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„LEGITIMACY IN INTERNATIONAL POLICY

with Regard to the Self-Determination of Peoples in the
Middle East and their Relations with the UN and the EU“

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Abstract

This dissertation focuses on a discussion of the roles and functions of both the United Nations Organization and the European Union; their cooperation, their differences, how they deal with crises and how they pass specific resolutions. The roles of the United States and the former Soviet Union are also discussed. The main goal of this research is to investigate how the classically denoted definitions of peace and independence processes, as well as domestic wars of liberation and self-determination of people, have developed and how they will be defined in the future.

As applied methodology materials are evaluated, their content will be pragmatically and analytically interpreted, in combination with the thorough analysis of numerous literary resources. The specific period of time under investigation lies between 1989 and 2014. The varying unexpected events of this era have raised new perspectives which go so far as setting the basis for future policies of the 21st century. In particular, 11 September 2001 brought about a significant turning point in international policy.

Considering the passion and yearning for freedom and democracy expressed by people, and particularly minorities in developing countries worldwide, the situation has intensified, especially in the Middle East. People in multi-ethnic states such as Sudan (Darfur and South Sudan) and Kurdistan, and minorities in general, are especially affected. For instance, the question of recognition of Palestinian statehood has still to this day not been resolved. The main questions that remains is how long such political regimes can exist without legitimacy, taking into consideration that dictators of some of these states are still internationally recognized. How can the existing UN criteria regarding the self-determination of these people, with respect to freedom, democracy and state sovereignty, be then framed and effectuated?

In order to answer this question, I will refer to three social models, namely the transformational model, the mosaic model, and the social mobilization model. I will argue that in cases of oppressed minorities, the UN should not only consider the principle of state sovereignty, but also the impact its policies have on the people themselves with regard to the right to self-determination.

Abstrakt

Die Fragestellung dieser Dissertation besteht darin, sowohl über die Rolle, als auch über die Funktionsweise der Vereinten Nationen und der Europäischen Union eine Diskussion zu führen. Wie interagieren sie gemeinsam? Wie unterscheiden sie sich, und wie setzen sie sich mit Krisen auseinander? Wie verabschieden sie bestimmte Resolutionen? Die Rolle der Vereinigten Staaten von Amerika und jene der ehemaligen Sowjetunion werden ebenfalls diskutiert.

Hauptziel dieser Arbeit ist eine Untersuchung der klassischen Definitionen von Friedens- und Unabhängigkeitsprozessen, sowie von nationalen Befreiungskämpfen und dem Selbstbestimmungsrecht der Völker. In diesem Zusammenhang wird aufgezeigt, wie sich diese Begriffe im Laufe der Zeit entwickelt haben und wie diese in Zukunft zu definieren sind.

Was die Methodologie betrifft wird Quellenmaterial ausgewertet und dessen Inhalt pragmatisch und analytisch interpretiert, sowohl auch werden zahlreiche literarische Quellen analysiert. Der zeitliche Untersuchungsrahmen bilden die Jahre 1989 und 2014. Diese Era ist von reichlichen unerwarteten Vorfällen geprägt, die neue Perspektiven für die zukünftige Politik des 21. Jahrhunderts eröffnet haben. Im Besonderen ist hier der 11. September 2001 zu erwähnen, der ein Wendepunkt der internationalen Politik bedeutet hat.

In Anbetracht der Leidenschaft und der Sehnsucht nach Frieden und Demokratie, welche die Völker, beziehungsweise die Minderheiten der Entwicklungsländer weltweit zeigen, hat sich die Situation, insbesondere die im Nahen Osten, eskaliert. Minderheiten und Völker in multi-ethnischen Staaten wie im Sudan (Süd-Sudan, Darfur, sowie Kurdistan) sind besonders betroffen. Ebenfalls ist die Frage bezüglich der Anerkennung der Staatlichkeit Palestinas noch nicht geklärt. Die Frage bleibt: Wie lange können derartige politischen Regime ohne Legitimation existieren, an Betracht dessen, dass Diktatoren in einigen dieser Staaten noch immer international anerkannt werden.

Wie also können heute existierende Kriterien der Vereinten Nationen zum Thema der Selbstbestimmung dieser Völker in Hinsicht auf Freiheit, Demokratie und Staatssouveränität umgesetzt werden?

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1. Introduction

Having lived in two cultures and experienced their specific differences between the two, I have come to know and understand the stark disparities existing between a free country and one dominated by an authoritarian regime. Being able to compare Austria, a country which embodies democracy at almost every level, not only at the political, but also at the economic and social levels and a totalitarian regime such as Iraq, I have the unique opportunity to share my experiences while looking deeper into the phenomenon of authoritarian regimes.

An example of the great disparities between these two countries and their type of rule can be seen in the freedom of speech, press, and independent media that still do not exist in Iraq. Violations of human rights are an everyday life component for the people of Iraq. Moreover, the inferior status of women within the society, as well as mismanagement, erroneous administration and corruption within the offices of public authorities are common experiences of the citizenry. The protection and rights of minorities are constantly abused. All of these factors contribute to the people's loss of trust in the state on every level of its jurisdiction. Mikhail Gorbachev brought about the political “earthquake” in 1989, which affected the Soviet Union and Eastern Europe, but who will assume this role in developing nations? With the Arab Spring, the process of democratization has begun in certain Arabic countries, such as Tunisia, Libya, and Egypt. However, these countries do not have their own Mikhail Gorbachev – who will aid the process in these countries? The United States of America serves a dual function, in that it initially endeavors to eradicate terrorism in Afghanistan, while simultaneously sanctioning the proliferation of democracy in developing nations, but by what means and at what price?

As George Danton (1759-1794), a poet of the French Revolution, aptly said: “*Après le pain, l’éducation est le premier besoin d’un peuple*” [“After bread, education is the first need of the people”]. I will examine more closely the importance of education within democratic and authoritarian regimes. The question remains as to how democratic theories and principles can find a foundation in developing countries that are overwhelmed by poverty and illness.

Additionally, in underdeveloped nations, cultural, economic and social conditions have an incongruous focus when compared to those of Europe, and are frequently accompanied by extreme religious doctrines and fanaticism of the rulers. To what extent can such a regime be reformed? How can democracy be implemented? I will address the specific issues of the formation of a democracy and its importance. This will be in direct contrast to that of an authoritarian regime.

Georg Jellinek presents the opinion that every government requires a constitution in order to bind society into a singular unity.¹ Every country can, indeed, vote on the constitution, which should be utilized as a basis for the system of government, but it is imperative that such a document exists, regardless of its specific contents. A nation without a constitution would certainly dissolve into a state of anarchy.

The countrymen become the victims of these instances and the incentive to change cannot emerge from within the state. Even those developed nations and countries of greater power that offer assistance often only do so in order to exploit the land in the interest of their respective monetary and political gains. It is not uncommon that such initiative must

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originate from outside the state, but actual implementation of said processes must take place internally. This brings the question of whether a democratic system is truly most beneficial for the individual and the country itself or not. The rebuilding of Iraq around 2003 after the USA intervention would be an example. Although the answer to this query is multifaceted, I will attempt to delve into this question more deeply.

I will utilize the countries in the Middle East in order to serve as examples in my analysis of the political regimes, economic status, aspects of social spheres, human and women's rights, Islamic culture, and civil rights. I have chosen the Kurdish people as those to represent an oppressed population, and the United States as an example of a world power. Furthermore, I will discuss organizations such as the European Union, the United Nations and the League of Arab States within the context of the post-Saddam Hussein era, as well as the role of terrorism and fundamentalism in Islamic society. In this manner, I draw attention to international law and politics and their role in authoritarian and democratic regimes throughout the Middle East and the world.

2. Theoretical bases

2.1 Legitimacy

Although the notion of legitimacy has long been a subject of discussion by philosophers (Plato, Aristotle), it is central to the political discussions of philosophers such as Machiavelli and Thomas Hobbes. Closely connected to the discussion of legitimacy is that of sovereignty, which arose during the middle ages through altercation between the church (Pope) and secular powers (king/emperor) and the dispute over separation between the spiritual and secular worlds.² In the development of the theory of state, decisive for Hobbes is not the specific kind of state, whether Monarchy or Republic, but the political neutrality of Church and feudal systems/nobility. The politicization of a society is possible through the voluntary partial relinquishment of individual freedoms to a sovereign (Monarch or parliament), who is entrusted with the representation and protection of subjects.³ The freedom of all subjects is guaranteed by a constitution or contract between the state and its subjects.⁴

In addition, many concepts of John Locke can be compared to Hobbes. According to Locke, a government that is entrusted with political rights through a constitution is the optimal guarantee of the protection of an individual's life, liberty and property. Political power here is described in terms of relation and not an agent.⁵ Growing from these ideas of sovereignty and legitimacy from Lock was the later development of political theories of liberalism, as the fundamentals of political philosophies of state.

² Roth, Klaus, 2006: Ordnungskrise von Kirche und Reich und die Genese des modernen Staates, in: M. Brouck/T. Stein (Hg): *Christentum und Demokratie*, Darmstadt, Wissenschaftl. Buchges., S 79-96.

³ Roth, Klaus; Die Wende zum Staat; in: Salzborn, Samuel/Voigt Ruediger (Hg): *Souveraenitaet, Theoretische und ideengeschichtliche Reflexionen*; Stuttgart, Franz Steiner Verlag, 2010, S 35-38.

⁴ Horster, Detlef, *Rechtsphilosophie*, (Hamburg: Junius, 2002) S. 33.

⁵ Pfetsch, Frank. R, *Theoretiker der Politik von Platon bis Habermas*, Paderborn, Wilhelm Fink Verlag, 2003. S. 179.

Sociologist and philosopher Jean-Jacques Rousseau, who will be referenced again later in this paper, produced many works that contributed greatly to the basis for social sciences today. He derived many ideas from sociologist Ibn Kahaldun (1332-1406). Rousseau's work, *The Social Contract* presents the basis of political order between the state and individuals within a republican framework, against the absolutist power of a king. The work marked an important turning point for the development of a theory of legitimacy, and was also a basis for the French Revolution and the forming of legitimacy and a democratic political system, serving as a ground model for the process of democracy and legitimacy in the rest of the world.

In Max Weber's book "*Economy and Society*", he determines that the question of legitimacy is always intrinsically tied to a traditional, personal or institutional claim to power. Every ruler attempts to arouse a belief in his or her legitimacy in this manner.⁶ Additionally, Weber sought to find an answer to the question of how the existence of a constitution can account for the legitimacy of a system⁷, which he sees as dependent on social and political conditions, and are completely ascertainable through various motivations. Therefore, Max Weber differentiated between three types of legitimate rule whose primary validity of legitimacy are:

- a) Rational Character: From the belief in systems based on legitimacy through rationally created rules grounded in objective competence (legal sovereignty).
- b) Traditional Character: Power of belief in the sanctity of all existing systems and the ruling power (traditional sovereignty).
- c) Character of the Charismatic Ruler: Power of devotion to the ruling person and his/her charisma.

The second type of legitimate rule regarding the character of belief in certain systems, in which obedience is opposed to that of the conventional form and the coming about of formal

⁶ Weber Max, *Wirtschaft und Gesellschaft*, Hrg. Winkelmann Johannes, (Berlin, Duncker & Humblot Verlag, 1964), p. 122 et seqq.

⁷ ibid.

decisions, is specifically the type of rule which pertains to the common contemporary model of legitimacy.⁸ With regard to the issue of empirical and sociological notions of legitimacy, the question has to be answered accurately and truthfully – from which motives can a political order be accepted by a subordinate population?⁹ According to this argument by Schliesselberger, it can be criticized that Weber links the notion of legitimacy completely to its roots in the belief in its legitimacy. He further does not subsequently ask whether these systems of rule have occasionally earned their practical acknowledgment.

The notion of legitimacy has many definitions, such as that from Jürgen Habermas, who clarified the term as:

“...*Anerkennungswuerdigkeit* einer politischen Ordnung.”¹⁰

“... *dignified acknowledgment* of the valuation of a political system”.

Juergen Habermas uses a term that is connoted with the Frankfurt School in that it considers the dignity (“Wuerdigkeit”) of an acknowledgment. Therefore dignity tends toward a normative term by relying on the acceptance of an objective scientific community that is not necessarily bound to the people of a country. The expression of a people that is bound to a medium may not be able to rely on a medium in an oppressive context. This means that a society with a critical potential can enter into a discourse of legitimacy which refines reflection on a lawful system.¹¹ The concept can also be understood as the lawfulness of a governmental organization, that is, political sovereignty. This may also incorporate system’s historical, cultural, societal, as well as, group-specific and individual categories.¹²

⁸ Schliesselberger Hermann, *Aktuelle Probleme der Legitimität demokratisch verfasster Staaten.* (Salzburg, Diplomarbeit 1989), p. 11.

⁹ Höreth Marcus, *Die Europäische Union in Legitimitätsdilemma*, (Baden-Baden, Nomos Verlagsgesellschaft, 1999), p. 172.

¹⁰ Habermas, Jürgen *Legitimitätsprobleme im modernen Staat*, in :ders., *Zur Rekonstruktion des Historischen Materialismus*, S. 271-303, hie,r(Opladen, West deutscher Verlag, 1976) S. 293.

¹¹ Ibid.: 271.

¹² Gaus, Daniel, *Der Sinn von Demokratie: die Diskurstheorie der Demokratie und die Debatte ueber die Legitimitaet der EU*, (Frankfurt/Main, Campus Verlag GmbH, 2009), p. 21-34.

The idea of legitimacy also evolves with the course of history and is influenced by the experiences of the inhabitants, that is, where the conviction of a legitimate government emerged. The development of civilization and society is bound to the notion of the nation state in an absolute manner through historically developed systems of legitimacy. From this arises the concept that, in the perspective of historical ideas, the term legitimacy is limited to its exclusive usefulness in the analysis of its integration in the European context.

