A Common Law of Democracy? – an Experimental Conceptualization

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Introduction

> "I watched and learned much from the tribal meetings that were regularly held at the Great Place. […] It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard […]. The foundation of self-government was that all men were free to voice their opinions and were equal in their value as citizens."
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> *Nelson Mandela*[1]

The following paper attempts a stocktaking of the contemporary values and sources of international law through the example of rights to political participation. Traditionally, international law had a largely formal, value-free, positivist character. The content and formation of the state legal order belonged to the *domaine réservé*. Norms of contractual or customary nature were primarily recognized as international law, general principles of law secondarily so. We hypothesize here that the international and state system has assumed a strong value orientation due to a change in popular conscience (*"l'esprit collectif"* of Émile Durkheim) and that democracy is now among its values.[2] The

[1] Nelson Mandela, Long Walk to Freedom, London 1994, p. 24.

[2] This development has not occurred overnight but represents the culmination of a long historical process. As McDougal similarly observed many years ago, "[t]he history of recent centuries documents a rising common demand of the peoples of the world, a demand which transcends the boundaries and competence of their inherited governmental forms, for all the values which we today summarize as the values of a free society or as fundamental respect for the dignity of the individual human being. This rising common demand is explicit in varying degrees, and implicit to the fullest degree, in most of the new constitutions, territorial and functional, international and national, created since World War II, and it includes more specific, detailed demands for the greater production and sharing of all values and for *security* in the sense of opportunity to pursue and enhance all values by peaceful, non-coercive procedures, free from violence and threats of violence." (Myers McDougal, International Law, Power and Policy: A Contemporary Conception, 82(I) RdC (1953), p. 138; italics in original, footnotes omitted.)

discrepancy between "système international" and "société transnationale" observed by Raymond Aron has diminished, and the "culture étatique" has been in part replaced and complemented by a "culture de la société civile". We hypothesize further that the traditional doctrine of the sources of international law no longer meets actual needs; a reformed doctrinal basis is called for. Accordingly, we postulate a novel concept for international law – common law – and contend that democracy belongs to this concept – a so-called common law of democracy. Our reflections are tentative in nature. They are dedicated to Giorgio Malinverni.

I. Contemporary political reality and its legal characterization

> "Jüngst wurde ich gefragt, welche Ereignisse ich für die bedeutendsten im 20. Jahrhundert hielte. Nun war dieses Jahrhundert nicht arm an aussergewöhnlichen Geschehnissen. [...] Dennoch hatte ich keine Schwierigkeiten, die wichtigste Veränderung auszumachen: die Verbreitung der Demokratie."
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> *Amartya Sen*[3]

Democracy – broadly understood as the idea, value, and goal of dialogue among all citizens and their effective participation in the conduct of public affairs[4] – is recognized globally in constitutions today. It is reflected internationally in strictures, practice, and opinion regarding popular self-determination and individual involvement in governance of the State.[5] There appears, in short, to be a widespread desire to participate in political decision-making and a growing rejection of systems that do not express the people's will.[6] The

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3 Amartya Sen, Reif für die Freiheit – Warum Bürgerrechte vor grossen Katastrophen schützen, 60(6) IP (June 2005), p. 34.

4 We favour Sen's description of democracy. He defines it in rich terms, transcending the act of choosing and voting, as "la possibilité pour tous les citoyens de participer aux discussions politiques et d'être ainsi en mesure d'influencer les choix relatifs aux affaires publiques." (Amartya Sen, La démocratie des autres – Pourquoi la liberté n'est pas une invention de l'Occident, Paris 2006, p. 12.)

5 For example, as Hilf asks rhetorically, "würde heute noch ein Staat in die Vereinten Nationen aufgenommen werden, dessen Verfassungsordnung keinerlei Anklänge an das Demokratieprinzip enthielte?" (Meinhard Hilf, Ein europäisches Grundrecht auf Demokratie?, in: Jochen Abr. Frowein u.a. (ed.), Verhandeln für den Frieden / Negotiating for Peace, Festschrift für Tono Eitel, Berlin 2003, p. 751.)

6 Further see Dinah Shelton, Keynote Speech, Expert Seminar on Democracy and the Rule of Law, United Nations Office of the High Commissioner for Human Rights, Geneva 28 February 2005 (with authors).

contemporary empirical reality regarding political participation does vary significantly. When one looks, however, with the eye of a comparative lawyer,[7] the particularity of political systems is abstracted away, and certain standards of democratic participation spanning the different systems are identifiable. In a previous paper we elaborated and illustrated some of these "cosmopolitan" values and rules.[8] Here we ask whether these may be more broadly characterized as part of a common law of humankind.

