who gives and changes the constitution, the second being the branch of government passing political laws. And even though both institutions are usually identical in an existent democratic polity (in contrast to Rousseau’s claim for a strict separation), we often find a symbolic differentiation depending on whether the parliament comes together as legislature or as legislator. In France for instance, Senate and Assemblée Nationale hold a joint session in Versailles under the name of Congrès du Parlement français when acting as legislator. This is supposed to show that the doing of parliament at this moment is something categorically different from its usual doing when politics are done through legislation. It does not articulate a particular political will but acts as a representative of the people’s constituent power.

3 Ideal Constitution-Making in a Non-ideal World

The main argument the Aristotelian tradition wants to make is that for the necessary distinction between politics and basic laws, i.e. constitutionalism. This separation is highly compatible with liberal constitutionalism, for a liberal constitution sets up a neutral framework for politics but does not favor one political opinion before the other or give structural preferences to one group or the other (which it fails to achieve, as its opponents from the left argue). The constitution is constitutive of equal political liberty and the institutions for its enjoyment, and not itself political. Yet constitutions and their constitutional laws have to come into being somehow. So, the question arises which procedure or which mode of constitution-making suites best for guaranteeing the establishment of such rules. At this point, certain reflections of neo-idealistic political theory come into play and add to the assumptions of Aristotelian political theory and liberal constitutionalism so far described.

First, the constitution must be drafted in a certain mindset – no matter who does it. The power of constitution-making must not be misused for particular political interests, it must not be used in a politicized fashion. If it is so used, it is likely to erect a despotic political order. The mindset required for constitution-making is described by John Rawls in A Theory of Justice when he introduces his four-stage

---

6Wandan (2015) argues that even though legislation and constitution making are two distinct kinds of actions, they both follow the same logics of action, namely those of representation.

7Carl Schmitt argues that the parliament even in these moments acts as legislature, not as legislator. It changes the constitutional text, not the constitution. See Schmitt (1928), 91–92, Sect. 10/I.

8On the importance of a specific constitutional mindset, see in this volume Ming-Sung Kuo, From Institutional Sovereignty to Constitutional Mindset.

9A similar mindset is required for certain constitutional actors within a constitutional system. See Vermeule (2001).
sequence to establish just institutions in accordance with his principles of justice. Each stage of this sequence describes a particular ‘mindset’ the actors have to have in order to act justly. The first stage and its particular mindset are well known as the veil of ignorance which is supposed to put actors in the position to find the basic (and universal!) principles of justice. “After the parties have adopted the principles of justice in the original position, they move to a constitutional convention.” (Rawls 1971/1999, 172) At this second stage, the parties “are to decide upon the justice of political forms and choose a constitution.” The next stages describe the ‘mindsets’ for a just legislature (3rd stage) and a just judiciary and executive administration (4th stage). Apparently, Rawls follows the distinction between constitutionalism and politics, between constitutional and political law, for each represents a distinguished stage in this sequence. At each stage, “the veil of ignorance is partially lifted.” (ibid. 172) “The flow of information is determined at each stage by what is required in order to apply these principles intelligently to the kind of question of justice at hand, while at the same time any knowledge that is likely to give rise to bias and distortion and to set men against one another is ruled out.” (ibid. 175/76) The four stages thus represent a “series of points of view from which the different problems of justice are to be settled. […] Thus, a just constitution is one that rational delegates subject to the restrictions of the second stage would adopt for their society.” (ibid. 176, my emphasis) The mindset of ideal legislators is thus a modification of the veil of ignorance which is supposed to guarantee that they “arrive at their choice together as free and equal rational persons” and to deprive them “of the knowledge that would enable them to choose heteronomous principles.” (ibid. 222)

But what is that point of view or mindset? Well, delegates to the constitutional convention of course know those things which persons behind the veil of ignorance already know, especially the general circumstances of human social life and an “understanding of the principles of social theory.” (ibid. 172) But in addition, “they now know the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on. […] Given their theoretical knowledge and the appropriate general facts about their society, they are to choose the most effective just constitution.” (ibid. 172–73, my emphasis) They still do not know their particular place in society or dispose of any other particular information about themselves or others in society, for this would make them act like politicians, not like framers. But even though they do not know their particularities, ideal framers may and must know that citizens of a modern society will hold different political views and pursue different political interests. While framing the constitution, they must be aware of the factuality of a reasonable pluralism as described in Political Liberalism by Rawls. All this actually