As already mentioned, a direct transfer of all the structures of legitimacy utilized by the European democratic nation states hardly carries a purpose and consequently it appears as though the tools presented by the classical theories of legitimacy are not applicable in the investigation into distinct features of the system employed in the European Union. The legitimacy of a political system occupies a point of central significance in the history of Western thought and, moreover, can be viewed as one of the fundamental accomplishments of human existence.

2.1.1 Examination of Legitimacy

Although the issue of legitimacy is frequently addressed in secondary literature, these are primarily extracted from the contributions of Max Weber, Jürgen Habermas, Wilhelm Hennis and Niklas Luhmann. These selections are appropriate in that the work of these authors supplement the debate in regard to political legitimacy, as explicated by Frank Ronge.¹³

In many cases, the prevalent idea is that the favor of the majority of the people is equivalent to gaining legitimacy. This equation does not defy the notion of legitimacy. The somewhat contrived difference between legitimacy and legality is as such: the government functions within the framework of a constitution put in place by a majority of the votes. This concept can be elucidated as follows: a unity of opinion exists that the administrative proceedings of the democratically elected government are legitimate if they have been appointed by the majority of the voters. It is this particular classification of legitimate government, which is enacted by a majority of the voters within a democracy, that will be investigated in the following pages.

The three hypotheses listed below establish a guideline for this discussion:

Hypothesis 1: A government is only legitimate when it is based on a stable foundation. At the same time, the results that come from the government can only be seen as legitimate if they also come from a similar foundation of democratic principles.

Hypothesis 2: Having a majority of the votes in a political election does not necessarily mean that the elected official has gained legitimacy within the country by the voting population. Much more needs to be manifested from the political regime including political

¹³ Ronge, Frank, *Legitimität durch Subsidiarität. Der Beitrag des Subsidiaritätsprinzips zur Legitimation einer überstaatlichen Ordnung in Europa*, (Baden-Baden, Nomos Verlagsgesellschaft, 1998), p. 184.

engagement and long term democratic principles. Voting for a political regime is only one form of political engagement from the people of the country.

Hypothesis 3: Commitment and active participation have, however, no “worth in and of itself”, but rather, require for their part a minimal portion of logic that has to reflect itself within the specific boundaries of laws, so that a clearly formulated orientation of values must exist.

Democracy and an understanding of legitimacy are grounded in the modern democratic system. This means that they are based upon trust and their premise upon a rightful basis. Hence, the national regime justifies the debate regarding legitimacy in its fundamental discrepancies between the two premises respectively. Notions of legitimacy must then be observed, as they can be characterized as either empirical and sociological or normative and philosophical.

2.1.2 Theory of Legitimacy, Power, Privilege and Sovereignty

The basic problematic nature of the occidental theory of legitimacy is an issue of discontinuity: either both positivity and legitimacy fall apart (Rousseau, Kant, Fichte, Levi Strauss) or legitimizations are incompatible in their non-circumventable pluralism. The foundation for the legitimacy of a sacral monarchy is power which is promoted by a monarch, and it is therefore his task to remain on the highest level with other supernatural powers.¹⁴ Moreover, the monarch or emperor's absolute authority was enormous and met little resistance. His rule was legal and legitimate at that time, but that was in the context of a different social structure, and there were several contemporary justifications and normative systems on which to base this legitimacy. One example of the extent of this monarchical power was encapsulated in the words of Louis XIV, “*L'État, c'est moi*”, or “I am the State.” The French Revolution can be seen as the turning point in the fate of absolute monarchy in Europe and the world, but the democratization process nonetheless took centuries and in some cases is not yet complete.

The legitimization of power and privilege can be differentiated in accordance with the character of a community. Also, the key to the type of community and its forms of legitimization lies particularly in the circumstances of the system of two contrasting orders: the system versus power and rights as a foundation for forming new communities versus rights as an exterior coercive order.

A process of the development of a foundation of legitimacy can be outlined according to the following three hypotheses:

¹⁴ Trotha, Trutz von, *Zwischen Streitanalyse und negativem Evolutionismus. Skizzen über einige Probleme der Rechtsethnologie aus soziologischer Perspektive*. In: *Zeitschrift für Vergleichende Rechtswissenschaften* 1986/87, p. 61-137

Hypothesis 1: Definite forms of a foundation of legitimacy fall together themselves at the inception of a governmental rule with fundamental antecedent of accession to power.

Hypothesis 2: The foundation of legitimacy is directly related to the ruling party and to those being ruled. Legitimacy cannot be obtained for the ruling party without the consent of the parties being ruled. This is most often seen through means of voting and the majority coming into power.

Hypothesis 3: The inception of the governmental rule and definite forms of foundations for legitimacy fails under the conditions of foreign domination.¹⁵

In contrast to a large proportion of considerations in the increased theoretically reasoned studies (contributions), Spittler determines that in the majority of empirical case studies two features of the legitimization of power and privilege were emphasized.

Firstly, the legitimacy of power and privilege is an essential, dynamic phenomenon, although it is not a significant fraction of theoretical case studies in the present time. Legitimacy is confrontational and embedded in processes, and is located both at the level of political and economic macrostructures and the microcosms of institutions, processes of interaction, and social and political strategies of institutional players or subcultures. Legitimacy is above all a process of authentication, and therefore a conflict of legitimacies.

Secondly, the variety of legitimization is not only a phenomenon that differentiates and segregates the character of cultures and communities. Rather, it is an intercultural and intrasocietal phenomenon which is emphasized in most theoretical case studies.¹⁶ As a result, if nothing else, it establishes the confrontational character of legitimization and legitimacy. This includes the political sense of a conventional constitution that illustrates the

¹⁵ Trotha, Trutz von, *Avant-Propos zu dem Sonderheft Anthropologie du Droit en Allemagne et aux Pays-Bas.* (In: *Droit et Culture* N 21, 1991), p. 7 et seqq.

¹⁶ Spittler Gerd, *Konfliktaustragung in akephalen Gesellschaften: Selbsthilfe und Verhandlung.* In: *Alternative Rechtsformen und Alternativen zum Recht, Jahrbuch für Rechtssoziologie und Rechtstheorie*, Bd. 6 Westdeutscher Verlag, Opladen 1980, p. 142-164

justifications for the legitimacy of a political rule. The standard of legitimacy of a political rule connected to the proceedings of its formation is considered to be the “achievement” of a civil, secularized, democratized image of society.

2.1.3 Political Dimensions of Legitimacy

The theory of political legitimacy faces an entire series of interconnected outstanding problems. In particular, socio-economical stability and legitimacy are factors that are closely correlated and cannot be looked at separately. What may be disputed is whether the normative balance of the aspects of legitimacy may be scientifically forgotten.

If legitimacy could be legally established the process would then be arbitrarily fundamentally dependent on something from the specific political culture or located through an intrinsic logic, such as the principle of tolerance, majority rule, or consensus decision-making, et cetera, that obtain at least long-term and actual validity?¹⁷ Empirically, with which criteria (values, standards) does a political reign expand its legitimacy? Does the legitimacy of a political reign have an indispensable connection to its stability?

The empirical variant classifies the moral issue as scientific, as a matter of purely private and fundamentally rational decision. Therefore, the question regarding the influence of legitimacy upon its degree of stability becomes futile. From a scientific stance, the only acceptable interpretation is that legitimacy and stability are identical. A political regime that is not stable will not gain the legitimacy it needs within the country. At the same time, a regime that is legitimate needs to be stable in order to gain the trust of its citizens. Otherwise, the country will be in constant fear that the government will collapse at any moment causing unrest and therefore illegitimacy.

Max Weber formulates this issue as such: the legitimacy of a regime may, of course, be considered only as an opportunity in that it is held in a relevant measure and is practically treated, whereby, these beliefs regularly sustain other motives of submission (opportunism,

¹⁷ Bell S.D., *The Cultural Contradictions of Capitalism*, (London: Heinemann 1976).

self-interest, weakness). The normative variant can be stated as such: the stability of a regime has nothing to do with its legitimacy, or not in a necessary manner, in any case.¹⁸ Coupling both dimensions with each other in a rigid manner would be committing a categorical mistake. Here, legitimacy is considered to be a counterfactually valid seal of approval that its material connection (dignity, tolerance, et cetera) owes a specific political culture (Western democracy) and can be turned critically upon other forms of rule that do not correspond to traditional models.¹⁹

In this context, more variants can be discussed, for example, the constructivist or reconstructivist, as well as the *de facto* variations. Any attempt to have these alternatives confront each other and weigh in against the other options, instead of simply being strung together, meets an obvious difficulty: calculated evidence of this kind is bound to a political viewpoint. Generally it can always be stated that when the identity of legitimacy is entirely defined by stability, it is absolutely not an autonomous issue.²⁰

¹⁸ Hennis W., *Legitimität zu einer Kategorie der bürgerlichen Gesellschaft*, in: Peter Graf Kielmansegg (Hrsg.), *Legitimationsprobleme politischer Systeme* (PVS-Sonderheft 7), (Opladen, West deutscher Verlag, 1976), p. 9-38.

¹⁹ Cf. Lorenzen P., Schwemmer O., *Konstruktive Logik, Ethik und Wissenschaftstheorie*, (Mannheim Bibliograph Inst, 1973), p. 107 et seqq.

²⁰ Schar J.H., *Legitimacy in the Modern State*, in: Green P./Levinson S. (Hg), *Power and Community, Dissenting Essays in political science*. Random House, 1970, p. 276-327

2.1.4 Legitimization of a democratic republic vs. a dictatorial regime

The legitimacy of a democratic political government is based on the foundation that the reasons for decision making are sound. Decisions should only be made from concrete evidence and facts, rather than inauthentic circumstances. These aspects build legitimacy within the regime in the eyes of the people. For example, the political democratic government has already existed for a long time, but the new political system, which includes representation of the people, political parties, a parliamentary system, etcetera, has only come into existence since the end of the First and Second World Wars, that is, the beginning of the twentieth century. These aforementioned aspects of the new political system have anchored the rules and laws of the new constitution as the optimal formulation for both, the people and the state.

A major matter of discussion for John Locke was the theory of consent, which was central to his political philosophy. According to Lock, the legitimacy of a government depends on the consent of their subjects, which in turn enables individuals to become part of a society. Emerging from a natural state in which they are not subject to authority, in his *Two Treatises*, Lock stresses that an individual becomes a full member of society through the act of consent.²¹ Governments are created through the consent of individuals in order to protect their rights and best interests and a governments' power is limited to the public good; those governments that fail to do so or who abuse their power may be resisted through revolution and replaced. Consent takes place on an individual and also on a tacit basis, as exemplified by individuals living in a certain political territory or by foreigners who have an obligation to follow the laws of the country they are residing in.²²

²¹ Grabner-Haider, Anton, *Die wichtigsten Philosophen*, (Wiesbaden: Marix Verlag GmbH, 2006), Pp. 104-106.

²² Forster, Greg, *John Locke's Politics of Moral Consensus*, (Cambridge: Cambridge University Press, 2005,) Pp. 7-11

The western political system has developed slowly towards the proper level – elections and representation of the people and federalism, plus the founding of new political parties, plus more freedom and rights for citizens, as well as free press and media – all of these issues are very important elements of the foundation for a legitimate constitution. The constitution was constructed according to all of these basic principles. The legitimate state regime is always without a doubt on the side of the people - the rights of the state as purely judgmental in actuality are not the legitimate rule. Every vaguely structured attempt at a qualification of the state necessarily contains a valuation and must be normative; it therefore always turns out to be an enterprise for the purposes of a justification of their power.

Rational legitimacy and the problem of the attainment of rights, the law and the executive actions have a high valuation in respect to anarchy, since they appreciate the law of the state and the people and the legitimacy of the state regime. The sovereignty and the authority of a political regime are enforced as legitimization of the rights of the state, but how? The acceptance of a dictatorship by the people of the country on the other hand comes about through various different means; perhaps the most dominant being the state run propaganda. This propaganda comes from the regime through media outlets including radio, television, newspapers and magazines.

At the same time it is forbidden many times under a dictatorship for the opposition parties to exist. If they do exist, they are portrayed as being irrelevant and infantile. The problem is that there is that no other opinions are being expressed. Without the free flow of information for and against policies and the dictatorship, citizens are not able to properly form an opinion on various matters. This is exactly what the dictatorship wants. Without information against the dictatorship from opposition parties or with information only from opposition parties that have been characterized to seem foolish and untrustworthy, the dictatorship gains a following by default. Of course, a lack of opposition does not automatically mean that citizens agree with the dictatorship in power, but it certainly helps them gain legitimacy when there are no dissenting opinions being spread around the country.

A real democracy allows for free speech and media in which opinions are able to be freely expressed without the fear of persecution by the authoritarian regime in power because it simply does not like what is being said.

2.1.5 Legitimacy of the Ruler

The authority of the ruling party is part of a prerequisite for its existence. Without justification for this belief, populations can be attacked and their resources raided, but they are not permanently ruled over. Conquerors always believe that their occupation is vindicated in the same manner in which sovereigns believe that their rule is justified. A forfeiture of these tenets would mean an automatic end to all conquest or rule.

Max Weber notoriously placed the legitimacy of a ruler at a central point in his sociology of sovereignty. For this reason, his sociological examination of rule is famous, in that the perceptions of the existence of a legitimate order of the design principle is used in order to differentiate between the types of ruling parties. Weber's theory first bestows its validity of the typical claim to legitimacy, which is implied by the consistency of the ruling party.²³ At the outset, Weber differentiates between the two levels of validity implicit in a belief in legitimacy: on the one hand, the belief in legitimacy of the rulers and their administrative staff, and on the other hand, the belief in legitimacy on the part of those under rule. Weber perceives that the belief in the legitimacy of the rulers, and particularly in the members of an administration, is the key to the nature and preservation of sovereignty.