To be more specific, we see the advent of new effective rights to political participation worldwide. These rights may in their detail be blurry and may in their development differ.[9] Whatever their precise normative content their advent cannot, we believe, be gainsaid. States and intergovernmental organizations (IGOs) are striving to promote and protect democratic forms of government in many and diverse ways, and their efforts have a legal as well as a practical significance.

We do not mean to claim that state (and IGO) practice – in addition to the widespread adoption of norms of democratic government in major human rights instruments – unanimously shows democratic tendencies. The day is not past when elections can be stolen, bought, or rigged. However, prevailing contemporary practice is at least "evidence of a worldwide trend to prefer democratic forms of government over any other type of regime"[10]. It is this fact that the democratic ideal has gained political and legal importance nationally and internationally that is decisive to our thinking.

Put otherwise, to what degree States characterize themselves as democratic in their domestic laws and in international treaties, and if so, how far they actually fulfil their legal promises, are here beside the point. These are legalities in the pejorative sense. It is the terms of the argument that are

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7 Following the approach of Ernst Rabel, Aufgabe und Notwendigkeit der Rechtsvergleichung, in: Hans G. Leser (Hrsg.), Gesammelte Schriften: Arbeiten zur Rechtsvergleichung und Rechtsvereinheitlichung, Band III, Tübingen 1967, p. 1, 7.

8 Further see Daniel Thürer and Malcolm MacLaren, In and around the Ballot Box: Recent Developments in Democratic Governance and International Law put into Context, in: Marcelo G. Kohen (ed.), Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch, Leiden 2007, p. 549-568.

9 Formatively on the convergence of expectations internationally and the rise of the liberal-democratic model see Thomas M. Franck, The Emerging Right to Democratic Governance, 86 AJIL (1992), p. 46 et seq. For an anthology of the ensuing democratic entitlement debate see Gregory Fox / Brad Roth (eds.), Democratic Governance and International Law, Cambridge 2000. Summarizing see Steiner / Alston: "the degree to which the contemporary observer detects a significant trend toward democratic governance will depend on the conception of democracy that is employed and on the related essential components of democratic governance." (Henry J. Steiner / Philip Alston, International Human Rights in Context, Oxford 1996, p. 659.)

10 Christian Pippan, Book Review, 15(1) EJIL 2004, p. 217.

important. Democracy has come to dominate public discussions about political systems worldwide; its vocabulary and concepts are framing debates relating to government structures.[11] Moreover, the question in public discussions is no longer whether a particular society is "mature" enough for democracy; every country is considered as such.[12] Sen concludes that there is a worldwide consensus that democracy is the best of all possible forms of government and that those who reject this assumption are those who must explain themselves.[13] Democracy has yet to win a total and final victory – *pace* Francis Fukuyama – in the struggle of ideas. It has, however, undoubtedly emerged as the dominant reference point in the formation of political systems.

II. "Common law" as substance and process

> "[The law] cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."
>
> *Oliver Wendell Holmes*[14]

Emergent cosmopolitan values and rules regarding democracy have, as argued, a legal significance. Other scholars have to date attributed them to customary international law and general principles of law[15] or understood them as principles of justice that should guide the interpretation and application of international law.[16] These characterizations of their normative foundations are open to question. (Specifically, it is debatable whether the constitutional affirmations of the rights to political participation in States, however widespread, suffice to establish the rights as general principles. As regards custom,

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11 For example, see the experience of the Iranian presidential campaign of June 2005. Unlike in previous campaigns, "conservative candidates know that they stand a chance only if they speak the reformist language of democracy". (Iran's presidential election: Will it make any difference?, Economist, 11 June 2005, p. 37, citing the editor of an Iranian daily.)

12 Democracy is, in the words of an American newspaper columnist, the subject of a contemporary "thought contagion": people around the world are asking themselves "why not here?". (David Brooks, International Herald Tribune, Why not here?, 1 March 2005, p. 9.)

13 Sen, Reif, p. 34. Sen speaks of democracy as having become one of the "umfassende 'Glaubenswerte', die als eine Art allgemeiner Regel einen gewissen Respekt geniessen" and that mark every age and every social climate.

14 Oliver Wendell Holmes, The Common Law, 1881, p. 1, online at: www.law.harvard.edu/library/collections/special/online-collections/common_law/Lecture01.php.