---

10 However, there is a somehow cryptical statement to be found which seems to undermine the strict separation between the second and the third stage: “By moving back and forth between the stages of the constitutional convention and the legislature, the best constitution is found” (Rawls 1971/1999, 174). This seems to suggest that Rawls regards practical constitution-making as an act of legislature which demands a different mindset of actors than normal legislature but which can be done by its actors as well.
sums up to the Aristotelian and Rousseauean legislator: a de-contextualized and pre-
political rationality framing the constitutional laws for a particular polity, but which
remains unpolitical itself. In Rawlsian terms, this mindset or point of view is the
one which delegates to a constitutional convention ideally have. It is part of what he
described as ideal theory. “This scheme is part of the theory of justice as fairness
and not an account of how constitutional conventions [...] actually proceed.” (ibid.
176, my emphasis) It is desirable that they do so, but far from sure that they do in a
non-ideal world. At the same time, members of a real constituent assembly should
possess the ability to take this point of view actively: they are required to act as
framers, not as politicians – and they should know this. They should be able to ask
themselves whether proposed regulations are just norms for their polity, not whether
or not they correspond to or support their particular political interest or worldview,
or worse, their particular group. Ideally, constitution-making follows the principle
of public reasoning and is not a form of political bargaining or of finding some political
compromise.11

Another aspect must be added here in order to count these Rawlsian reflections
as being part of neo-idealistic political theory, for they sound more analytical and
less normative than they actually are. The reason for this is that the question of
the ‘mindset’ of framers of a just constitution is not only one of knowledge or
information, but also one of the normative standpoint they have to take. As rational
actors at the second stage of the four stage sequence, they already agreed on the
general principles of justice which they share and wish to realize in their polity.
So the legislators do not have to find any constitutional scheme suitable for their
society, but a scheme which suits it and most perfectly embodies these principles,
especially the first principle of equal personal and political liberty.12 A legislator
who knows he has to frame constitutional laws for a society without any democratic
or human rights tradition or with a rather authoritarian political culture will – in
light of his acceptance of the principles of justice – still be inclined to make laws
which at least enable a transition to a ‘more perfect union.’ So even though an
‘overlapping consensus’ for basic rights and equal liberty is usually and practically a
consequence of free and just institutions in a society, he who sets them up must still be
guided by its principles in advance. An ideal framer does not only take a particular
epistemological point of view at the stage of a constitutional convention, he also
takes a particular normative standpoint expressing the principles of equal liberty.

11See especially Chap. 4 “A Rational Reconstruction of the Practice of Constitution Making” in
Patberg (2016). In comparison to my account, Patberg sketches out a Habermasian ideal theory of
constitution making and constitutional amendment. See also Habermas (2001).
12This priority of the first principle derives not only from the lexical order of the two principles which
gives priority to the first to the second principle, but also from a “division of labor” which Rawls
sees in the four-stage sequence and the ‘responsibility’ of each stage to realize the two principles:
“The first principle of equal liberty is the primary standard for the constitutional convention. […]
Thus the constitution establishes a secure common status of equal citizenship and realizes political
justice. The second principle comes into play at the stage of the legislature. It dictates that social
and economic policies be aimed at maximizing the long-term expectations of the least advantaged
under conditions of fair equality of opportunity.” Rawls (1971/1999), 174–175.
Altogether, traditional idealistic political philosophy in the tradition of Rousseau, Kant and Hegel regarded this standpoint as being one of *reason*. Not men, laws shall govern, and consequently, not men, reason shall draft these laws.

Second, we have to raise the question what happens with these ideal-theory-considerations when they are confronted with the real, non-ideal world. Ideally, every member of the demos who elects a constituent convention and who will later ratify the constitution, as well as every member of that convention can effectively take that position of a reasonable and just legislator. However, real-life constitution-making usually takes place in contexts and under circumstances which prevent these principles for ideal constitution-making from being applied effectively. Usually, drafting a new constitution occurs in situations of revolutionary change after the breakdown of an *ancien régime*. These situations are characterized by strong political emotions and an extraordinarily high degree of politicization. The beneficiaries of the old order stand against the proponents of change, while that group is more often than not united only through its opposition against the old order and itself divided along various political, social and cultural cleavages. Each of these groups assigns its particular political hopes to that situation in which a new political order can be established from scratch. It is too tempting to try to inscribe their particular political positions into that new order. The danger is therefore high that the process of constitution-making gets politicized as well. In its worst case this may lead to the usurpation of political power by one particular group as described above. At best, various groups form some more or less stable balance of power and find some more or less reasonable political compromise. Yet such compromises easily collapse with the dissolution of their underlying balances of power.