However, Weber shares the popular belief that a sovereign can only hope to persist for a long period of time if he/she succeeds in arousing the belief of those under their rule that the existing order is not only authoritative, but also ideal. Thus, the stability of the ruling power depends upon the hope that both spheres of validity do not disproportionately break apart. As stated before, there are only three kinds of bases for legitimacy, according to Weber: tradition, legality and charisma. If one ignores Weber's theoretical concern, one may point

²³ Breuer Stefan, *Max Webers Herrschaftssoziologie*, (Frankfurt am Main/New York, Campus Verlag, 1991).

out the fact that these three types do not explain the full extent of proper levels of legitimization.²⁴

If one remains close to the historical testimonials, then the variety of the kinds of justification and sources of legitimacy are evident: divine coronation, intuition, divination, inspiration and direct revelation. The laws of the election and the throne and succession are pragmatic, while those of the modern forms of the social contract theory are civil.²⁵ However, the various forms of legitimacy that are discussed by Weber are not so different from those mentioned by Dolf Sternberger – they possess comparatively great contextual certainty, a high level of institutionalization, and far-reaching theoretical groundwork.

Weber isolates the beliefs in a leader's legitimacy from phenomena in that conformity and the obedience of the dominated party are able to secure, as well as those which constitute the difference of belief in legitimacy, however, with no calculable foundations for rule.²⁶ For this purpose, Weber includes convention, contextual interests, and motifs of purely effectual or purely rational worth to create solidarity.

There is therefore little justification for a regime to act in a severe and harsh manner. Rudolf Asmi in particular agrees with this assertion strongly. This severity becomes ruthless at the moment when the regime is being jeopardized. The justification for harshness is also not definite and absolute from an even-handed regime. Instead, the justification is even more aligned with the concept of the regime. The regime acts in order to appear successful before international media and the international community. On the one hand, the regime acts as a patriarchy of absolute trust and unconditional obedience. On the other hand, it can also be an almost militarist regime consisting of competent people reigning over its citizens. The

²⁴ Sternberger, Dolf, *Grund und Abgrund der Macht. Über die Legitimität von Regierungen*, Neue Ausgabe in fünfzehn Kapiteln, Schriften VII, Ffm (Insel), 1986.

²⁵ *ibid.*, p. 20

²⁶ Weber Max, 1964, p. 157

adjective “just” thus qualifies not the severity, but rather designates the severity of the concept of the regime that is just.²⁷

The state’s monopoly of the use of force, as defined by Weber, focuses extreme political and social power enhancements and an intensely increased responsibility on the part of the state regarding the protection of civilian lives. Indeed, even according to Hobbes, the unrestricted power of sovereigns is granted. In case the state no longer perceives these protective aspects of his tasks, the contract of subjugation between the members of the community and the ruler are considered obsolete. However, the question still stands as to what extent the organization of these protective tasks has in delaying the collapse of the protective function of the state.

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Asmis, Rudolf, Kalamba Na M’Putu, *Koloniale Erfahrungen und Beobachtungen*, (Berlin, E.S. Mittler & Sohn Verlag, 1942).

2.1.6 Sovereignty

Jean Bodin described sovereignty as the highest power of the monarch in 1576, and sovereignty has since then been central to political and legal discussions. The struggle between monarchical rulers and the Church for the right to authority and power at this time created a background for many of Bodin's theories. Autocrats or monarchs held more and more power due to the effects of the Reformation as the separation of religion and politics began, weakening the power of the Church. Bodin saw sovereignty as an essential element of the state, grounded in the importance of a sovereign who could breach the gaps caused by rivalries in society. Essentially, sovereignty as described by Bodin was the capability of prescribing law without being dependent on any other body, of higher, lower, or equal power²⁸. Contrastingly, Machiavelli granted absolute power to rulers, allowing them to break laws as long as it assured the self-assertion of the state.²⁹

Another political philosopher who discussed sovereignty was Thomas Hobbes. Surviving civil war in England, Hobbes developed theories of sovereignty focusing on the obtainment and retention of peace. The only way to avoid major war was through a powerful sovereign state. Hobbes justified the existence of a state through his theory of the social covenant, which bound every member as creator and participant of the state, giving over part of their rights to the state and being lead by a parliament or sovereign, the duty of the sovereign being to represent, rule, and protect their subjects.³⁰ This discussion focused on the concrete form of the state, its order and structure.

The attainment of rights is understood as the entering of rights into the social reality and its configuration as well as the transformation of reality in accordance with the rights. This goal can only be achieved through the actual positioning of general legal norms. This has to

²⁸ Bodin, Jean, 1576: *Sechs Buecher ueber den Staat*. Dt. v. B. Wimmer. Hg. v. P. C. Mayer-Trasch. 2 Bde., Muenchen, 1989. p. 110

²⁹ Salzborn, Samuel/Voigt Ruediger (Hg): *Souveraenitaet, Theoretische und ideengeschichtliche Reflexionen*; Stuttgart, (Franz Steiner Verlag, 2010), p. 32-36.

³⁰ Hobbes, Thomas, 1651: *Leviathan oder Stoff, Form und Gewalt eines buergerlichen und kirchlichen Staates*. Dt. v. W. Euchner. Hg. v. I. Fetscher. Frankfurt am Main, Berlin, Wien 1976. p. 255.

happen in a manner in which the corresponding application allows the national normalized attainment of rights.³¹

What do we mean by sovereignty in constitutional law? The term “sovereignty” is applied in domestic law and political theory to denote the supreme jurisdiction over the exercise of power within a nation. As such, sovereignty refers to the supremacy the state has over other actors in regards to the use of force and the application of law. Sovereignty, therefore, can be designated as the “holding of authority of the state”.³²

The legal concept of classical sovereignty of constitutional law has existed since the new modern states were founded, and most have remained unchanged to the present day. Authoritarian regimes have exploited this concept mercilessly in favor of their own rule and interests at the expense of the people, minorities and ethnic groups, and sometimes at the expense of neighboring countries. Therefore, new measures in this respect should be worked out, and new criteria and specific rules should be written or the old criteria be reformed, so that the absolute right of sovereignty may never remain absolute if changes are necessary.

Until now, every attempt at forcible intervention was illegal, that is, it contravened the criteria for sovereignty, and therefore every initiative to this end has been harshly criticized. In fact, in the present some regimes depend upon aid programs, such as those provided in instances of natural catastrophes. Private international organizations such as NGOs are generally not accepted or at least not trusted by all regimes. Under the notion of sovereignty, one understands that many initiatives on all levels of politics and society have the political regime as their principal source and if these regimes are not democratic, the extent to which these initiatives can develop is strictly limited. The huge gap between the interests of the

³¹ Schmitt Carl, *Politische Theologie Vier Kapitel zur Lehre von der Souveränität*, (Berlin,Dunker&Humboldt 1996), p.270

³² Salzborn, Samuel/Voigt Ruediger (Hg): *Souveränität, Theoretische und ideengeschichtliche Reflexionen*; Stuttgart, (Franz Steiner Verlag, 2010), p. 13-23.

people and those of the government will increase. The political regime takes no interest in the demands of the people, infrastructure, jobs, and assistance for families.

As some countries indicate, like Iraq for example, hundreds of thousands of men were killed due to wars and the corresponding instabilities that occurred (the first Gulf War 1980-1988 against Iran, the second Gulf War began in 1990 with the invasion of Kuwait and was ended by the United States in 1991 and the war against the Kurdish National Movement). The first Gulf War claimed the lives of 250,000 Iraqis.³³ Today, there are, for example in Iraq, over 600,000 fatherless families, 500,000 widowed women, over one million orphans, and about 200,000 individuals who were disabled due to the war. We must ask the question as to what remains in this community, what kind of growth is there, what gross domestic product, et cetera, since this downfall, devastation and decay happened in every stratum of society. In addition, the United Nations has adopted a resolution imposing an embargo in Iraq.

These measures directly affected the society as a whole and the Iraqi people, whom the United Nations should have saved and helped, were the ones who lost the most. However, the Iraqi people were punished two-fold. They were punished firstly through Saddam Hussein's authoritarian regime and secondly, by the United Nations resolution. The Iraqi people were further oppressed and abused in their everyday lives. During the period following the embargo, a higher mortality rate in children was observed, most likely due to contaminated drinking water, amongst other causes. The high mortality rate arose from the ongoing embargo: the almost complete destruction of the drinking water, sewage and waste disposal systems, destruction of hospitals, the pharmaceutical industry, et cetera. In order to diminish the consequences of the embargo, the United Nations implemented Resolution 986 in 1995, the so-called "oil for food" program, which ended in January 2003.³⁴

³³ Joseph, Kostiner, *Conflict and cooperation in the Gulf region*, (Wiesbaden, VS, Verl. Fuer Sozialwissenschaften: 2009) p. 65-72.

³⁴ Starck, Dorothee, *Die Rechtsmaessigkeit von UNO-Wirtschaftssanktionen in Anbetracht ihrer Auswirkungen auf die Zivilbevoelkerun*, Berlin, Dunker und Humbolt: 2000.p. 86.

The question of legitimacy in the Iraqi regime, that is, the legitimacy of Saddam Hussein, is why the sovereignty of the state can be acknowledged as signifying the legitimization of a political regime. In this case, an autocrat or dictator, in other words an authoritarian type of national sovereignty, which has remained unreformed, was recognized by international organizations, including the UNO, as well as through bilateral and multilateral diplomatic relations from the entire international community. That sovereignty alone can be interpreted as legitimizing such an authoritarian regime is strong evidence for the claim that the notion of sovereignty in relation to legitimacy is in drastic need of reform.

The process of democratization in Western Europe has been ongoing for centuries. Particularly after the Second World War, following the downfall of fascist regimes in Italy and Germany many countries of Western Europe began to implement the foundation of a democratic system anchored in their constitutions, after numerous debates and discussions in Parliaments with representatives of opposition parties, the press and the media. This process gradually took hold in all countries in Western Europe as fascist regimes in Spain and Portugal crumbled, and, after the fall of the Berlin Wall and the collapse of the Soviet Union, spread also to the former Eastern bloc.

One can adapt oneself to the criteria of the League of Nation (those regarding the principles of sovereignty and integrity of the state, the recognition and role of political authorities in states), taken up in the criteria of the United Nations and still relevant today, and also to the European Union, which has adopted all of the new legislation and conditions of the United Nation. In western democratic countries, these criteria succeed, but in developing countries these principles are exploited and lead to absolutist and authoritarian regimes. Keeping in mind the causes of the Arab Spring and the civil war in Syria, which exemplify this situation.

This shows that resistance from authoritarian regimes, however, can negate all of these criteria mentioned above, as criteria is lacking about the processes of democracy in

developing countries (those regarding real elections and United Nation observers, opposition parties, freedom of press and freedom of speech, real access to internet). This can only benefit political regimes and the military, but at the expense of their own peoples, similar to the contemporary political regimes that exist today in North Korea and Iran. Saddam Hussein was a paradigm example for all such cases, winning each of his elections by a great majority as there was no real base for the opposition party, and was himself a great admirer of Stalin.

Saddam Hussein began with his authoritarian decision to go to war with Iran, which cost the lives of over one million people on both sides and many more injured and disabled. As already mentioned, the country's economic and social infrastructure was completely destroyed. Saddam Hussein's war against the Iraqi Kurds then began after he had signed an agreement with them in 1970, granting Kurdish autonomy in 1974 which he did not fulfill, thus breaking his promise and breaching the peace agreement. The war subsequently ensued as from March 1974 to March 1975, resulting in the deaths of 60,000 soldiers, and one million banished Kurdish Christians.

At the end of the Iraq-Iran war, Saddam Hussein released poison gas into a small city, Halabja, which resulted in the death and injury of more than 5,000 civilians. Additionally, the natural environment in and around the town was completely destroyed. The "Anfal Campaign" (1986-1989) was also started by Saddam Hussein against the Kurds after the Iraq-Iran war was over. One hundred thousand displaced civilians fled to Turkey and Iran. Saddam Hussein proclaimed an amnesty after which thousands of Kurdish Christians were arrested, many of whom are still missing today. After more than 100,000 Iraqi soldiers were killed in the Kuwaiti conflict, Iraqis suffered from poverty and starvation. This was also partly attributable to the United Nations resolution on the conflict, as explained above. As a result, over 2 million people immigrated to other countries.

The arsenal of weapons belonging to the Iraqi army was financed at the cost of economic and social infrastructure, and likewise the Iraqi army's chemical weapons and atomic program led to United Nations weapons inspectors being prevented from doing their work properly by the Iraqi government. The United Nations weapons inspectors, in response to the United Nations resolution 1441 concerning weapons of mass destruction, searched throughout Iraq for months without results. The United Nations sought to prove that Iraq was producing forbidden biological and chemical weapons, and furthermore, had connections to the terrorist organization Al Qaida. The Iraqi atomic, biological and chemical weapons still have not been found. With this came the decline of scientific studies on the national level and the downturn of the economy. These economic and especially fiscal problems caused the further deterioration of Iraqi society. The Iraqi currency had no longer little worth.

To broaden the spectrum of the conclusion of this example of sovereignty, it is necessary to take a closer look at Saddam Hussein, the ruler who made these decisions. Saddam Hussein was the absolute ruler and dictator, as well as leader of the authoritarian regime of Iraq. The kind of legitimacy and legal rights he had in view of the aforementioned facts deserve special mention, which can be explained through the narrative of his rise to power. After the upheaval of the regime in 1968, he became a statesman and slowly gained all of the power for himself. When the Baath party took power, Hussein became representative General Secretary of the Revolutionary Control Council and the Head of the Ministry for State Security and Ministry of Propaganda in the new regime. In 1969, he became the Vice President and on the first of July 1973 he was appointed a three star general of the Iraqi armed forces. Later, he also appointed himself field marshal. In 1979, the President, Ahmad Hasan Al-Bakr, appointed Hussein, at the age of 42, as leader of the party and his successor. On the 11th July 1979 he became General Secretary of the Baath Party, and five days later took power as National President and leader of the regime.³⁵

At the beginning of his rule, Hussein gained popularity among the Iraqi population through means of extensive propaganda. He also used tools of generosity in order to appear

³⁵ Cockburn, Andrew/Cockburn, Partick, *Saddam Hussein: an American Obsession*, (London, Verso:2002). p. 132.

sympathetic to the Iraqi people and their national as well as regional causes. Granting amnesty to prisoners and raising the average salary across the country were additional methods used in order to create and solidify his reputation as a humanitarian who cares for the people of Iraq. After investing huge amounts of resources in the school and economic systems, it was no surprise that he easily gained the respect and popularity of the Iraqi population.