15 For example, see Jude I. Ibegbu, Right to Democracy in International Law, Lewiston (NY) 2003.

16 For example, see L. Ali Khan, A Theory of Universal Democracy: Beyond the End of History, The Hague 2003.

it is debatable whether the prevalent adoption of a democratic government constitutes the necessary *usus* and the near universal consent to international human rights instruments protecting the rights to political participation constitutes the necessary *opinio juris*.) If the yardstick for these developments is the European Union (EU), in which common constitutional traditions and international human rights instruments ratified by all Member States have become a recognized source of regional law,[17] cosmopolitan values and rules regarding democracy have not yet achieved comparable status in international law.

We prefer a novel concept of the sources of international law to capture these developments rather than their questionable characterization as customary law or as general principles of law. We see these rights to political participation as forming part of a common law of humankind.

Like "democracy", the term "common law" is open to various interpretations, and its use should be carefully explained.[18] From a *substantive* perspective, we believe that:

– the rights to political participation constitute "common law" in the original meaning of the term: they are rules and principles not of local law (i.e. existing in particular places) but of the law that is common to the whole (once England, now the world);

– they also constitute "common law" in the term's usual meaning, i.e. law that is not the result of legislation (or treaty) but that is created by the custom of people, the work of experts, and the decisions of judges. Popular preferences, academic authority, and judicial interpretation can shape – and, as shown in our previous paper, have in fact shaped – a body of law regarding government nationally and internationally; and

– the rights to political participation constitute "common law" due to the subject matter that they regulate, namely "low" and not "high" politics. Rather than Great Power relations and States' foreign policy, they concern a social activity and human rights. The matter of the form of government is one open to and belonging to (as well as affecting) the public / whole community, and as such should be considered part of what has been termed a "common law of mankind".[19]

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17 See Art. 6(2) of the Treaty on European Union.

18 In the original English legal context, Glanville Williams, Learning the Law (11th ed.), London 1982, p. 24 et seq.; in a modern-day European legal context, Peter Häberle, Verfassungslehre als Kulturwissenschaft (2nd ed.), Berlin 1998, p. 1083 et seq.

19 Generally see C. Wilfred Jenks, The common law of mankind, New York 1958, p. 8.

Democracy as common law may also be understood in terms of its dynamism. It constitutes a *process* by which certain policies and practices relating to the collective and individual exercise of political will come to be universally viewed as acceptable, while others do not. More specifically, we see the concept of democracy as being so developed internationally:

– Influences reach from country through regional to universal fora and back again. Democracy as common law develops in both directions: to use traditional terminology, not only from above (i.e. top-down) but also from below (bottom-up). State and IGO policy and practice receive decisive impetus from the national, and commonality comes to characterize governance structures of the parts of the whole.
– Democracy as common law manifests a living character. This character means that the concept is not immutable but always open for further development, and then not in such a way as to renounce what has been established rather to refine it. The description of democracy as another name for the sum total of humane traditions[20] seems apt.
– The origins of democracy internationally are diverse, not traceable to any one, definitive source. Instead, like all common concepts, democracy has many parents. It is formed by principles and practices deriving from the experience of different systems (national, regional etc.) and finding expression in different forms (constitutional tradition, general comments and case law of international tribunals etc.).

The concrete meaning of such a common law internationally is well illustrated by reference to Europe. It can be seen on the continent that rules and principles of human rights common to the whole have emerged from various sources. Europe[21] is in this sense "a laboratory for legal pluralism".[22] These rules and principles can be expected to continue to be built upon, as they are relative and open to all different national systems and experiences.

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[20] G.K. Chesterton cited in: Clive James, Guest from the future – Gaps and glories in the legacy of Isaiah Berlin, Times Literary Supplement, 3 September 2004, p. 3.

[21] We mean by "Europe" a public space consisting of states and civil societies, supranational communities such as the EU, and IGOs such as the Council of Europe or the Organization of Security and Cooperation in Europe (OSCE).

[22] Generally see Mireille Delmas-Marty, Vers un droit commun de l'humanité, Paris 1995.

III. Concept of and tendencies in multi-layered legal systems

> "In reality, there is only one human right which is valid in the international sphere as well as in the domestic sphere."
>
> *Judge Kotaro Tanaka*[23]

1. Relationship between international and national law in general

Our re-conception of the rights to political participation is based on two newer trends in the relationship between international and national law. First, it seems that the classic, dualist distinction between international and domestic law has broken down. The dividing line between the sphere of international law and the *domaine réservé* of sovereign States is being blurred, and it has become the business of constitutional lawyers to deal with international law and that of international lawyers to deal with constitutional problems.[24] Second, it seems that in the interstice between the international and domestic legal orders, values and rules are developing that can no longer be considered exclusive to either order, but that now underlie both. Democracy, in addition to human rights and the rule of law, belongs to these values and rules. A unitary perception of the "law" according to liberal ideas of a world society – a substantive monism, as it were – is being vindicated.