In the parlance of the theory of constitutions as rational precommitments, “constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy.” (Elster 2000, 89) They are some sort auf “auto-paternalism” (Thomas Schelling) which the demos uses in its ‘sober’ moments against itself to prevent itself from acting irrationally when it is less clearheaded: “A constitution is Peter sober while the electorate” – sometimes – “is Peter drunk.” (Holmes 1995, 235) The legislator is supposed to act like Ulysses before he is tempted by the sirens. Unfortunately, revolutionary situations are usually not exactly situations of calm temper. The sirens chant loud and clear. At the same time, these are exactly the situations in which that quality of putting oneself in a reflective mindset is required if the demos is supposed to draft a constitution in that sense. Historically, constitutions are rarely drafted during peaceful phases of stability and prosperity, or in circumstances with a vast time budget for careful reflection and thorough discussion. So in the heat of revolutionary situations chances decrease significantly that people will act as ‘reasonable’ legislators. It’s like asking Peter to work out some clever precommitment-strategy to prevent himself from driving drunk while being drunk.

---

13…and guarantee that people govern themselves through reasonable principles.
14Critical on that account: Waldron (1998).
There are three further aspects which worsen the prospects of a successful and stable constitution-making in such situations. First, they are usually marked by a high degree of violence. When old regimes collapse during a war (as was the case before the constitution-making of the Weimar Republic), this is apparent. But it is of course also observable in ‘normal’ revolutions when the old regime is removed by force. Violence is thus widely regarded as a legitimate means of politics in such moments. And even if the collapse of the old regime happens in a non-violent way, the recourse to violence is in the air as the fear of violent counter-revolution or violent usurpations of the revolution by particular groups. Moments of (re-)founding a polity are thus marked by a high degree of explicit and tacit violence. The negative emotion of fear is very present – and it is no good guidance for calm reflection. Constitution-making in such situations must go hand in hand with the confirmation or the reestablishment of the state’s monopoly to the use of force and prevent the revolution to slide into civil war. This is historically and empirically observable from Weimar to the Arab spring revolutions. A central threat to the establishment of a constitutional democracy lies in the widespread demand for security and the preparedness to have it satisfied by some sort of authoritarian savior, such as the Egyptian generals in the course of the Egyptian Revolution after 2013. At the same time, constitution-making with various competing factions may lead to a competition for the support of the armed forces and may hence increase the danger and fear of a usurpation of the revolution by the group which succeeds in that competition.

Second, – and this is also very well observable in the countries of the Arab spring and in prior historical examples – successful constitution-making in revolutionary situations is dependent on economic success. Revolutions are often not actually caused, but driven by economic need and injustices and supported by social groups suffering from both. They attach high hopes for economic improvement to the change of the political system and are ready to withdraw support for the new system with its continued incapacity to alleviate their economic situation. This readiness can easily be augmented by the fear of actual and tacit violence just described. Even though priority must be given to the questions of political order which are raised during a revolution – as Hannah Arendt argued in her book On Revolution (Arendt 1963, 59–114) – the founding of the republic will not succeed if economic improvement for the least advantaged fails to appear or if the economic situation of the middle classes deteriorates significantly under the new system.

Third, – and this is a crucial point which will lead us back to idealistic political theory – ‘liberal-democratic’ revolutions rarely occur in well-ordered societies but usually in rather despotic, authoritarian countries. Some abstract wish for equal rights and liberties, for just political and social institutions may drive some, maybe even all revolutionary groups. But they are not and cannot be motivated by strong attitudes which result from the enjoyment of these freedoms and such institutions. On the other hand, citizens of rather well-ordered societies tend to share an overlapping consensus about the importance of equal rights and liberties and democratic institutions. Many

---

15See in this volume Fatih Öztürk, Again: From 1867 to Today. Making a Constitution under an Elite Umbrella in Turkey.
of them will dispose of a “morality of principles” (Rawls 1971/1999, 414) rather than of moralities of authority or association. And they will rather hold “reasonable comprehensive doctrines” (Rawls 1993)\textsuperscript{16} in their private and public lives instead of unreasonable or even fanatic doctrines. The pluralism in a nearly well-ordered society will be a reasonable pluralism, not a dogmatic or agonistic pluralism. In short: Its citizens are quite well-prepared to be good legislators – which they do not need to be. This preparedness, which is an effect of the socializing force of just and reasonable institutions, cannot be found to the same extent where those institutions never existed and unfolded that force. In despotic countries we rather find a lack of this sort of overlapping consensus, strong affiliations to moralities of authority or association (such as strong ties to ethnicity, tribalism, nationalism, clan-structures), strong ties to rather unreasonable comprehensive doctrines (in the Rawlsian sense) and quite often a public sense of justice which is dominated by one of these (religious and authoritarian) doctrines or by moralities of association (nationalism). That does not mean that every single person in such societies is a hardcore authoritarian personality, but that these structures tend to prevail in comparison to an open society (which knows authoritarian characters as well, see D. Trump). Hence many citizens and members of the elite of formerly despotic countries will lack the ability to actively take the standpoint of an ideal legislator (or even come close to it). This is of course the case for those who actively reject these values, but often enough also for those who are driven by that abstract want for equal rights and liberties and democratic structures. When fighting for ‘democracy’, such actors tend to overemphasize majority rule and to underestimate constitutionalism (for they knew authoritarian constitutionalism in advance) and to misuse majorities for one-sided constitutional policies.\textsuperscript{17}