In true authoritative regime fashion, this did not last long and he quickly changed his image and agenda after about a year in power. Hussein only created this image as a tactic in order to establish himself and entrench his position in the Iraqi government. However, he then eventually moved in the direction of intense authoritarian rule, leading to the breaches of human rights and the disregard for the well-being of his population described above, and I delve into more detail about this in the following section.

After one year as President of Iraq, Hussein started a campaign against the Islamic revolution in the neighboring country of Iran. In August 1980, he led troops across the borders into Iranian territory with the explanation that these actions were taken as a preemptive strike to protect the Iraqi people against an aggressive country. In fact, this did not happen as self-defense of the Iraqi people, but rather for much different reasons.

The revolution in Iran was beginning to influence the Shiite majority in the South of Iraq. There was a fear on the part of Hussein and the Sunni Muslims that the Iranian revolution would incite a similar revolt on the part of the Shiite Muslims in the South of Iraq, which Hussein wanted to avoid. There were also personal reasons for Hussein to use military force against Iran, which stem from a visit to the holy city of Najaf. During this visit in the mid 1970's, during his period of exile, he got into a scuffle with a Shiite religious leader. The long-running struggle between the Shiite and Sunni Muslims in Iraq also influenced his decision to invade. The fear that the Shiite majority would rise up and overthrow the Sunni Muslims in power played an enormous role in his political decisions during his rule.

Perhaps an even more influential reason for his decision to move military troops into Iran came from a geopolitical conflict between Iraq and Iran. The Shatt alarab River that runs between Iran and Iraq into the Persian Gulf has caused major problems in the region for decades. The Euphrates and Tigris rivers flow into the Shatt alarab River in the last 180 kilometers before the Persian Gulf. Two Iranian cities, Khorramshahr and Abadan, are situated on the last sixty kilometers of this river and it is crucial for Iranian trade to use the ports in these two cities to transport goods into the Persian Gulf. Therefore, Iran wanted the usage of this last part of the river for trade purposes; however, due to nationalistic reasons, Iraq desired the river Shatt alarab for its own. Iraq viewed the people living in the region as Arabs, and should therefore belong to the Iraqi nation.

This problem arose again when Hussein promised Iran the usage of this last part of the river and the ports at the Algerian OPEC Conference in 1975. Years later, he still had not followed through on this promise and tensions were starting to rise again concerning this integral part of Iran's shipping industry. This was one of the causes of the 1980-88 Iran-Iraq war, as Hussein claimed that he had been intimidated into accepting the 1975 agreement, and therefore denied its legitimacy. Hussein saw himself as a hero of the region and the reason behind the growth for the area. He wanted to gain more influence and power throughout the Middle East and become an even more influential religious leader. Understandably, he used any means necessary to remain in power and to push away any attacks from outside his regime. In a regime such as the one that Saddam Hussein led, there are no opposition parties, no free press and no parliament or national council.³⁶ There were different charges brought against him, including crimes against humanity. Some of these crimes were for the inhuman acts against the Kurdish minorities and the aforementioned poisonous gas in Halabja. Saddam Hussein was eventually tried for his crimes and condemned by a Baghdad court to death by hanging in 2003.

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Coughlin, Con, *Saddam Hussein: Portrait eines Diktators; eine Biographie*, (Muenchen, List: 2002), p. 167

2.1.7 Legacies of the “Presidential-System” in the Middle East

In order to present a contextualization of presidential systems in a democratic republic, a difference should be considered between a presidential and a parliamentary democracy. The parliamentary system depends on an electoral system that produces multiple parties for which the people of a state can vote. Through this process of voting a party is elected and centers its policies on one politician who stands as the Prime Minister. An example of this model would be the parliamentary democracy of the United Kingdom, in which the Prime Minister's legitimacy is founded in the election of his party.

The starkest contrast to this is the presidential system in the USA. The President is directly elected as the head of state, while also fulfilling the role of head of government. Although the President is elected as the head of his party, as in the United Kingdom but by a more open method, his legitimacy is more direct. A middle-ground system is one in which the President fulfills the role of head of state, while the Prime Minister fulfills the role of head of government. This model can be seen in many Western European democracies, such as in France, Germany, or Austria. The President, although affiliated to a party, is directly elected in a separate election to the parliamentary elections. The Prime Minister in France, or the Federal Chancellor in Germany and Austria, is elected in a similar method to that in the United Kingdom, and is the head of government. In Germany and Austria, the system is *de facto* closest to the British system, since the Federal Chancellor, as head of government, fulfills all political tasks in a similar method to the American President. The President, as head of state, fulfills primarily representative tasks in a manner comparable to the British monarch. By contrast, in the French system, the President and the Prime Minister share tasks, the President being responsible for foreign affairs, for example. In this way, the French system can be seen as representing the synthesis of the American presidential and the British parliamentary democratic systems.

The current presidential model in the Middle East is a new phenomenon on the political level. In former times, the son of the president would take his place after his death, the best example of this occurred in Syria. After the death of President Hafiz al-Assad in 2000, his second youngest son, Bashar al-Assad was elected to the position of the next president. This required a modification of the constitution regarding the minimum age of a president, which passed with a majority of 97.29% of the votes according to the official election results. This occurred despite the fact that he had no political background and was trained to be a physician.³⁷

The question of legitimacy was not brought into question in Syria and neither was it during Saddam Hussein's regime, in which he had chosen his second son, Qasbi, to be his successor before it was overthrown during the war by the United States on the ninth of April 2003. Similar occurrences took place in Libya, Yemen and Egypt, although after being the target of severe criticism from all sides, Hosni Mubarak explained that his son would not be his successor, despite the important role he had already played in the regime's political system. In Jordan, too, after the death of King Hussein due to his long, difficult battle with illness in 1999, his son Abdullah II was to step in as his successor. Both the royal family and the United States have favored and supported his appointment as king.³⁸

The question which must be asked here is: where is the legitimacy? By what criteria can one measure the constitution? What are the criteria by which one can judge constitutional law (sovereignty, authority)? How could one develop and maintain a system of legitimacy and, with it, give hope to those people who have lived under authoritarian rule?

The implementation of a capitalist, liberal political economic system is not the sole solution. People need freedom, jobs and satisfaction within a political regime, meaning that the

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³⁸ In Jordan as well as Syria socio-political rules were broken. In Jordan the king had to come as offspring from a pure Arabic marriage, but the son of King Hussein had a non-arabic mother. In Syria a rule regarding the age of the king was broken, because a legitimate king was not allowed to be younger than 40 years old.

regime should create new jobs, safeguards and support their citizens. The regime should see their citizens as worthy of respect and align itself to the identity of the people. This was not the case in Iraq and other countries in the Middle East. In these nations, people were used and exploited by the state regimes.

2.2 Legitimacy II

2.2.1 Legitimacy and Democracy

Legitimacy here is considered as an element of the right to vote, which is a prerequisite to the basis of majority. This constitutes a legality that lies beyond a singularity.

Even though Winston Churchill, Prime Minister of Great Britain was a great admirer of the monarchy, even he said after the Second World War, despite all its drawbacks, democracy is still the best political system for the people. To quote directly:

“... democracy is the worst form of government except all those other forms that have been tried from time to time”.³⁹

Undoubtedly, democracy is considered to be the highest level of development of a political system after oligarchies, monarchies, dictatorships, et cetera. The right of the state and the right of the political system and legitimacy comes from the free will of the people through an election, regardless of how direct or indirect this representation is. The significance of this is that there exists thereby a choice and competition (rivalry), as well as limits to the offices that may be held and executive power of the elected president or prime minister. In this way, he/she does not have the option of holding absolute power in the manner that a king, authoritarian or dictator does. The voice of the people counts and the citizens maintain their respect in the community and the state due to the fact that democratic governments provide a great deal of services and support to the people.

To put it more succinctly, the inhabitants enjoy real support and backing, even when they run into difficulties abroad. That is to say that the state acts as a second father towards its

³⁹ Speech in the House of Commons (11.11.1947). The Official Report, House of Commons (5th Series), 11 November 1947, vol. 444, cc. 206-207.

citizens. Solidarity and a trust and respect for the governmental regime should be the foundation of democracy. This does not necessarily mean that everyone blindly follows the leader of the government or even agrees with their decisions. In fact, democracy works best when there is an opposition that criticizes the current party in power. This brings up many great discussions about policies that are important for a democracy. What is meant by solidarity, trust and respect for the government is that it is important for the citizens to have an understanding that the system works as a democracy and that it is stable and not corrupt. This is one of the fundamental justifications of a democratic system: it renders possible criticism, one of the general elements of self-reflection and acknowledgment. A further element of this is registered in the existence of a free press.

2.2.2 Legitimacy and Human Rights

If the political system is not democratic, how could one talk about human rights? A prerequisite for the worth of a human life does not exist. An undemocratic political regime is simply not interested in human rights. There may be no NGO activists and critics, and to be sure, such principles do not exist in non-democratic countries.

The main concern of an undemocratic political regime is to rule and to serve the interests of family, clan, staff and the military, including generals. There is little place for human rights, and as such human rights associations do not exist for citizens. It results from this that many refugees from these countries who flee to democratic nations have enormous respect for human rights. The rights of minorities and protection for ethnic and religious minorities have their roots in democratic countries and these rights are anchored in the constitutions of Western nations.

One hears of abuses of human rights nearly every day in developing countries. Human Rights Watch, a Swiss human rights organization, criticizes a list of countries that have abused human rights in their yearly report.⁴⁰ Among these nations are not only developing countries, but also countries that were part of the former Soviet Union, such as Russia and Serbia. Even countries in the European Union, Austria, for example, have been criticized with regards to their treatment of refugees and detainees, the latter having been treated badly. This creates a negative image of politics in the area. Countries such as France, Italy, Germany, Great Britain and Belgium have also been criticized in this respect.

In principle, however, these are simply not comparable to the abuses of human rights committed in non-democratic countries. The roots of this criticism lie in the French

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Revolution. Human rights are principles which were elaborated in the period of the Enlightenment and referred to by those active in the French Revolution, and they have been strengthened in the decades following the Second World War. This occurred especially thanks to the founding of the Geneva Convention, according to which human rights are to be observed and respected due to their inclusion in the Constitution. In fact, countries wishing to apply for membership of the European Union are required to fulfill standards and duties regarding human rights. The United Nation's International Covenant on Human and Civil Rights (1983) states their inherent defense of inalienable rights of all members of the human family insofar as their freedom from fear and want is achieved through the ability to enjoy civil, political, economic, social and cultural rights.⁴¹

During a war, one always sees abuses of human rights, especially of civilians, that is, of women, children and the elderly. The European Court for Human Rights in Strasbourg, the War Criminal Court in The Hague and the International Criminal Court are responsible for the indictment of war criminals. An example is the case of the Yugoslav wars in the 1990s. Legitimacy means recognized human rights anchored in a constitution, civil rights and everyday life. Specialized institutions and associations have been established for the purpose of reporting about this in the press and other media.

⁴¹ UN Documents, Resolution adopted by the General Assembly, 38/116, International Covenants on Human Rights, <http://www.un-documents.net/a38r116.htm> (Stand: 11/05/2014).

2.2.3 Legitimacy and Minority Rights

The rights of minorities are an important point in the framework of a democratic Western political regime. The following groups are mentioned:

1. Ethnic minority groups
2. Religious minority groups
3. Social minority groups
4. Racial minority groups

The protection of the rights of these groups appears in the constitution and is applicable on all levels. It is dependent however upon the political regimes in Western countries. They are based on law and have their own representatives and associations, but their activities and published materials are not comparable to those in non-democratic countries since the latter lack a basic foundation. The best examples of this are in countries such as Iraq, Iran, Russia, India, Pakistan, and Afghanistan, etc.

2.2.3.1 Ethnic Minorities

Ethnic minorities are active on the inter-political level and in international law, but they are sometimes subdued by the great powers due to their political, economic and military interests, as for example, the Chechen people in the Caucasus. These Chechens engaged in partisan warfare against the Russian troops, in a similar manner to the Kurdish situation in Iraq.

Minorities often strive for freedom and their right of self-determination, and want to preserve their language, culture and national identity. Everyone is proud of their national identity. This caused the Yugoslav wars in the 1990s and it was also the root cause of the Kurdish uprising against Saddam Hussein's regime and the armed national movement of the Kurdish people in Turkey. This was also the main reason for the conflicts in Kashmir between Pakistan and India. There was also a similar situation in Afghanistan before the invasion of U.S. troops. There are many examples in which ethnic minorities are labeled as terrorists by the political regime or depicted as separatists or as enemies of the state. Alternatively, in the case of Iraq, the ethnic minorities are arabized, as can be seen in the graph below. This means that people are made to naturalize, or they are suppressed. The last population census was taken in 1957, during the start of Saddam Hussein's regime. Therefore it cannot be considered a serious census.