Taken together, the trends point to a new legal paradigm. Rather than a paradigm of hierarchies and plural orders based on the distinction between international and domestic law, it is a paradigm of an interconnected and interacting world organized according to certain conceptual continua.[25]

2. Federal constitutional orders and common rights protection

What effects could this perceived integration of the international and national law have for the content of fundamental rights? The influence of international law on state constitutional systems is, for example, direct and obvious

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[23] Dissenting Opinion, South West Africa Cases, Second Phase, ICJ Reports 1966, p. 297.

[24] Generally see Brun-Otto Bryde, Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts, 42(1) Der Staat (2003), p. 61-75.

[25] Recent experience in constitution-making in post-conflict situations illustrates this argument. See Daniel Thürer, Kosmopolitische Verfassungsentwicklungen, in: Daniel Thürer, Kosmopolitisches Staatsrecht, Zurich / Berlin 2005, p. 3-39.

in the extensive functions attributed to United Nations peacekeeping: international instruments have come to serve as mandates for comprehensive institution building.[26] The UN has, however, acquired its decisive role in national elections and referenda only in extraordinary circumstances such as peacekeeping or where the countries in question sought its approval.

International law's shaping of state constitutional systems takes less direct and obvious – but arguably more powerful – form in the interrelations of the legal orders themselves. The likely effects of such integration can be seen by referring to existing federal constitutional orders. This reference is not intended to suggest that the world community has achieved a quasi-state organization, as aspired to by some of the UN's founders. It is rather to draw on a dynamic that seems inherent in multi-layer governance, be the layers in question international and national structures or central and constituent state authorities. In short, such interrelations can be expected to provoke a certain centralization of and uniformity in the law, even where each governance layer has substantial powers and enjoys real autonomy vis-à-vis the other layer(s).

This dynamic is especially pronounced in systems where there is provision for judicial review. The cause lies in the characterization of the rights in question as "fundamental". If liberal individual rights are, for example, considered to be universal and transcendent, they require a system-wide consistency: they cannot be open to contextualizing locally but must logically be applied "in the same way everywhere, and for all."[27]

This type of law, "*Gemeinrecht*" as Peter Häberle popularized it,[28] is in short a natural dimension of a federation under the rule of law.

3. Examples from Canada, Germany, and Switzerland

- Canada

In the Canadian federation, there are two layers of constitutional or legislative instruments for the protection of rights, one national and the other provincial. A degree of homogeneity is guaranteed through the application of federal rights throughout Canada; the provincial instruments must be compatible with the federal constitution. In addition, the Canadian Supreme

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[26] Further see Mary Kaldor, New and Old Wars – Organized Violence in a Global Era, Palo Alto 1999.

[27] José Woehrling, The Relationship between Federalism and the Protection of Rights and Freedoms, in: Stefan Breitenmoser et al. (eds.), Human Rights, Democracy and the Rule of Law, Liber Amicorum Luzius Wildhaber, Zurich / St. Gallen 2007, p. 895, 910.

[28] Further see Peter Häberle, Gemeineuropäisches Verfassungsrecht, 18 (12/13) EuGRZ (30 August 1991), p. 261, 268 et seq.

Court, as the final interpreter of the quasi-constitutional instruments of the provinces as well as of the Constitution of Canada, has limited diversity and simplified the law in the country through its jurisprudence.[29] The Court tends to interpret these legislative and constitutional instruments similarly, even in cases where there are significant differences in their respective wording.[30] It has thereby imposed uniform values on the provinces.

An example of these homogenizing effects may be usefully cited. Prior to the passage of the Constitution Act of 1982, there was no constitutional right to vote in Canada; each legislative body was free to make its own provisions regarding voting.[31] Section 3 of the Charter of Rights and Freedoms now confers on every citizen the right to vote in federal and provincial elections in relatively sweeping terms.[32] Courts in Canada have considered federal and provincial voting provisions on many occasions since then. The leading case on voting rights and electoral boundary readjustment is the *Saskatchewan Electoral Boundaries Reference*.[33] A provincial electoral map in which rural ridings were overrepresented was challenged before the Supreme Court as a violation of the right to vote on the grounds *inter alia* that section 3 guarantees not just the right to the franchise for all citizens but also the equal weight of each individual vote. In rejecting this challenge, the Supreme Court held that the Constitution protected the right to effective representation and not absolute parity *per* "one person, one vote". Population variances are acceptable to the extent that they can be justified as providing more "effective representation". The Court thereby showed considerable deference to electoral boundaries stipulated by a legislative body. It did, however, describe equality of weight as being "of prime importance" and outlined a (non-exhaustive) list of considerations that might validly improve effective representation.