The paradox of founding\textsuperscript{18} a constitutional democracy can therefore be formulated as follows: While citizens of a constitutional democracy tend to benefit from the socializing force of just institutions and would therefore frame a constitution creating such institutions, citizens of a ‘less perfect union’ are handicapped in taking the position of good legislators. Constitution-making in the mode of the constituent power of the people in a well-ordered society is feasible but not necessary, while it is desirable but not feasible during the transition from badly-ordered to well-ordered societies.

This paradox was first described by Rousseau in the Social Contract in exactly that chapter in which he introduces the legislator as the external “engineer who invents the machine” (Rousseau 1762/1782, 2/7) and thereby follows the Aristotelean tradition of seeing the framing of the constitution as ‘making’, not as political acting. But more importantly, Rousseau emphasizes exactly that ‘transforming’ nature of the institutions the legislator is supposed to create: “He who dares to undertake the making of a people’s institutions ought to feel himself capable, so to speak,

\textsuperscript{16}See John Rawls, Political Liberalism (Columbia University Press 1993).
\textsuperscript{17}See for instance Victor Orbán’s or Jarosław Kaczyński’s references to their democratic support and ‘democratic majorities’ for their questionable constitutional policies.
\textsuperscript{18}Taking up the debate between Jürgen Habermas and Frank Michelman, a closely related paradox is described by Olson (2007).
of changing human nature, […] of altering man’s constitution for the purpose of strengthening it. […] He must, in a word, take away from man his own resources and give him instead new ones alien to him, and incapable of being made use of without the help of other men.” (ibid.) In that idealistic strand of political philosophy, creating a just constitution is some sort of a paternalistic intervention which helps people to leave the state of nature and live a civilized life under just and reasonable institutions. The legislator must apply a sort of reason which the masses cannot have yet but which will be open to them once his work is finished: “For a young people to be able to relish sound principles of political theory and follow the fundamental rules of statecraft, the effect would have to become the cause; the social spirit, which should be created by these institutions, would have to preside over their very foundation; and men would have to be before law what they should become by means of law.” (ibid.) So the external or authoritative legislator solves the hen-egg-problem of reason and constitutionalism because he is a bearer of that reason which the demos needs but cannot have yet. He makes reasonable laws which then, after his work is done and while people live and do politics by these laws, make people reasonable too.

But in Rousseau’s considerations the legislator has to solve another problem: How should he convince people of the reasonableness of constitutional laws which restrain their natural freedom and whose beneficence becomes apparent only after their implementation? Rousseau – in contrast to Hegel who knows a heroic right to create just institutions by force – rules out force, apparently, because force is a means of the state of nature itself and not suitable for leaving it. But he needs to rule out appeals to reason too, because the right sort of reason to appeal to is not there yet. “The legislator therefore, being unable to appeal to either force or reason, must have recourse to an authority of a different order, capable of constraining without violence and persuading without convincing.” (ibid.) Rousseau seems to be a bit clueless at this moment because he knows not how to help himself but by taking recourse to divine authority. Within ideal theory, the legislator as a bearer of reason has “nothing in common with human empire.” (ibid.) Practically, “this is what has, in all ages, compelled the fathers of nations to have recourse to divine intervention and credit the gods with their own wisdom, in order that the peoples, submitting to the laws of the State as to those of nature, and recognizing the same power in the formation of the city as in that of man, might obey freely, and bear with docility the yoke of the public happiness.” (ibid.) This is the only external anchor point Rousseau can imagine which gives the legislator the authority he needs to ‘persuade without convincing’ by reason.

This is of course not very satisfactory. Still, these reflections pave the way for finding a possible solution of the reason-constitutionalism-dilemma which we also find when contrasting Rawlsian ideal theory with constitution-making in a non-ideal world. Apparently, constitution-making cannot be done by public reasoning or by a democratically elected assembly if the institutional and normative preconditions for such procedures do not exist yet, and if their application increases the chances of authoritarian misuse, violent turmoil and the failure to set up a just polity. What we learn from Rousseau is that some sort of authoritative, quasi-paternalistic constitution-making might solve that dilemma.
I am well aware that this conclusion is not very popular in the light of various objections and that its implications run against widespread calls for more democratic, more inclusive, more discursive constitution making processes. Furthermore, radical democracy and its theory of revolution highly estimate the high degree of politicization in revolutionary situations, because exactly this constitutes the demos in ‘democracy’. The demos actually comes into being in these moments through politicization. Constraining the demos through constitution-making cuts it off from its political self-empowerment it just won in the liberation from an exclusionary system. Proposing a rather authoritative than democratic constitution-making process even aggravates this re-disenfranchisement. While I appreciate that view very much, I cannot see what is won for reaching the goal of justice if the degree of politicization in combination with a contested monopoly of force rises to a degree which threatens the polity to disrupt into civil war. In these moments, it can be wise for the demos to ‘commission’ (Arendt) a legislator who secures the achievements of the revolution in its name by making a workable democratic constitution. It might even be helpful to abide to a revolutionary usurper who defends these achievements against potential particular usurpers or against counter-revolution and who authoritatively drafts and implements such a constitution. High risks are attached to these procedures as well, but they are probably not higher than to hustle a society into turmoil and civil war.