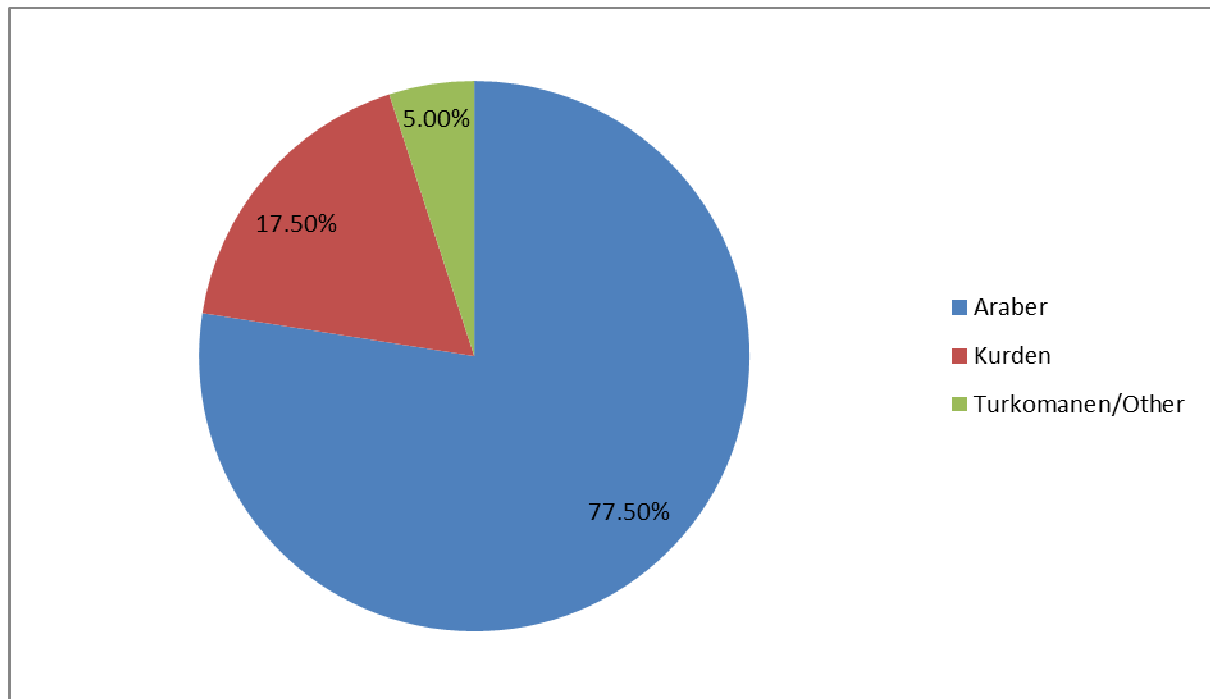


Fig. 01: Ethnic groups of Iraq in percent (Source: <http://www.pbs.org/wgbh/globalconnections/mideast/maps/demotext.html> accessed on 10.02.2014.)

2.2.3.2 Religious Minorities

Religious minorities are often opposed and berated, fought against, are not permitted to exist or to practice religious rituals. Numerous examples of these groups can be found in various developing nations across the world, in Asia, Africa, Latin America and India. As a concrete example, I will use the oppression of minorities in Iraq under the regime of Saddam Hussein, in order to demonstrate how this process can function.

The conflict between Shiites, Sunnis and Kurds in Iraq was a characteristic of Hussein's rule, and was marked by the heavy oppression of the religious minorities or those religious groups not in power, including brutal acts of aggression and severe breaches of their human rights. The government was, until the fall of Saddam Hussein in 2003, run by the Sunni population, although Arabic Sunnis were actually and still remain in the minority. Nonetheless, because they had control over the government apparatus, they were able to oppress both the Shiite and Kurdish populations. For example, during the First Gulf War, 1980-88, Hussein feared an incursion from the Shiite population in Iran, and so oppressed the Iraqi Shiite population in order to prevent a Shiite uprising in Iraq. He prevented Irani Shiites from entering Iraq for reasons of pilgrimage, and in doing so hoped to hinder contact between the respective Shiite populations in the two countries. Additionally, at the end of the same war, he used poison gas against the Kurdish population in the city of Halabja in March 1988, killing up to 5000 people and injuring up to 10,000 more. In the aftermath of the Second Gulf War, the Kurds were further attacked and repressed. The Shiites and Kurds freed their regions from the rule of Saddam Hussein, but Hussein, who retained strength in domestic politics, responded with an iron fist. He marched into first the Shiite area in South Iraq and then into the Kurdish region in the North. As a result, there were huge waves of refugees heading to the borders, as Hussein's troops bombed the cities, including those of religious importance to the two groups. There was a repeat of the use of poison gas. Minority rights were very obviously in this case not respected, and in this way, one can see how an authoritarian regime represses specifically religious minorities.

Governments in the aforementioned countries have shown little interest in reconciling these conflicts and are not capable of this because they stem from deep rooted beliefs. It is often the case that these religious struggles between groups go back so far, that it is difficult to change such traditions. This also happens when the leader or government comes from one group and rules the country in favor of their particular group, while opposing the other. This is very often the case because these are cultures where these religious traditions and ideologies are deeply rooted in the culture. It is very difficult for a leader to separate the political policies and their religious beliefs.

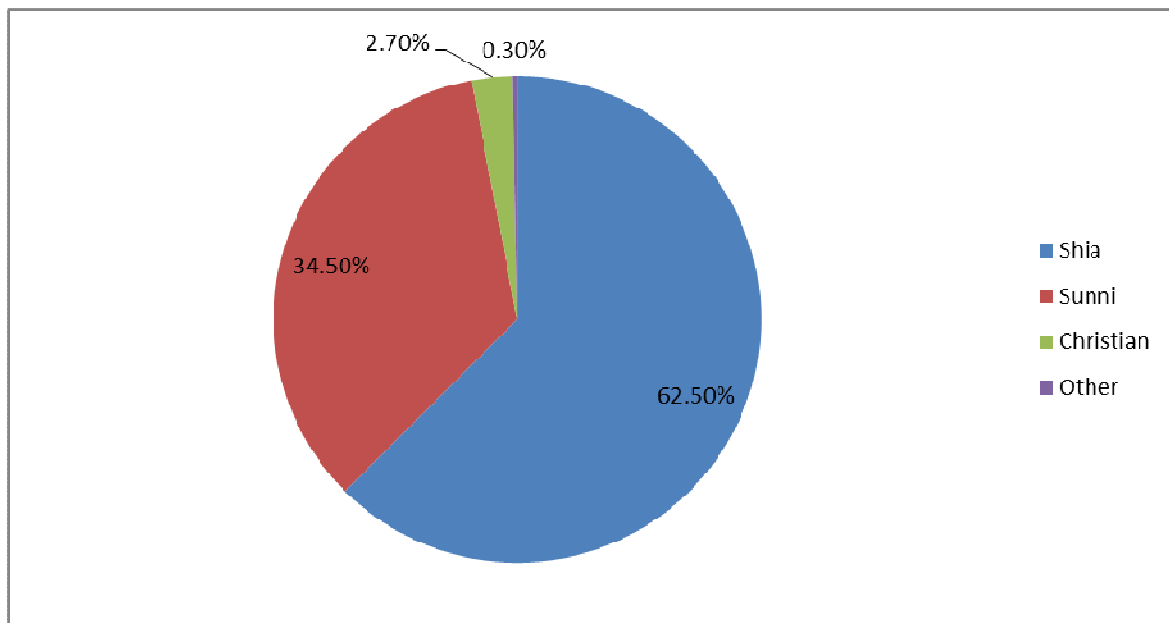


Fig. 02: Religious groups of Iraq (CIA.gov, et al.)

2.2.3.3 Social Minorities

Although such minorities exist in every country, the question remains as to whether they are able to live freely and have freedom of expression. Such groups, for example homosexual men and lesbians, have no official right to exist in many countries and even if they do have the same rights: a public outing is considered a taboo, so they can only act clandestinely and are without any public approval.

These problems differ from region to region and are also influenced by factors such as religion and the degree of social tolerance in a society as a whole. Unapproved social relationships between people are thus not accepted due to the rule of the religious majority and furthermore, many religions do not recognize or at least consider such situations and people in a negative way.

Due to such a mixture of intolerance, religious spurring and goading on of people by clerics, the image and reputation of these social groups is automatically menial, and therefore the political regime represses their rights and does not recognize them as a minority group. Moreover those groups are in danger of being used as scapegoats for social and economic problems or even natural catastrophes to detract from the respective regimes' faults and errors.

2.2.3.4 Racial Minorities

Racial theories today are considered to be obsolete theories in which humanity is divided into various races. These races were differentiated primarily based on physical features such as skin color and type of hair, and in most cases, differences in character and ability were assumed. These views are now considered obsolete. In the 1990's, research was carried out which proved that the alleged differences between the races are as small as the possible variability within these populations, and consequently, that race is not biologically significant.

There were many theories which were based upon race, partially and directly implying racism, which distinguished between human races of higher and lower worth and asserted coherence between racially contingent features and cultural development. One race is sometimes declared superior at the cost of all others. This was especially true during the rule of the National Socialists in Germany from 1933–1945, during which the value of races was emphasized and, through the use of propaganda, became a central point of the National Socialist ideology. Ideas about the biological evaluation of race were radicalized and exaggerated. The case of the indigenous population in Australia is another example of where one race was oppressed by another on the grounds of racial superiority. Between the years of 1909 and 1969, the children of aboriginal groups were taken from their parents, at least partly due to the belief in the superiority of the White European population, in a case now referred to as the Stolen Generation. These problems also exist in many other countries with different ethnic groups and are especially great if there is no democratic political party in power. The rights of these racial minority groups are ignored by the state, that is, the political regime, and helped by the masses, they put pressure on the minorities.

The political regime undoubtedly does have power in its hands; however, with what legitimacy and legality do they lead the people? The constitutional criteria are radical and

extreme, and the only existing party does not act in the interests of the population. Furthermore, it does not serve the benefit of the people. Rather, the support of the people is assessed by racist principles of parts of the population and abused through racist behavior.

2.2.4 Overview over the Protection of Minorities in International Law

As early as the seventeenth century, one can find provisions regarding the protection of religious minorities in peace treaties; for example, in the Treaty of Augsburg in 1555 or in the Treaty of Westphalia in 1648.⁴² In the final act of the Vienna Congress of 1815, the first step towards the protection of ethnic minorities was already taken, as well as in the treaty created by the Congress of Berlin from 1878 in which the Turkish, Greek and Bulgarian demographic groups gained protection.⁴³ These treaties together indicate that there exists an alliance between a protected minority group and an external power.

In the London and Paris Conferences between both World Wars the first institutional protection of human rights came into being in the form of the protection of minority groups – multinational agreements were amended by successive bilateral treaties. The reason for this development lies in the fact that through agreement in the London and Paris Conferences, changes of territorial areas were made, allowing ethnically mixed states to emerge.⁴⁴ It was known by the initiators of the treaties that disregarding for the rights of individual groups could pose a threat to the newly constructed peace. Therefore, the protection given by these treaties was quite far-reaching: “... it should facilitate the ethnic, ‘racial’, religious or linguistic minorities on every level in order that they may exercise their religion, tradition, and utilize their language.”⁴⁵ Likewise, it was determined that access for minority groups to public administrative offices and all occupations and industries had to be ensured.

“The fundamental idea of the treaties is to protect minorities, social groups that are integrated into the state whose population is of another race, language or religion than the

⁴² Duchrow Julia, *Völkerrechtlicher Minderheitenschutz in einem multikulturellen Staat? Das Beispiel der weißen Bevölkerung Südafrika*, Schriftenreihe Recht und Verfassung in Südafrika, Band 7, (Baden-Baden Nomos Verlag, 2000), p.15

⁴³ Duchrow, *Völkerrechtlicher Minderheitenschutz*, p. 15

⁴⁴ Duchrow, *Völkerrechtlicher Minderheitenschutz*, p. 16

⁴⁵ Duchrow, *Völkerrechtlicher Minderheitenschutz*, p. 16

group, the possibility of a peaceful existence side by side and to secure a sincere cooperation with this population, under the protection of distinctive features that differentiate them from the majority, and under the compliance arising from necessities. For the attainment of this goal should be guaranteed that the subjects, the minorities associated with race, religious or language, are entirely equivalent to other subjects of the state in every way. Furthermore, the minority groups should be assured as being a qualified member for the preservation of the national characteristics, convictions and national virtues.’’⁴⁶

Through the generation of a certain equality between members of the state, the intended peaceful coexistence should be ensured. This should likewise enable the existence of cultural, linguistic and religious minorities.

Yet the outcomes of these treaties could not prevent totalitarian regimes from gaining power and violating the rights of minority groups in the period before World War Two. These nations did not adhere to the treaties, and furthermore, possibilities for enforcement through the League of Nations were confined so that the concept of protecting minority groups could not be attained.

The first efforts of the United Nations after the Second World War brought about the general protection of human rights, rather than the rights of minority groups.⁴⁷ The international community was, however, aware of the necessity of protecting minorities. Nonetheless, neither the charter of the United Nations, nor the Universal Declaration of Human Rights of 1948 contains an explicit protection of minority rights.⁴⁸ The obligations from the First World War did not apply any more – no bilateral treaties were put into effect; rather, a general prohibition of discriminatory practices was stipulated in the peace treaties.⁴⁹ The exception to this was seen in the Gruber-de Gasperi Agreement between Italy and Austria on

⁴⁶ Duchrow, citation according to: Entscheidungen des Ständigen Gerichtshofes, Vol. 12, p. 26 et seq. (published by the Institute of International Law, University of Kiel), p. 16

⁴⁷ Duchrow, Völkerrechtlicher Minderheitenschutz, citates Heintze und Pircher, p. 17

⁴⁸ Duchrow, Völkerrechtlicher Minderheitenschutz, p. 17

⁴⁹ Hoffmann, Minderheitenschutz in Europa, cited in Duchrow, p. 17

September 5, 1946, in which Italy pledged to grant regional autonomy to the German population in the province of Bolzano.⁵⁰

Developments thus proceeded from specific protection of minorities to a general prohibition of discriminatory practices. This did not, however, meet the needs of the minority groups requiring protection. Equal treatment must not only exist, but also possibilities must be created so that minority groups can preserve their cultural identity.