- Germany

Democracy is a fundamental principle of the German polity.[34] Art. 20(1) of the Basic Law defines the Federal Republic as a democratic state. Art. 28(1)

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29 The Supreme Court of Canada "is more of a national than a federal court because it is a 'general court of appeal for Canada', with power to hear appeals from the provincial courts [...] in all kinds of cases, whether the applicable law is federal or provincial or constitutional." (Peter W. Hogg, Constitutional Law of Canada (3rd student ed.), Toronto 1992, p. 163.)

30 Further see Woehrling, p. 901 et seq.

31 Further see Hogg, p. 997 et seq.

32 Section 3 is, however, subject to section 1, namely "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

33 *Re Prov. Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158 et seq.

34 Among others see Peter Badura, Staatsrecht – Systematische Erläuterung des Grundgesetzes (3rd ed.), Munich 2003, p. 271-284; Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (20th ed.), Heidelberg 1995, p. 58-83; Klaus Stern, Staatsrecht der Bundesrepublik Deutschland (2nd ed.), Munich 1984, p. 587-634.

specifically requires the States (and counties and municipalities) to conform as well to the principle of democratic government. These provisions set forth a fundamental structural principle of the German state, a principle that may not be amended out of the Basic Law (Art. 79(3)). A uniform basis of democratic legitimation for all territorial divisions within Germany is thereby to be guaranteed.

In interpreting these provisions, the Federal Constitutional Court has proven itself an important custodian of the political order. Trend-setting was the Court's reasoning in *Southwest State* Case (1951),[35] its first major decision and the first time that it set aside a federal law as unconstitutional. Baden had challenged the constitutionality of federal statutes that merged it with two other south-western States on the grounds *inter alia* that the statutes violated the principle of democracy because the electoral districts foreseen would dilute the votes of citizens in Baden. In its decision,[36] the Court confirmed that the constitutional orders of the States must conform to those of a democratic government based on the rule of law within the meaning of the Basic Law. As long the orders do, they fall within State jurisdiction. (States may then exclusively determine the rules that govern the formation and functions of their constitutional organs, including setting regulations regarding how often and on what occasions citizens may vote.) It is incumbent upon the federation, however, to ensure that the constitutional orders of the States conform to the principle of democratic government.[37]

- Switzerland

Swiss constitutional practice offers an outstanding example of the interplay of constituent units in a federation and the resultant standardization of operative legal and political principles. The Cantons have exercised the competences provided them in the Federal Constitution to define a variety of political rights of their own. However, due to open formulations of the cantonal provisions – or rather the problems encountered in applying these in practice –, cantonal provisions regarding political rights have tended to be applied uniformly.

This process of standardization has been mainly driven by the Federal Supreme Court's jurisprudence,[38] which is in turn based on the Court's broad

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35 1 BVerfGE 14.

36 Translated in Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (2nd ed.), Durham (NC) 1997, p. 62 et seq.

37 It is also interesting in the present context to refer to the category of *Gemeinschaftsaufgaben* provided for in Art. 91a and 91b of the Basic Law. These joint responsibilities of the Federation and States form a sort of intermediary governance or more broadly, a law between layers of the system within the German federal constitutional order.

38 For example, see Federal Supreme Court decisions regarding *Volksrechte* in: Andreas Auer / Giorgio Malinverni / Michel Hottelier, Droit constitutionnel Suisse (2nd ed.), Volume I, Berne 2006, p. 274-309.

use of its jurisdiction over violations by cantonal authorities of federal and cantonal provisions regarding political rights (Art. 184(1) lit. f of the Federal Constitution). In interpreting cantonal provisions regarding political rights, the Court long followed the so-called *Ohne-Not*-practice, according to which it would not deviate from the highest cantonal authorities' interpretation unless it were an emergency.[39] This practice was revised by the Court in 1971.[40] The Court declared that all cantonal provisions regarding political rights, irrespective of their constitutional or statutory status, can be interpreted freely by the Court and that the Court would follow the highest cantonal authorities' interpretation only in cases of genuine doubt about two possible interpretations. The Court has basically stuck to this jurisprudence ever since.[41] It claims that, due to the silence of cantonal law and the absence of an own cantonal practice, it had no choice but to outline definitions and principles itself.[42]