4 Ideal Types of Authoritative Constitution-Making

In what remains in this paper I wish to sketch out three ideal types of authoritative constitution-making. I intentionally call them ideal types, for authoritative constitution-making and democratic constitution-making practically never occur in pure form. Real life constitution-making processes combine elements of both. They represent a particular mixing ratio of both. What is constitutive for authoritative modes of constitution-making is the necessity of some anchor point outside the sovereignty of the demos and its constituent power. And if it is to serve as an anchor point to constitute a democratic polity, this anchor point has to be acceptable by the demos. Otherwise, the so imposed constitution can and will not gain legitimacy.

19See Hart (2003), Eisenstadt et al. (2015), Elkins et al. (2008). I am grateful to Solonga Wandan who currently has a paper under review, entitled ‘Do Citizens Influence Constitutional Content? Mechanisms of Popular Constitution Making in Comparative Perspective’. See in this volume Manar Mahmoud, Constitution-Making, Political Transition and Reconciliation in Tunisia and Egypt: A Comparative Perspective. Our papers are contradictory only at first sight. We both agree as political scientists that the mode of the constitution making process is of high importance for the legitimacy and effective implementation of a democratic constitution. While I agree that constitution making processes can have the reconciliatory effect Manar Mahmoud suggests, her comparison between Tunisia and Egypt shows that more inclusive and more discursive modes of constitution making (i.e. a more ‘ideal’ process) are based on certain normative and institutional preconditions. Citizens and their society must be ‘fit for discourse’ in order to engage in that type of deliberation. In that regard, her findings support my hypothesis.
Consequently, the successful use of modes of authoritative constitution-making depends on certain preconditions which must prevail.

First and in line with Rousseau, there is *divinely assisted constitution-making*. It is not exactly a technical mode of constitution-making, for rarely Gods or beings of their kind draft constitutions and send them to earth. If one believes, they sometimes do something similar through Moses, Jesus or Mohammed, but their action did not constitute a democratic polity for a given society. However, secular constitutions often take recourse to some divine formula at their beginning; or to some natural rights formula which fulfills the same function as an ‘external’ anchor point. They do this to ‘root themselves’ in something outside the constituent power of this particular demos and its polity. The German *Grundgesetz* for instance knows such a formula when it starts with Article 1: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” (Basic Law, 1(1)) This human dignity is preexistent to the constituent power and hence not tangible by it.

However, in secular, post-religious or multi-religious societies, appeals to some divine authority are at least problematic, if not unfeasible. They are especially problematic when formulated too narrowly or with recourse to a particular god or ‘comprehensive doctrine’ (Rawls). An explicitly Christian formula would, for instance, fail to bind adherers to other faiths. In that light, the hidden divine formula of the *Grundgesetz* is very intelligently designed, because many religions and even non-religious groups can accept it as the normative and somehow ‘transcendent’ rooting of the constitution.

At the same time, it is important to notice that the use of some divine authority for this sort of ‘rooting’ is not equivalent to designing a religious constitution. A particular religion does not necessarily become a structuring structure for the constitution only because some credit is given to it at the beginning of the constitution. Divine authority and secular constitutions (i.e. securing freedom of religion etc.) are indeed compatible. And it might even be advisable to use a narrow religious formula taken from one particular doctrine. If there is one dominant religion in a society and if it is strongly believed in by its members, why should the authority of a secular constitution not be enhanced with such a formula? It might prove helpful in order to open up the ‘overlapping consensus’ for strong adherers of that ‘comprehensive doctrine’ and to bind them to the constitutional order. It might even prove helpful to transform a doctrinarian pluralism into a reasonable pluralism in the Rawlsian sense if it helps to unite the major doctrines in a society under the umbrella of a secular constitution.