In the resolution that accompanied the declaration of human rights it was particularly emphasized that the United Nations would not show indifference towards the fate of minorities. Article 27 of the Pact for Civil and Political Rights from 1966/1974 International minority rights and protection were anchored in the International Pact for Civil and Human Rights in 1966 (IPBürg) in article 27:

“In states with ethnic, religious, or linguistic minorities, the members of these minorities may not have their rights withheld from them, together with other members of their group, they may continue to lead the specific cultural life to which they are accustomed, to profess and practice their specific religion, or to use their specific language”⁵¹

The pact is, insofar as it is a multilateral agreement, mandatory, as it is a basic law in most signatory countries. However, in this pact the term “minority” is not defined. Nevertheless, the protection is more advanced through this article than in the previous attempts to protect minority groups in peace treaties.

⁵⁰ The German speaking citizens of the Boden Province (and the neighboring bilingual settlements of the Trient Province) have full equality with the Italian speaking citizens in the framework of extraordinary measures to protect the ethnic character and to enable the German speaking parts of the population to participate in the cultural and economical progress. See also: http://zis.uibk.ac.at/stirol_doku/dokumente/19460905.html, 7.6.2010

⁵¹ Cited according to Duchrow, Völkerrechtlicher Minderheitenschutz, p. 16

“Art.27IPBürg should satisfy the needs of the minorities for special protective measures in order for them to be able to retain their singularity.”⁵²

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities constitutes a further step forward for the protection of minority rights. It was passed as a declaration in 1992 by the United Nations Commission on Human Rights of the General Assembly.⁵³

This declaration also lacks a specific explanation of the terms which define a minority. To begin with, there is no particular statement regarding the Art.27IPBürg describing the rights of a group or only the rights of individuals, which are deserved by individual members of a group. Nevertheless, the declaration is seen as evidence of success in the pursuit of a comprehensive protection of minorities – since in its posited protection deals with an established right of minority groups resulting from Art.27IPBürg. The declaration demands explicit arrangements for the preservation of minorities as well as the preservation of their identity. This includes ramifications for all former means used to protect minorities since the declaration must be viewed based upon its preamble, as a guideline for the construction of former provisions regarding the protection of minority groups under international law.⁵⁴ The declaration asserts that the existence of a democratic state is a prerequisite for any protection of minorities. The declaration therefore represents progress in the respect that the minorities are thus accorded the right to speak their own language, practice their religion, and follow their traditions. It is also notable that the declaration also gives information regarding the doctrine of protection of minorities.

Minorities must be granted access to a political and economic life by the state, and it must carry out and arrange measures to ensure that the minorities receive the same opportunities as the nation's other citizens. The declaration also gives some indication of the doctrine of

⁵² Duchrow, Völkerrechtlicher Minderheitenschutz, p. 19

⁵³ *ibid.*

⁵⁴ *ibid.*

the protection of minorities; thus it is based upon the protection of human dignity, which can be expressed through one's affiliation with an ethnic group and the identification with such.

Article 4, Paragraph 4 of the declaration makes it clear that the state in which minorities live must assume responsibility for the flow of information occurring between the majority group and the minority group – with this, both groups must deal with each other's customs and traditions.⁵⁵

On the local and regional level, it quickly becomes clear that the protection of minorities can still be greatly improved. In the European Human Rights Convention there is no explicit article regarding the protection of minorities. Therefore, Article 14 of the European Human Rights Convention (prohibition of discriminatory practices) and Article 8 of the Human European Rights Convention (protection of personal life) are given particular importance.⁵⁶

These aforementioned rights can certainly not replace an explicit protection of minorities. For this reason, the Council of Europe has undertaken a special effort to change this in the past few years. A further protection of minorities is offered by the European Charter for Local or Minority Languages, which was adopted by the member states of the Council of Europe in 1992.⁵⁷ This comprehensively protects the languages of the citizens who are identified as a minority within a nation. However, this certainly does not provide enforceable rights. It should also be mentioned that not all member states of the Council of Europe have since ratified the charter; for example, France has as yet been unable to complete the ratification process due to constitutional reasons. A recent vote, on January 28, 2014, in the Assemblée Nationale, represents a step in the direction of ratifying the charter.

⁵⁵ Duchrow, Völkerrechtlicher Minderheitenschutz, p. 20

⁵⁶ *ibid.*, p. 21

⁵⁷ *ibid.*

A blanket agreement from the Council of Europe, offering an additional safeguard for minority groups, specifically regarding the protection of national minorities, was passed in 1994.⁵⁸ This emphasized the protection of the languages and religions for minorities, in particular the necessity for cultural exchange within the community.

In conclusion, it can be asserted that the singular universally recognized law regarding the protection of minorities is ensured by Art.27IPBürg, as other attempts are limited by their scope or their effectivity.

⁵⁸

ibid.

2.2.5 Legitimacy and the People's Right of Self-Determination

The idea of self-determination has been since the antic closely connected to the rights of the individual. Political legitimization through the realization of the free will of individuals was central to the political theories of philosophers of the Enlightenment and French Revolution. Descartes emphasized the freedom of thought for spiritual and political self-determination.⁵⁹ The development of modern concepts of the right to self-determination is based in the two conceptions of democratic and national self-determination. The democratic conception of self-determination is rooted in the philosophies of the Enlightenment such as those from John Locke and Jean-Jacques Rousseau, focusing on the social contract and consent of subjects as well as state sovereignty. The national conception of self-determination arose from the process of nation-building, accompanied by national freedom and independence movements of the late 19th century against the absolute authority of kings and emperors of various European regions.⁶⁰

After the First World War and Treaty of Versailles, the League of Nations precised the notion of people's rights to self-determination, although there existed many discussions regarding the integrity of the state and sovereignty of the state. US President Woodrow Wilson's proclamation became essential for the territorial and national re-organization of European, even as this principle was, in practice, in controversy with the principles of sovereignty of the state.⁶¹ This controversy will be addressed later in the further chapters.

In many countries today, the regime denies the citizens (especially minority groups) the concept of self-determination, despite the fact that it is specified in the United Nations Charter. The German President Walter Rau once said that there are over three thousand

⁵⁹ Colak, Ferdo. *Die Selbstbestimmung der Voelker zwischen Recht und Machtpolitik*, (Zagreb, eigene Herausgeber, 1996) Pp. 19-21.

⁶⁰ Bruehl-Moser, Denise, *Die Entwicklung des Selbstbestimmungsrechts der Voelker unter besonderer Beruecksichtigung seines innerstaatlich-demokratischen Aspekts und seiner Bedeutung fuer den Minderheitenschutz*, (Basel, Helbing & Lichtenhahn Verlag AG: 1994) Pp. 3-8.

⁶¹ Colak, Ferdo, (1996), Pp. 23.

minorities in the world and if each of them would demand their co-determination, it would result in the rise of chaos in the world order and in the political sphere. An alternative opinion could be that if minorities are not represented within the political system, these minorities can be oppressed and abused and their families are torn apart. They cannot retain their language, culture or identity. The political system, especially when it is not of a democratic nature, does what it wants and, therefore, the problems are not resolved, rather, the minorities feel as though they are being dominated as in colonial times.

The best examples of this are demonstrated by the Kurdish people, the minorities of Kosovo in Serbia and Montenegro, and in Chechnya. All of these instances show how entire ethnicities are oppressed and driven out. They have minimal rights, as exhibited by the Kurdish population in Turkey, who, until 1990, were not permitted to speak their mother tongue. The Kurds were not recognized, but rather Turkey referred to them as mountain Turks and imposed an emergency rule of Kurdistan and in Eastern Turkey. The situation was not any better for the Kosovars in Serbia and Montenegro and their expulsion during the Milosevic regime was similarly enacted in Chechnya in the Caucasus, in which they wanted to have their right of self-determination and their own independent country like the neighboring nations of Georgia, Azerbaijan and Armenia. However, this was rejected by the Russians who put the Chechen national movement on the same level as terrorism, which is reminiscent of the national movement in Kosovo as well as the PKK⁶² in Kurdistan.

Where is the principle of self-determination? Why are these populations not recognized? What was the response of the United Nations, particularly the Security Council and the General Assembly? Where does the validity of this principle lie?

Are the principles of the United Nations only recognized in democratic countries? Where, then, is the freedom of determination for all people? Taking another example, if the situation

⁶² The PKK („Partiya Karkerên Kurdistan“ / „Workers Party of Kurdistan“) is a Kurdish Underground movement based in Turkey and active in various countries. The PKK uses political tools as well as sheer weapon force and armed assaults for their fight for Kurdish political autonomy in certain regions in Turkey. See also. Lothar, Heinrich: *Die kurdische Nationalbewegung in der Türkei*. Deutsches Orient-Institut Hamburg 1989, p. 47

between the Flemish and the Walloon peoples in Belgium became worse, would they then also settle into a situation of self-determination, similar to that of the two particularly large ethnic groups in Switzerland (the Germans and the French who represent the two largest groups of minorities)? Would this remain the case during a period of economic hardship?

Is it preferable to have the right of self-determination of these groups in respect to freedom and independence or to retain national boundaries as they are, so that the entity of the state (union) remains sacred and is not affected? What is the United Nation's stance on this debate? What is legitimate? Who is right, the people or the nation?

There is already a resolution⁶³ that promotes the right of peoples to self determination. The resolution reaffirms the universal right of self-determination and thereby opposes all military intervention by foreign powers. However, the future has to show how such resolutions will find their way into national as well as international agreements and practicable policies.

⁶³ UNO Resolution 62/144, adopted without vote in the 76th Plenary Session on 18th, December 2007

2.2.6 Legitimacy of Revolutionary Movements

Revolution can be described as “a social movement advancing exclusive competing claims to control of the state, or some segment of it”⁶⁴ The history of revolutionary movements in which populations were oppressed and abased, banished or threatened causes the people affected to consider resistance against the ruling body. This is similar to the battle against colonialism and conquerors or against foreign troops and occupying forces. Jeff Goodwin, a Harvard scholar, has also given two definitions of “revolution” in his work *No Other Way Out: States and Revolutionary Movements, 1945-1991*; a broader definition: “revolution (or political revolution) refers to any and all instances in which a state or political regime is overthrown and thereby transformed by a popular movement in an irregular, extraconstitutional, and/or violent fashion (...) this definition necessarily requires the mobilization of large numbers of people against the existing state.” and a more restrictive definition in which: “...revolutions entail not only mass mobilization and regime change, but also more or less rapid and fundamental social economic, and/or culture change during or soon after the struggle for the state power.”⁶⁵ An example of the former definition can be found in the civilian combatants who fled with light weaponry into inaccessible areas and rebelled against the regime (e.g. Mujahedins in Afghanistan in the 1970s who were fighting the Soviet occupation of their territory). An example of the latter definition can be found in the former satellite countries of the Soviet Union and their European integration.

In terms of revolutions, one can identify a pattern of events that tend to occur. National regimes will firstly agree upon a ceasefire or a peace conference and/or amnesty for prisoners. The national regime will permit all media outlets to report for or against the regime and, on the level of international political agencies; they will always speak positively of one side (the side of the national regime) and negatively of the other. Generally, the state regime, in fact, wants the rebellion to be treated as an internal matter, neither to be arbitrated

⁶⁴ Tilly, Charles, *European Revolutions 1492-1992*, Oxford: Blackwell, 1995, p. 10.

⁶⁵ Goodwin, Jeff, *No Other Way Out: States and Revolutionary Movements, 1945-1991*. Cambridge: Cambridge University Press, 2001. pp 10-11

by another regime nor by a regional or world organization, nor even to be acknowledged by such institutions. The press and the media are also always restricted, meaning issues are to remain clandestine since they are being carried out by the national regime. This links up with the other accusations that the national regime is the adversary of opposition parties. Every national movement or attack, every campaign is condemned as terror by the national regime. Therefore, in this case terror could be defined as every campaign upon the civilian population.

Is the revolutionary national struggle for independence legitimate? The United Nations Charter decisively declared and defined that humans have a right to their self-determination and to freedom and independence. It is irrelevant how this comes about, but if the nation has an authoritarian, dictatorial, communist or non-democratic regime, then the opposition of such a regime is possible, but not that of civil, social, touristic or economic institutions.⁶⁶

Therefore, the people of each nation, when occupied by an enemy power, have legitimate reasons to fight for their freedom and independence. In actuality, an overwhelming number of minority populations gain their freedom and independence through rebellious actions and revolution against their oppressors rather than through the means of negotiation. Under such specific aspects and according to the before mentioned stance of the UNO, a revolution can be considered legitimate.

When one speaks about legitimacy and legality, does one mean opposition from one side and the national liberation movement, or opposition towards the rule of foreign troops, conquerors, occupying forces? It is important to define the specific terms and the conditions around such events.

⁶⁶ Unfortunately it happens regularly that rebels try to hit such targets with attacks and innocent civilians as well as tourists get caught in between those actions which gives the specific regime credibility despite its own crimes.

Physical space is restricted and therefore rebel leaders are isolated and have no access to modern life or contact to foreign countries. Mostly they are utilized for regional countries, that is, the neighboring countries. Regarding rebel parties, an example of this is the PKK (Kurdistan Workers Party). The Turkish national regime succeeded in delivering a serious blow to the party, after they had been revolting against the Turkish government for many years (since 1985). The situation revolving around the Kurdistan Workers Party's leader Abdullah Ocalan (APPO) and his very public capture in Kenya was a serious defeat for the PKK and their followers.

Due to the so-called principle, this pertains to other rebellions and fighters for national independence too, such as the Tamils in Sri Lanka, the freedom movement (OGK) in Kosovo, the Chechen movement, et cetera, all of whom are referred to as terrorist movements by the central state regime. The reason for this is often that the rebel leaders are not well educated or properly informed about international politics and the politics of new global governance. Freedom fighters or rebels could never battle at the front against troops of the national regime because they only have simple equipment and do not have sufficient weaponry. National troops have precisely the opposite; they are equipped with heavy weaponry and are equipped with military-grade machinery, such as airplanes and tanks. The rebels are therefore always on the move and, as a result, the level of secrecy in their operations functions underground and are often well organized.