The result is the aforementioned standard application of the respective cantonal provisions, which is described in the legal literature as "gemeineidgenössisches Staatsrecht"[43] and "gemeinschweizerisches Staatsrecht".[44] Scholars have been critical of this process. First, they caution against an excessive harmonization of cantonal constitutional law by the Federal Supreme Court. Second, they caution against the cantons employing federation-wide constitutional law, as the cantons would allegedly want to impose "general legal provisions" from comparative cantonal constitutional law upon the Confederation as well, thereby robbing it of its needed room to maneuver.[45]

In short, in all three legal systems examined, a common ground between the central and constituent constitutional orders seems to have formed and is considered to be legitimate in the polity. The old debate concerning the location of sovereignty in federal countries has become largely moot, and room is provided for the development of general principles (such as democracy) applicable to the whole system.[46]

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39 See BGE 81 I 196 E. 3, 83 I 176 E. 2, 89 I 44 E. 3c.

40 See BGE 97 I 32.

41 For a summary of the Court's jurisprudence regarding the interpretation of cantonal provisions see BGE 111 Ia 201 E. 4a.

42 See Andreas Auer, Die schweizerische Verfassungsgerichtsbarkeit, Basel 1984, p. 296.

43 See Yvo Hangartner / Andreas Kley, Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft, Zurich 2000, p. 185 et seq.

44 See Peter Häberle, Neuere Verfassungen und Verfassungsvorlagen in der Schweiz, insbesondere auf kantonaler Ebene, 34 JöR (1985), p. 340-354.

45 Häberle, Neuere Verfassungen, p. 354.

46 As observed in the drafting of the Constitution of the United States of 1787 by Philip Allott in his Seegers Lecture, Valparaiso University School of Law, Valparaiso (IN) 8 February 2007 (with authors).

IV. Consequences for the implementation of rights to political participation

> "[T]he participation of the people in line with the conception of true law from Cicero to modern times has called for arrangements whereby this participation is assured within the framework of a constitution resolved upon by the people themselves."
>
> *Carl Joachim Friedrich*[47]

As a matter of contemporary international law, States retain discretion in the domestic implementation of international rights to political participation as long as their citizens have an effective opportunity to enjoy these rights.[48] As a matter of contemporary state practice, many political systems exist that fulfil even the terms of Art. 21 of the aspirational Universal Declaration of Human Rights of 1948. Nonetheless the balance in international law between principles of universal human rights and of state sovereignty is shifting regarding democracy and like concerns. States appear to exercise ever less latitude in determining their national political system unilaterally.[49] The emergent set of cosmopolitan values and rules is more demanding than the "common standard of achievement" of the Universal Declaration regarding the design and operation of political systems.

What then is the significance for contemporary legal ordering of the rights to political participation as we have conceived them? Reference is often made to constitutional doctrines to explain the implications for the building and protection of political systems. Traditionally, three types (or "generations") of human rights have been distinguished in international legal theory. Upon application to rights of political participation, this distinction proves limited in its ability to classify these rights precisely and to elaborate their implementation.[50]

We prefer in this context the status theory of Georg Jellinek.[51] His concept of the *status activus* offers an agenda for States to realize democracy domesti-

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47 Carl Joachim Friedrich, The Philosophy of Law in Historical Perspective (2nd ed.), Chicago 1963, p. 219.

48 Exemplary see United Nations Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12/07/96, CCPR/C/21/Rev.1/Add.7, para. 1, online at: www.unhchr.ch/.

49 Among others see W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 AJIL (1990), p. 866-876.

50 Further see Henry Steiner, Political Participation as a Human Right, 1 Harv. Hum. Rts. Ybk. (1988), p. 130 et seq.

51 Georg Jellinek, System der subjektiven öffentlichen Rechte, Tübingen 1905, p. 87.

cally. Jellinek distinguishes rights to political participation and the *status activus* from liberal rights and the *status negativus* on one hand and from social and economic rights and *the status positivus* on the other. Where the former protects the individual from the State and the latter empowers the individual to make a claim on the State, the *status activus* requires individual participation in state affairs.[52] Following Jellinek and Friedrich, we believe that rights to political participation are rights that must be domestically "positivized", "institutionalized", and ideally "constitutionalized" for a democratic rule-of-law State to be achieved.