Second, there is *internal expertocratic and authoritative constitution-making*. Even very democratic constitution-making procedures know expertocratic elements for very practical reasons. It is rare that a constitution is actually drafted by the entire demos which meets on the fields outside the city. And it is unfeasible in larger territorial states. The Philadelphia convention was a highly expertocratic (and aristocratic) body. Representative national assemblies with a constitution-making mandate often know constitutional committees, which themselves often know one individual ‘father’ of the constitution like Hugo Preuss for the Weimar constitution. All these steps are steps away from a truly ‘democratic’ mode of constitution-making. As
it is an act of craftsmanship (as argued above), judicial experts are the dominant craftsmen who do the actual ‘making’ of a constitution. If there is a widespread trust into the judicial elite of a country (and its democratic reliability), this mode of constitution-making is easily accepted, especially if this elite is democratically ‘commissioned’ to draft a constitution and if their product is accepted democratically afterwards. Ideally, the members of the constituent committee draft the constitution in the mindset as described by Rawls. This is the usual course of events of a very democratic constitution-making process which tolerates expertocratic elements for practical reasons.

However, the needle may show to the rather authoritative side of the spectrum too. A council of experts may be nominated less democratically than through a national election for a constituent convention.\(^{20}\) It may be called into existence by current or revolutionary power holders or it may nominate itself if it has the power and authority to do so (like de Gaulle did more or less in 1958). In all these and other imaginable ways it comes into being without the will of the demos being explicitly expressed. And yet it can do the same work and yield the same results. If trust into such a council (or some other form of tacit acceptance) is high and if its product is accepted and democratically implemented, a constitution can gain sufficient output legitimacy even though its input legitimacy is deficient from a democratic point of view. This was for instance the case in Germany, where the “Parlamentarische Rat” which drafted the Grundgesetz in 1948/49 was not directly elected by the demos and hence less democratically legitimized than the national assembly of Weimar and its constitutional committee. Yet it drafted a constitution which proved to be more successful in the long run.

While the establishment of an expert council can be quite authoritative, the implementation of its product can be so too, at least at the beginning of the establishment of a democratic order. Some sort of ‘constitutionalizing dictatorship’ may be legitimate, if it secures the implementation of a democratic constitution – ‘dictatorship’ being used here in the Roman tradition of a Republican institution and in the sense of a “provisional dictatorship” as described by Schmitt (1921/1994, 1–41).\(^{21}\) The power of bad will and the preparedness to use force of anti-constitutional and anti-democratic minorities (which in sum may even represent a majority) may present an existential threat to a young constitutional order. It may hence be necessary that it starts its existence with a state of exception, even to the degree that the realization of some democratic or basic civil rights is postponed until this threat is banned. (They are not ‘suspended’ in the literal meaning, because they were not effectively applied yet.) Various Western constitutions know provisions for emergency and even

\(^{20}\)In that regard, the Philadelphia Convention was less democratically constituted than the National Assembly of Weimar. At its time, it was probably the most democratic attempt to draft a constitution for it was the first time such an assembly was elected through universal – male and female – suffrage. Hence every establishment of a constitutional convention can be spotted at a particular point of an authoritative-democratic-spectrum.

\(^{21}\)See also the debate about the, guardian of the constitution “between Carl Schmitt and Hans Kelsen during the Weimar Republic: Vinx (2015).
an individual right to resistance to *preserve* their constitutions in cases of constitutional emergency. The *Grundgesetz* for instance states in Article 20/4: “All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.” (Basic Law, 20(4)) Articles like this are *conservative* in nature, because they authorize the use of authoritarian – or even violent – means for the preservation of democratic constitutions. Conversely, there might be a right to use such means to *create* them and put them into action. If it is allowable to suspend basic freedoms and democratic procedures to save democracy and rule of law, why should this be banned for their implementation? The Weimar constitution for instance only survived its turbulent beginning thanks to the much-maligned Article 48, which was also used to protect the Republic against an attempted putsch by Hitler and Ludendorff in 1923 (see Dreyer 2012).

However, as the example of the Weimar constitution and its ending shows, a great danger comes with associating the establishment of a democratic constitution with the possibility to suspend it. For it presents exactly the same opportunity for the usurpation of the state and the revolution it is supposed to ban. Sometimes, one simply cannot know in advance whether some particular dictatorship represents a constitution-saving state of exception and withdraws itself from power to establish democratic normalcy, or whether the party so acting turns into a real dictatorship and (re-)establishes an authoritarian political order. Once the results of a revolution have to be secured by authoritarian means, this risk seems to be inevitable, and only history can tell, which side the actors were on. In the aftermath of the military coup d’état in Egypt in 2013 it was for instance quite unclear whether or not it served to save the revolution or to reestablish a new dictatorship by the army. We only learned afterwards that Abdel Fattah el-Sisi led Egypt into a new era of authoritarianism, not into democracy (see Zwitter 2015). But as the case of Myanmar/Burma shows, it is not completely unrealistic to see a military dictatorship hand over power to democratic normalcy and put a democratic constitution into action, even if it takes some time and compromise. This process was – in various forms – supported and enhanced from abroad, which leads us to the final ideal type of authoritative constitution-making.