It is also possible that the agents of the liberation movement are acknowledged and their demands partially met; this could occur, for example, if they decide to have peace negotiations, but this depends on which national regime is in place. This can be seen in the peace talks between Israel and the Palestinian Liberation Organization (PLO).⁶⁷ The PLO as a national liberation movement was considered as savior of the Palestinian people and was

⁶⁷ The Palestine Liberation Organization, PLO, is an umbrella organization of different nationalistic fractions of the Palestinians. The PLO was founded on May 28th, 1964 in Jerusalem because of an initiative of the Egyptian president Nasser, to create a representation of the Arabian ethnicity in Palestine and to enforce a pan-Arabic movement. Since 1969 till his death on November 11th, 2004 Jassir Arafat was the head of the PLO. Arafat was crucial for the creation of a Palestinian national consciousness and the wish for an independent state Palestine. Under Arafat's guidance and leadership the PLO radicalized itself and was involved in several civil wars throughout Arabic countries for decades and held responsible for numerous terrorist attacks on Israeli, Jordanian und Libanesian targets. Cf. Bernhard Chiari, Dieter H. Kollmer, Martin Rink (Hrsg.): *Naher Osten*. 2., überarbeitete und erweiterte Auflage. Schöningh, Paderborn u. a. 2009, pp. 114–122.

active as the judicial representative of the group in the Israeli regime, but would later become known as a terrorist group and movement.

There are undoubtedly many more examples, but these are dependent on legal foundations – the most important of which is whether the national regime is democratic or not – and whether it wants to find a solution to these problems peacefully, because with other conditions and foundations, anything is possible.⁶⁸

The examples of the KDP (Kurdistan Democratic Party) and the PUK (Patriotic Union of Kurdistan), both of which had for an extended period of time resisted the regime of Saddam Hussein and implemented the Kurdish national movement, can be used to demonstrate this point. They were never referred to as a terrorist group or movement despite the fact that Saddam Hussein sought to eliminate them through every means possible. Currently, both parties are actively committed to building a new Iraqi regime with a democratic foundation. Additionally, these parties never attacked civilians nor were they ever involved with car bombings. Their supporters implemented guerrilla warfare in the mountains against Saddam Hussein's regime for years, contributing to both parties having a good reputation and having established modern and, to a certain degree, democratic systems. Conversely, many of their supporters were detained by Saddam Hussein's regime and threatened with punishment or death, therefore their fate was not much better than that of their former president and dictator.

⁶⁸ Potentially, after a regime falls because of a coup for example, the new political regime will try to find a way to reforms and peaceful, balanced solutions for the enemies of the former regime.

2.2.7 The Legitimacy of Interventions

The United Nations Charter explicitly prohibits all military aggression of a nation against another nation because this firstly violates the sovereignty of the nation and secondly, war is a catastrophic event on every level of human life. In addition, it has huge financial costs and destruction of infrastructure and economies follow, whether it is the decimation of the environment, the countryside or urban as well as industrial settlements.

As a result, military intervention is usually forbidden, however exceptions exist for two different scenarios:

1. If a minority group is being threatened or has been displaced, and when a UN Security Council Resolution therefore demands intervention.⁶⁹
2. If a nation is threatening the safety of the world or world peace.⁷⁰

A third and controversial scenario involves nations simply wanting to conquer other nations (assault, aggression).⁷¹

There exists a legitimization by the United Nations of legal national self-defense against the aggression of another nation. If a state or neighboring country attacks another, the former has the right to defend their nation. (Art. 51 UN Charter).

⁶⁹ Such as in the Yugoslavian conflict that evolved around the status of the Kosovo region. Thousands of civilians were forced to leave their homes, although the political intervention of the EU failed. The eventual NATO intervention was, however, not founded in international law, but went ahead anyway due to the severe oppression of minorities occurring under Milosevic.

⁷⁰ The right of self defense is clarified in Art.51 of the UN Charter.

⁷¹ The assault on Kuwait by Iraq under Saddam Hussein's Regime on August the 2th 1990 can be considered as assault and aggression.

However, if the nation is small and weak, then the United Nations is required to offer their assistance, such as offering a solution or a decision by the Security Council, which makes decisions regarding United Nations troops under the leadership of the United Nations. In reality, however, it is usually led by the United States instead. The authorization of legitimization for war then begins, similarly to that for the allied troops in the Second Gulf War against Iraq in 1991.

Fundamentally, every assault by the national regime is justified and every government justifies itself with a variety of evidence and arguments, but aggression is aggression and is absolutely forbidden due to the UN Charter (2/4). Intervention or deployment in a nation has numerous dimensions, in that it can be either a military operation or a humanitarian mission. Violating the sovereignty of a nation⁷² and often interfering in internal state matters causes resentment and is a point of criticism. Several great world powers have played such a role under other pretenses and cloaked objectives,⁷³ or attributed to other goals. For this reason, the United Nations Charter should approach and interpret this article in a more thorough manner – the content should be rewritten in order to prevent world powers from exploiting it for their individual interests.

Although most countries affected have a weakened infrastructure, they refuse any assistance from foreign nations due to either their reputation, political system, ideology or because the state has a religious or lay system. Under the command of the United Nations, the UN troops have a better reputation and image, despite the fact that they do next to nothing – thousands of troops act to separate the two opponents in the war.

⁷² UN Charter (2/4)

⁷³ The USA use their role in various conflicts and turmoil in their own favor. They often supported dictatorships or other kinds of authoritarian regimes against the respective civilian populations or independence and nationalistic movements. Due to the loss of thousands if not millions of innocent life, the US Secretary of State, Madeleine Albright, apologized for the US foreign policies and actions of the 1970s and 1980s (especially for the involvements in Chile, Panama, Nicaragua, Angola, Afghanistan and Kurdistan). Every one of those cases has its unique aspects but the Image of the USA, especially in developing countries, took heavy damage. This is one of many reasons why the US forces have such great troubles in current conflicts like in Iraq and Afghanistan, they are considered enemies.

Humanitarian Missions on the other hand are undertaken to help individuals suffering from the effects of the acts of others; therefore they are generally accepted, particularly after natural catastrophes or civil wars, such as that in Northern Iraq, after the war in Kuwait, in the war of Bosnia-Herzegovina in 1993 and 1994, or that involving the minorities in Kosovo in 1999. The aid organizations only needed the approval of the particular country, but were refused entry in most instances. Such missions are conducted by non-governmental organizations, the United Nations aid organizations, or regional aid organizations. These operations do not require legitimization from the United Nations or the UN Security Council, among other committees. Regional and local organizations or nations, for instance, are able to help through various missions. International assistance in many countries manifests itself in the form of dispatching doctors and volunteers – that is humanized and humanitarian aid. These actions are not exploitative, but rather offer help to the affected population, the victims, injured individuals, the homeless, children, et cetera. In most cases, military troops from other countries are also sent, but only to remove debris and rubble or to sterilize water sources. The millions of dollars in financial backing for the aid is voluntarily provided by wealthy countries and industrialized nations, with the addition of humanitarian aid organizations such as the Red Cross, Doctors without Borders, or Caritas, among others.

The sovereignty of a political regime in the view of customary international law is carried out according to the following criteria, after the Montevideo Convention on the Rights and Duties of States of 1933:

1. The people (constant)
2. Territory (specific)
3. Sovereign Government
4. Recognition (participation in a legal capacity relative to other countries)

If a nation exists consistently, regardless of how large the nation is or how large the population is, the people all have the same individual rights and these are not influenced by the central law of the nation or by right or duty. Every individual in a nation has a legal and political affiliation (relationship) with the state, known as citizenship. Citizenship or nationality differs between two groups of people with the nation:

The first group which is connected to the state through their citizenship is the nationals. They enjoy general and special political rights and have a duty to the state to fulfill all obligations to the state, such as compulsory military service, even if they take up residence in a foreign country.⁷⁴

The second group resides in the nation but is not bound to the state through citizenship – these are called foreigners. State legislation determines how one can gain citizenship and conversely, the means through which one can lose his or her citizenship. In simple terms, the state fundamentally determines who is considered a citizen and who is a foreigner.

The territorial criterion is a differing aspect. A territory is defined according to the borders of the nation within which the state has asserted its sovereignty and authority, and a group of people who live there permanently.

A territory has two characteristic features:

1. Consistency; that is, the people who live in the territory should reside there for a considerable amount of time. This differs from the situation of Bedouins or nomads, who are constantly moving from place to place and who do not reside in a particular region.

⁷⁴

Schaafai Mohammed Bashier, *Völkerrecht (Generell) im Frieden und im Krieg*, (Alsdem, 1971,) p. 50

2. The state should enforce its governmental and authoritarian jurisdiction in a specific region (country).⁷⁵

The third feature and criterion according to the convention is the sovereign government. The government acts as the representation of its population at all levels of society, in that without government, there is anarchy in the international system. There are no requirements or prerequisites for a government to arise or exist, but it must represent the people. However, from my point of view, there should be new rules and stipulations given to emerging governments.

The United Nations should play an influential role in the process of the recognition of emerging governments and should initiate action at all levels so that in the future civil wars, military regimes and authoritarian regimes in developing nations can be avoided. Accordingly, it is in the best interest of all nations that the United Nations becomes stronger and obtains more authority and assertiveness, not only for the propagation of democracy as the best political system, but also so that the conditions of international law will be fulfilled in developing nations. At the time of writing several populations are being ruled by authoritarian regimes.

The final element of the aforementioned criteria is the capacity of the state to enter relations with other states, which, according to custom, normally begins with the state being recognized as a new government in the global community by one country after another. In most cases they would not be recognized, such as the Turkish part of Cyprus, or they would only be marginally recognized, such as Israel or Taiwan. For other countries, though, recognition after colonial times was normal and natural, similar to the situation after World War I and the breakup of great empires and sovereign nations. In the aftermath of World War I, countries were able to be recognized by the League of Nations and, after World War II, the United Nations.

⁷⁵

Charles Rousseau, *Droit International Public*, Paris, Recueil Sirey, 1953, p. 7

It is my opinion that one should demand that new countries fulfill and respect certain requirements, conditions and rules in order to be recognized after their compliance with these points. The task of the United Nations should be viewed as efficient and should fulfill these criteria collectively with the other nations of the world. For example, several nations in Africa, as well as many in Central and South America, suffer under authoritarian regimes.

Therefore, these countries should attain a certain standard in order to receive the respect and recognition of other nations. They must first achieve the normal basics of a cultured nation, find methods of deconstructing the authoritarian regime in their nations, and finally, fight against poverty, illiteracy and illness in developing countries.

3. Theoretical Studies: The Principles of Legitimacy

3.1 Principles of Legitimacy regarding minority rights in the context of majority rule

In this chapter, I will discuss legitimacy through a majority decision, the importance of which can be observed in light of political decisions which may cause problems in the future:

At the time of writing, the principle of majority rule is broadly accepted without contest.⁷⁶ Within this context, of course, the consensus allows for the fact that minorities have to have special and specific rights. On the one hand, the principle of majority rule was accepted because it was viewed as a vital structural element of democracy, but on the other hand, one

⁷⁶ Opladen, 1984, p. 297-310

regarded this type of decision-making as a “practical compromise” because unanimity was regarded as an unreachable goal.⁷⁷

In previous years, a dispute arose regarding which terms must be fulfilled so that the principle of majority rule may retain its validity.

⁷⁷

Häberle, p. 244

3.1.1 Legitimacy through Majority Rule

In Germany, since the time of the Weimar Republic (after the First World War) and until the end of the Second World War, fundamental discussions about the prerequisites and limits of majority rule were neglected.⁷⁸ The discussion pertaining to the legitimacy of the principle of majority rule was developed with a background in concrete political science. Since supporters of peace and environmental protection movements fought against such majority decisions, due to the fact that they felt their interests in connection with survival and safety were being threatened; arguments arose surrounding the fundamental worth of the principle of majority rule. An important question must be asked: is the principle of majority rule still absolutely applicable today in order to reach a generally binding decision in every situation?

Decisions considered not to be justifiable may cause a minority group to feel that they have been forcibly denaturalized.⁷⁹ This brings us to the issue that the majority must take into consideration the interests of the minority. This requirement, however, stands in clear contradiction to the democratic principle of popular sovereignty, that is, the sovereignty of the people.⁸⁰ Guggenberger and Offe believe that catastrophic ramifications can be foreseen. They are at any rate unwilling to accept the promise of great achievements at the cost of possible (even if this possibility is fairly low) hazards of enormous proportions or which have far-reaching consequences. Therefore, these authors insist upon the implementation of minority interests.

⁷⁸ Häberle Peter, *Das Mehrheitsprinzip als Strukturelement der Freiheitlichen-demokratischen Grundordnung*; (in: Juristenzeitung 2.Jg., 1977, Nr. 8,) p.241

⁷⁹ In this case the party who lost in vote counts as minority, in newer research and debates the term is used with reference to the participants of the new social movement.

⁸⁰ Guggenberger, Bernd/Offe, Claus, *Politik aus der Basis-Herausforderung der parlamentarischen Mehrheitsdemokratie, in An den Grenzen der Mehrheitsdemokratie*, (Opladen, Westdeutscher Verlag, 1984), p. 190

It is argued that it is the consciousness of living in a transitional historical period, in which new types of decision-making take place,⁸¹ for example; in the domains of nuclear energy, genetic engineering, data gathering, the regulation of communication, transport and city planning, space exploration like the International Space Station (ISS), weapons technology and the development of psychoactive pharmacological medicines.⁸²

Focusing upon the critique, it is surmised here that every technical advancement can permanently influence the life to which we are accustomed in both positive and negative respects. This point associates the criticism of the principle of majority rule with current discussions criticizing technology, that is, the evaluation of technological consequences. Therefore, they believe that the feared negative consequences must be prevented. The majority, however, when trivializing or rebuffing these objections, can be accused of arrogance and dictatorial self-righteousness.⁸³ The authors assume from this that the majority will not prevent the dangers, and therefore see themselves therefore appointed to protect the true needs of the citizens.