In theory, the correlative duty of governments may be understood as requiring them merely to permit political participation or, more, to support such participation; Art. 25 of the International Covenant on Civil and Political Rights, for example, imposes neither specific obligations (other than the conduct of elections) nor specific limitations on government action.[53] Civil rights (*e.g.* directly in the right to vote or indirectly in the freedom of expression) and consultative decision-making processes (be they direct or representative) are undoubtedly necessary. To our mind, they are not enough, however, to achieve the ideal of democracy. If the possibility for all citizens to participate in and to influence the conduct of public affairs is to be realized, governments must additionally be obligated to provide for and continuously foster political debate and action. Put otherwise, rights to political participation are programmatic as well as liberal in nature. They must be, like economic and social rights, converted into actuality by the State progressively over time in different ways in different contexts.

In short, the contemporary requirements on political systems impose upon States certain obligations of result. How exactly these obligations are fulfilled remains largely a matter of state discretion, informed of course by domestic preferences. (Democracy in western Europe takes disparate forms!). States can benefit from the assistance of the international community in the identification of best practices. What is decisive, however, is the degree to which the rights to political participation are actually vouchsafed by the State.

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52 On the characterization of human rights and its legal consequences see Sonja Grimm, Verpflichten Menschenrechte zur Demokratie? Über universelle Menschenrechte, politische Teilhabe und demokratische Herrschaftsordnungen, Discussion Paper SP IV 2004-201, Wissenschaftszentrum Berlin für Sozialforschung, 2004, online at: www.wz-berlin.de/zkd/dsl/abstracts2004.de.htm.

53 On competing interpretations and conceptions of political participation in international law see Steiner, Political.

V. Consequences for the doctrine of the sources of international law

> "[T]he process by which the law takes in, assimilates and uses matter from without and by so doing gathers the energy for its own growth is a matter of primary importance for the development of an effective universal system."
>
> *C. Wilfred Jenks* [54]

The emergence of cosmopolitan values and rules regarding democracy has significant consequences not only for the meaning of rights to political participation but also for the traditional doctrine of the sources of international law. It demonstrates how this doctrine, as set down in Art. 38(1) of the Statute of the International Court of Justice, no longer meets actual needs. These demand new ways of thinking. We have proposed to reform the doctrine by introducing the concept of common law.

To be more specific, the exclusively state-centric nature of international lawmaking is inadequate to contemporary international life. Universal treaty-making has ground to a virtual halt, as exemplified by the stalled efforts at reform of the International Law Commission. The days of the great codifications seem long past. Customary law, being also reliant on state consent, has always been prey to divergent national interests. However, a particularly cautious approach to the development of international law by this means seems now prevalent in the state community. The United States' reaction to the recent International Committee of the Red Cross' Study on Customary International Humanitarian Law is only one – if an especially troubling – example. As regards general principles of law, many have already been taken up in treaty and customary law and would-be additions are – wrongfully[55] – scorned as modern-day natural law.

If international law is to regulate international life effectively, it must be true to the "facts on the ground". Contemporary forces have, however, conspired to challenge the validity of the traditional doctrine going forward. A global community that concerns itself with international law has emerged [56]

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54 Jenks, p. 167.

55 On the general principles of law as a particularly promising – or so it appears to us in an age of globalization – source of law see Alfred Verdross, Les principes généraux du droit dans la jurisprudence internationale, 52(II) RdC (1935), p. 198 et seq.

56 Perhaps this development is most evident in the transformation of international humanitarian law from a legal system regulating inter-state relations to a "law of the community of six billion human beings". (Marco Sassòli, State responsibility for violations of international humanitarian law, RICR [2002], p. 401.)

through variously globalization (in the form of intensified borderless communication and transportation), the larger role of the media (which publicizes the postulates of concerned individuals around the world)[57], democratization of the conduct of international relations (which has opened up a "domain of princes"[58] to popular participation) and efforts of non-governmental organizations (which seek to represent a global civil society)[59]. This community displays a growing cognitive and identity integration. There is namely greater awareness of and concern for what people in once distant places are thinking and doing; an event in one place is no longer necessarily parochial in its importance but may be construed in many other places as a precedent; and political and economic initiatives are increasingly debated in a common idiom, such as that of democracy and equality.[60] The consequence of this integration is that the emergent global community is increasingly seeking to define international politics according to its understanding of what is right and just; through coordinated global action – in particular in the form of public protest – it is striving to be the real world legislator and judge.[61]

The preceding is not to say that the State has been circumvented in international relations. States are and should remain the foundation and master builder of a strong, stable world order; they – and especially democratic States among them – are alone capable of realizing the promise of a universal rule of law.[62] It is to say that States' fulfilment of the roles expected of them internationally can only be guaranteed through lawmaking that comprises popular concerns. We believe that common law can make a contribution in this regard.