So third, there is *external authoritative constitution-making*, which follows the Aristotelian notion that a legislator can be ‘commissioned’ from abroad. Most in line with the idea of commissioning some external, uninvolved ‘craftsman’ for constitutional design is the invitation of judicial experts from abroad. There is a long tradition to consult experts for constitutional law from countries with an established constitutional democracy, which represents a regular expertocratic element in rather democratic constitution making processes. However, the idea of ‘commissioning’ is also crucial in a precommitment perspective. Peter sober always needs some third party for his autopaternalism: He hands over his car keys to a friend and tells him not to give them back to him, no matter how much he insists after various drinks. Ulysses needs his crew, an addict someone who locks him up when getting weak, and so on. Equally, a demos might need some help of that sort when it comes to making and implementing a democratic constitution. The explicit commissioning of an external legislator would thus be an expression of the autonomy of the demos. However, this is rarely the case. At best, there is some tacit demand for external
support or a loud minority articulates it explicitly. At the same time, this topos gives
rise to dangerous opportunities for misuse. Did the Iraqi people want to be liber-
ated and benefit from the blessings of a democratic re-founding of their polity? It
is the old objection against all forms of paternalism: Nobody knows what the other
really wants and whether or not the paternalist is as altruistic as he pretends to be. So
arguing for external authoritative constitution making indeed helps to open Pandora’s
box of what James Tully called the imperialism of modern constitutional democracy
(Tully 2007). However, it is not impossible that some help or some pressure from
abroad facilitate the drafting and implementation of a democratic constitution, which
then gains quite some output legitimacy. For instance, the Parlamentarische Rat in
Germany was established by the victorious allies and not by some articulation of the
political will of the German people.

When speaking of external authoritative constitution-making, I wish to distinguish
between two forms: political and judicial. Affecting constitution-making politically
from abroad is the ‘traditional’ form and reaches from very drastic varieties (first
invasion, then occupation, then imposition of a constitution) to rather tacit forms like
NGO democracy promotion or the granting of economic or symbolic benefits. This
political version is not automatically a means of imperialism as described by Tully,
but it is very prone to become one, because it can easily be used strategically. This
is not the case to the same degree for the judicial version of external authoritative
constitution-making.

Judicial external authoritative constitution-making is comparatively new, because
it necessitates the constitutionalization of inter- and supranational relations (see
Patberg 2013; Walker 2010; Wouter 2010). Quasi-constitutional norms on these
levels (such as global or continental human rights regimes, the European Union) can
have an influence on domestic constitution-making processes. They represent some
judicial external anchor point which has to be respected by the demos of a signature
state of these conventions. In a multilevel constitutional order, inter- and supranana-
tional constitutional constraints can represent a judicial framework restraining the
sovereignty of the demos before it actually begins to frame a new constitution. The
constitution is then not actually made by some external authority, but framed by it.
Of course, this will rather lead to merely normative pressure and not to imperative
mechanisms. But this pressure can make quite a difference. And it can be amplified
with the help of political pressure and incentives. European Union’s enlargement
process gives a good example for a successful combination of both forms, while
even respecting the autonomy of the demoi in question. For various political and
economic reasons, they wanted to join the Union and hence declared to abide by
the rules the European treatises embody. During the admission procedure, they were
‘forced’ to legal, political and even constitutional reforms to put their constitutional
and legal systems in conformity with the treatises and their democratic and rule of
law principles (see Fruhstorfer and Hein 2016). These supranational norms hence
unfolded constitutizational force on these domestic constitutions. Whether or
not this conformity is enforced against a demos which does not want to abide to
it any more, will be seen in the current Commission’s Rule of Law Framework
process against Poland. So here this supranational constitutional framework even
seems to produce some pressure during the implementation or working phase of a democratic constitution and to externally help to protect it against the mischiefs of the constitutionalism-democracy-dilemma. These kinds of supranational assistance to create, implement and secure democracy and rule of law were not available to the Weimar Republic but would have doubtlessly been helpful between 1930 and 1933. And in the light of the positive experiences of the enlargement process it is worthwhile asking whether an entrance option for transitional polities such as Tunisia could not serve as an important tool to assist and secure its transition to democracy and rule of law.