Given that the aforementioned forces are already at play, having an effect on international life, our proposal to add the concept of common law to the

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57 See W. Michael Reisman, The Democratization of Contemporary International Law-Making Processes and Its Application, and Daniel Thürer, The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application, both in: Rüdiger Wolfrum / Volker Röben (eds.), Developments of International Law in Treaty Making, Berlin 2005, p. 15-30 and p. 53-59 respectively.

58 Already see Wolfgang Friedmann, The Changing Structure of International Law, London 1964, p. 7.

59 Further see Daniel Thürer, The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State, in: Rainer Hofmann (ed.), Non-State Actors as New Subjects of International Law, Berlin 1999, p. 45 et seq.

60 Further see Tom J. Farer, Globalization and the Democratic Entitlement: Remarks to AALS Annual Convention Plenary Panel on the Impact of Globalization on Human Rights, 4(4) GLJ (1 April 2003), online at: www.germanlawjournal.com/print.php?id=252.

61 For a discussion of this phenomenon in a recent context see Daniel Thürer, Irak-Krise: Anstoss zu einem Neuüberdenken der völkerrechtlichen Quellenlehre?, 41(3) AdV (2003), p. 320 et seq.

62 Further see Daniel Thürer, Herkules und die Herausforderungen des modernen Menschenrechtsschutzes, in: Rainer Grote et al. (Hrsg.), Die Ordnung der Freiheit – Festschrift für Christian Starck, Tübingen 2007, p. 1040 et seq.

doctrine of sources constitutes a recognition rather than an innovation in international law. We have identified the existence of a common law of democracy. Common law more generally may be said to exist when three conditions are fulfilled. First, its terms must be adequately precise, so as to be operable. Second, the internationally binding character of the terms must be evident if they are to influence state behaviour. Third, implementation must be possible via a recourse to sanctions. Propositions may thereby gain the verifiability, authority, and practicability necessary to qualify as law.

International law is in a critical stage of growth. The contribution that this additional source would make to legal development in substantive terms may be subsidiary and largely incremental, but the contribution could nonetheless be real. Moreover, a common law approach could significantly enhance the effectiveness of international law in regulating international life through its fundamental concern with needs as they emerge rather than with rigid rules inherited from the past. Put the other way around, a failure in international law to adequately reflect contemporary forces will undermine the validity of that law.

Conclusion

> "Apprendre à ordonner le multiple est la condition nécessaire pour construire un droit commun à l'échelle européene, comme à l'échelle planétaire."
>
> *Mireille Delmas-Marty*[63]

The scope of our paper was ambitious and the argument experimental. Many questions are left for the reader to answer. A few propositions can nonetheless be offered based on the preceding discussion.

- We observed that democracy as a form of government and as a concern of the state community has spread of late in response to the rising demand of the peoples of the world for democracy.
- Thereby a set of cosmopolitan values and rules regarding democracy has taken shape; law has developed from "life, the facts and not from abstract conceptions"[64]. This set comprises criteria for the design and operation of political systems worldwide that reach beyond the prerequisites for legitimate balloting. It does not prescribe a right to a particular

[63] Delmas-Marty, p. 113.

[64] Per a U.S. Supreme Court justice's description of the development of common law. See Louis D. Brandeis, The Living Law, 10 Illinois L.R. (1916), p. 461-471.

democratic regime, rather it prescribes the fundamental freedom of the citizen to participate effectively in decision-making in the State.

- We believe that this set urges the re-conception of rights to political participation, their implementation included. Contemporary requirements on political systems impose upon States obligations of result, which may be met *inter alia* by according these rights a *status activus* domestically.
- In itself the emergence of a set of cosmopolitan values and rules regarding democracy seems to exemplify an ongoing change of legal paradigm. This is marked and driven on by increasing interrelations of international and domestic legal orders. It can be expected to provoke a homogenization in the law analogous to that visible in federal constitutional orders. The construction of a value-oriented universal legal community may well be the end result.
- Lastly, the emergence of such a set of cosmopolitan values and rules challenges the traditional doctrine of the sources of international law. Lawmaking is no longer exclusively state-centric in nature. Indeed, the effectiveness of international law going forward demands that lawmaking reflects the concerns of the global community. "The path of the law" – to adapt a metaphor of Oliver Wendell Holmes – seems to be defined by flagstones symbolizing the States, their will and their instruments. These rest, however, on the soil of civil society, which is as soft as it is fertile.

The developments and trends that we perceive, when considered together, lead us to the following conclusion. The content and formation of rights to political participation resemble those of the common law – hence our designation of them as a "common law of democracy".