5 Conclusion: An Open Empirical Hypothesis

All three ideal types of authoritative constitution-making almost never occur in pure form, as is the case for democratic constitution-making. The secret for success to draft and implement a democratic constitution rather seems to lie in a wise and often lucky mixture of the constituent power of the people, expertocratic and authoritative means, and some assistance from abroad and from above. The hypothesis I wanted to present here, is that in certain situations, in which the recourse to rather democratic means of constitution-making bears the risks of failure (which tends to be a bloody failure), authoritative means might reduce these risks and help to achieve a goal which more ideal means could not yield. This is of course a highly controversial and normative hypothesis. But it is not meant to be a normative assertion as such. It is rather formulated as an empirical hypothesis, raising the question whether it is true – in the light of historical evidence of given constitution-making processes over time – that the mode of constitution-making actually influences the success of a constitution. The arguments I presented here give some reasons drawn from certain schools of normative political theory why this might be the case, but it remains open if this is actually true. So instead of giving normative guidance to practical constitution-making, this paper invites for historical and empirical research in the form of comparative studies of constitution-making processes to test this hypothesis.

References

Arendt H (1958) The human condition. University of Chicago Press, Chicago
Arendt H (1963) On revolution. Faber and Faber, London
Aristotle (2005) Politics (=Loeb Classical Library: Aristotle in twenty-three volumes). Harvard University Press Cambridge, Mass
Basic Law for the Federal Republic of Germany. https://www.gesetze-im-internet.de/englisch_gg. Accessed 13 Jan 2017
Bellamy R (2007) Political constitutionalism. A republican defence of the constitutionality of democracy. Cambridge University Press, Cambridge
Dreyer M (2012) Weimar as a ‘Militant Democracy’. In: Hung J, Weiss-Sussex G, Wilkes G (eds) Beyond Glitter and Doom: the contingency of the Weimar Republic. Iudicium, Munich, pp 62–79
Eisenstadt TA, LeVan AC, Maboudi T (2015) When talk Trumps text: the democratizing effects of deliberation during constitution-making, 1974–2011. Am Polit Sci Rev 109:592–612
Elkins Z, Ginsburg T, Blount J (2008) The citizen as founder: public participation in constitutional approval. Temple Law Rev 81:361–382
Elster J (2000) Ulysses unbound: studies in rationality, precommitment and constraints. Cambridge University Press, New York
Förster J (2009) Die Sorge um die Welt und die Freiheit des Handelns: Zur institutionellen Verfassung der Freiheit im politischen Denken Hannah Arendts. Königshausen & Neumann, Würzburg
Fruhstorfer A, Hein M (eds) (2016) Constitutional politics in Central and Eastern Europe. From post-socialist transition to the reform of political systems. Springer, Wiesbaden
Habermas J (2001) Constitutional democracy: a paradoxical union of contradictory principles? Polit Theory 29:766–781
Hart V (2003) Democratic Constitution Making, Special Report 107 of the United States Institute of Peace, July 2003. http://www.constitutionnet.org/files/Module%204_5.1A.pdf. Accessed 13 Jan. 2017; Elkins Z, Ginsburg T, Blount J (2008) The Citizen as founder: public participation in constitutional approval. Temple Law Rev 81, 361–382. I am grateful to Solonga Wandan who currently has a paper under review, entitled ‘Do Citizens Influence Constitutional Content? Mechanisms of popular constitution making in comparative perspective’
Holmes S (1995) Passions and constraint. On the theory of liberal democracy. University of Chicago Press, Chicago
Kennedy E (2004) Constitutional failure: Carl Schmitt in Weimar. Duke University Press, Durham
Michelsen D (2017) Die Fortführung des Gründungsmoments in der Verfassungsordnung. Arents, Jef...
Waldron J (1998) Precommitment and disagreement. In: Alexander L (ed) Constitutionalism. Philosophical foundations. Cambridge University Press, Cambridge, pp 271–299
Walker N (2010) Constitutionalism and the incompleteness of democracy: an iterative relationship. Rechtsfilosofie & Rechtstheorie 39:206–233
Wandan S (2015) Nothing out of the ordinary: constitution making as representative politics*. Constellations 22(1):44–58
Weingast BR (2006) Designing constitutional stability. In: Congleton R D, Swedenborg B (eds) Democratic constitutional design and public policy. Analysis and evidence. MIT Press, Cambridge, Mass., pp 343–366
Wolin SS (2016) Norm and form: the constitutionalizing of democracy. In: Wolin SS (ed) Fugitive democracy and other essays. Princeton University Press, Princeton, pp 77–99
Wouter WG (2010) Democracy, constitutionalism and the question of authority. Rechtsfilosofie & Rechtstheorie 39:267–275
Zwitter A (2015) The Arab uprising: state of emergency and constitutional reform. In: Lamont CK, van der Harst J, Gaenssmantel F (eds) Non-western encounters with democratization: imagining democracy after the Arab spring. Ashgate, Farnham, pp 103–127