It is not uncommon for a minority group to engage with themes regarding the environment, peace and women's issues.⁸⁴ The power of mobilization is new, however, and was developed in the West by minority groups in the 1970s.⁸⁵ Wide acceptance is then partially explicable since the movements were not limited to an exclusive group, but they are recognized for their "heterogeneous social recruiting" of supporters.⁸⁶ Knowing they have a large group of supporters behind them encouraged these critics to persistently urge for demands to be met.

⁸¹ Guggenberger Bernd/Offe Claus, *Politik aus der Basis-Herausforderung der parlamentarischen Mehrheitsdemokratie, in An den Grenzen der Mehrheitsdemokratie*, (Opladen, Westdeutscher Verlag, 1984), p.190

⁸² *ibid.*

⁸³ Guggenberger Bernd/Offe Claus, *Parlamentarische Mehrheitsdemokratie, Kommentar und Replik*, in: *Aus Politik und Zeitgeschichte*, (34 Jg. 1984, B 5), p. 45

⁸⁴ Cf. Brand Karl-Werner, *Vergleichendes Resümee*, in: Brand Karl-Werner (Hg.), *Neue Soziale Bewegungen in Westeuropa und den USA*, (Frankfurt/Main, New York, Campus Verlag.1985), p. 45

⁸⁵ Even after the cool down of the movement in the 1990s, a new aspect got introduced by massive demonstrations and chains of light against xenophobia and racism.

⁸⁶ Cf. Brand Karl-Werner/Büscher, *Aufbruch in eine andere Gesellschaft. Neue soziale Bewegungen in der Bundesrepublik*, Aktualisierte neue ausgabe(Frankfurt/Main, {u . a}, Campus Verlag.1986.)P54.

Due to the widespread support that peace movements and environmental protection movements have experienced, they managed to achieve a significance which could not be ignored by the representatives of the majority. Hence, the agents of majority positions now try to discredit minority groups and accuse them of a pre-democratic, egalitarian disposition.

Accusations of self-righteousness can be found, however, on both sides. Proponents of the majority decisions which are under attack consider this to be an indication that their majority position is legitimate. They have arisen as a majority in democratic polls and their power is bound to basic rights. For this reason, their position is legitimate and consequently those majority decisions are too.⁸⁷ They regard the new social movements as a minority that seeks to tear the power of decision-making from their hands.

However, now the critics call into question the legitimacy of the majority position in the areas mentioned. They measure legitimacy with different criteria: the existence of free elections and the limits of the majority's responsibility in the constitution are not accepted in their view as sufficient conditions for the legitimacy for majority decisions. For them the statement that the majority is the majority is not sufficient.⁸⁸

The critics arrive at the conclusion that the majority does not have the right to render decisions of a new historical type. This juxtaposition of the two different points of view provides evidence of the irreconcilability of the dispute, whose primary goal frequently appears to be politically and rhetorically discrediting the opposing position.

⁸⁷ Cf.. Sontheimer Kurt, *Zeitenwende*, 1Auflage. (Hamburg Hoffman u. Campe ,1983), p. 254

⁸⁸ Cf. Dreier Horst, *Das Majoritätsprinzip im demokratischen Verfassungsstaat*, (in: Zeitschrift für Parlamentsfragen, 17 Jg., 1986), p. 110

The most important point and the central aspect of legitimacy is thus: the majority, that is, those who make the decisions for the majority, must make themselves more transparent when expounding the problems surrounding new decisions.

Which prerequisites must be available so that the decisions of the majority will be regarded as legitimate? Conversely, one can also pose the question: when are the prerequisites of this legitimacy not fulfilled? Should there be a limit set in place for the future to ensure that decisions made by the majority ruling parties follow legitimate rule?

Establishing a limiting situation is not enough, however; we must pursue the goal of demonstrating a possible solution to the actualization of political consulting concepts. Initially a proposal was made to limit the discussion to the basic current facts, which had died down by the end of the 1980s, which was certainly not due to a lack of ideas towards solving the problem. This area was virtually detached from other social sciences, as well as philosophical and natural scientific discourse, which provided new facets of the questions surrounding majority decision legitimacy and which expanded the object of study to the extent that the original question was almost forced into the background.

In this context, it should be emphasized that Beck's publication⁸⁹ encouraged discussion of the "risk society" - the question was moved into the foreground, that is, how democratic societies should circumvent risks. The debate continued not only in philosophical circles about the possible rights of nature and of future generations, based further on theoretical democracy, but also practical political approaches to possibilities evaluating the impact of technology.

⁸⁹

Ulrich Beck (1992). *Risk Society, Towards a New Modernity*. London: Sage Publications. p. 260.

All of these topics have one thing in common: they implicitly or explicitly include the question of how far the right of majority decision-making is allowed to go, as well as exploring where the majority's limits may lie. In other words, considering the new challenges, will the existing forms of decision-making suffice?

In certain discussions it is stated that, considering the controversial matters of decision-making, various strategies should be pursued, for example the foundation of a policy of prohibition, which should be capable of stopping or forbidding activities not only of politicians but of all parties. This may be necessary because of the requirements of technocratic models or due to the search for new political techniques and institutions.

Considering this partially uncontrolled growth of interpretations, I must clear a path in order to facilitate the discussion of basic questions and answers with their practical political repercussions. This is to be done not merely to narrow the scope, but to be able to address thoroughly pertinent questions in an interdisciplinary discourse. Within this context, it seems necessary to return to the discussion of the conditions for the principle of majority rule and its limitations.

3.1.2 Democracy and Majority Rule

If the case can be made that democracy and majority rule are not congruent concepts, but rather that the democratic system requires a more limited application of the majority principle, it seems obvious that philosophical political reflections must be made as to whether there is an indeterminate area which is generally acceptable. This should apply to controversial majority decisions; if it is possible to outline and consolidate such limitations then the possibility arises to find out whether controversial issues can be assigned to certain areas. It makes sense to apply this to human rights, since there is already a general factual acceptance proved by both international United Nations pacts from 1966.

The question of the legitimacy of majority rule decisions of a specific quality affects two aspects: firstly, the problem of every decision which impacts decision-making and the vital interests of future generations as well as the (biological) natural world, and secondly, the problem of reasonableness for political minorities.

The clarification of the question as to when majority decisions are legitimate assumes an initial reflection upon its limitations; that is, what a majority in a democracy is allowed to do and what it should do. If an area can be outlined which should be removed from the majority's authority, it is reasonable to pose the question in the light of recent discussions as to whether controversial decisions can be allocated to this indeterminate area.

Furthermore, this discussion, which has partly been polemic and striking in nature, should be made practicable in that its multifaceted problems are confined to the serious central aspect of the argument. That the discussion is, to a certain extent, naturally full of implications, is a result of the notion of majority democracy.

Initially it seems to make sense to more precisely determine the concept of “democracy” and “majority rule”. Can both concepts identify with each other or are democratic systems denoted by the application of a principle of limited majority rule?

The underlying question of pragmatic deliberation should justify the recourse to a theoretical concept of democracy, that of the “majoritarians” – which currently has only a minor role in political scientific works, but which appears to be suitable for a basic discussion of the relationship between democracy and the principle of majority rule.

It goes without saying that an analysis of the relationship between the principle of majority rule and democracy is dependent upon the notion of democracy, which remains without proper explanation. The investigation regarding the legitimacy of majority decision-making should be preceded by certain hypotheses, which are, however, not meant as apodictic statements, but should rather be ascertained discursively. This selection of the theoretical conception of democracy presented as follows has been made in consideration of the important statements which can be derived from it.

One method of describing the relationship between the principle of majority rule and democracy is to place both notions in check. Such an interpretation of the concept of democracy can be justified by asking the following: the principle of a popular sovereignty – in which the principle of consensus decision-making is not feasible as a means of producing a collective decision – cannot be realized in any other way than through the application of principle of majority rule.

3.1.3 A Critical View of Democracy

Austin Ranney and Wilmore Kendall formulate their position of the “majoritarians” and demonstrate the possibility within the framework of a model of democracy⁹⁰ that popular sovereignty (self-governance) operates as posit of democracy.⁹¹

Whereas John Locke is seen as the representative of the first beginnings of the theory of the “majoritarians”,⁹² Hans Kelsen, Hugo Krabbe and James Bryce are considered to be examples of the modern advocates of the “majoritarians” theory, in whose tradition the authors are seen to be rooted.⁹³ The underlying concept of democracy here emanates from the equation of the notions of “democracy”, “self-government” and “unlimited majority rule”, which should nevertheless not imply that the democratic systems also contain other characteristic features.⁹⁴ Therefore, a democracy is considered to be extant if the following four conditions are fulfilled:

- 1) Popular sovereignty: “The definite source of final decisions, the power to make and enforce laws”.
- 2) Political equality: “The same chance ... to participate in its [the community’s, author’s note] decision-making process”.
- 3) Popular consultation with three attributes: a) on matters of public policy there must be a genuine popular will, b) the office holders must be aware of what this will

⁹⁰ Cf. Ranney Austin/Kendall Willmoore, *Democracy and the American Party System*, (2. Auflage, New York 1974), vgl. Auch weitere Schriften der Autoren zu dieser Thematik: Kendall Willmoore, *Prolegomena to any feature work on majority rule*, (in Journal of Politics, XII, 1950,) p. 94

⁹¹ On this base the principle of national sovereignty establishes a normative reference point for the empirical analysis of the American party system.

⁹² Kendall Willmoore: *John Locke and the doctrine of majority-rule*, (Urbana. University of Illinois Press 1941), p. 39

⁹³ Cf. Bryce James, *Moderne Demokratien*, autorisierte Übersetzung von Loewenstein K. und Mendelsohn Bartholdy A., (München 1923-1926), Krabbe Hugo: *Die moderne Staatsidee*, (2. Auflage, Den Haag 1919), Kelsen Hans, *vom Wesen und Wert der Demokratie*, 2. Auflage, Tübingen 1929, (Aalen, scientia-verl. 1981) P84.

⁹⁴ Cf. Kendall Willmoore, *Prolegomena to any feature work on majority rule*, (in Journal of Politics, 12. Jg. 1950), S.695

requires, and, c) having ascertained the nature of the popular will, they must then faithfully and invariably translate into action.

- 4) Majority rule: with guarantees that “the opinion of the larger groups which for most purposes we can usefully think of as one half of the enfranchised members plus at least one, ought to prevail”.

A central consequence of the identification of the notion of democracy and popular sovereignty is that the latter is formulated as an absolute goal and consequently accorded the highest priority.

In this sense, the authors remain tied to a notion of sovereignty which logically eliminates the subordination of a democratic ruler to standards of human rights. The equation of the concepts of self-governance and majority rule can therefore be justified because the principle of majority rule is considered to be the possibility of putting the popular sovereignty principle into operation.

The following five theses are derived from the main features of the “majoritarians” position on the conception of democracy:

- 1) Within democratic systems, the majority is the highest authority. Therefore, decisions made by the majority are unconditionally valid.⁹⁵
- 2) Because the majority is the highest authority, there can be no logical ground for placing limitations upon it.⁹⁶

⁹⁵ Krabbe, Hugo, points out the influence of the unwritten law, which evolves out of the impact of a non-organic consciousness of law within a nation (p.111). Cf. Krabbe Hugo, *Die moderne Staatsidee*, (Aalen, scientia verlag 1969) p.121. Krabbe therefore acknowledges the impact of a specific ethos that is rooted within a society.

⁹⁶ *ibid.*

- 3) The only limits that exist are those which the majority has placed upon itself, namely the Constitution.
- 4) No logical option exists other than the principle of majority rule and the principle of minority rule.⁹⁷
- 5) Democracy and the principle of majority rule must therefore be treated as equivalent to each other.

The fourth thesis should be examined more closely, as it contains the central argument of the authors: it consists of the consideration that there is no logical alternative between the principle of majority and the principle of minority.

“There is, we believe, no logical alternative to majority rule except minority rule; and of the two, majority rule must be chosen as a principle of democracy, since it is more consistent with the other principles of democracy than minority rule”.⁹⁸

Consequently, the constitutional protection of civil rights and liberties are rejected⁹⁹ because the minority is conceded an absolute power of veto and they are, in fact, able to govern whenever they please.¹⁰⁰ When the power of veto is granted, the power to govern is seen, in that a decision against something comprises at the same time a decision for the status quo.¹⁰¹

From this follows that the consequence that only the alternative between unlimited majority rule and unlimited minority rule exists, which always contains the same dangers. However,

⁹⁷ Cf. McClosky Herbert, *The Fallacy of Majority Rule*, (in: Journal of Politics 11 Jg. 1949), p.638

⁹⁸ Ranney Austin/Kendall Willmoore, p. 34. *Similar conclusions can be found in Downs, Anthony, In Defense of Majority Voting*, (in: Journal of Political Economy 69 Jg., 1961), p. 192

⁹⁹ In contrast to this stands Kelsen, who mentions that the constitutional protection of minorities should be compatible to parliamentary majority-based principles like the 2/3 and 3/4 majorities. Especially regarding the protection of basic and freedom rights. Ranney/Kendall, p. 53 et seq.

¹⁰⁰ Ranney/Kendall, p. 35

¹⁰¹ Ranney/Kendall, p. 36. Cf. Krabbe, *Die moderne Staatsidee*, p. 85. If a simple majority agreed to a certain change of laws, then the current law is already nullified in principle. If the new law can just be set up by an amplified majority, the rights of the minority would be kept up, so that the bigger merit of law gets sacrificed for the lower one.

the rule of the minority is rejected since it is contrary to the democratic principles of popular sovereignty and political equality.¹⁰² Additionally, if the power of the majority is not given any constitutional or other institutional limitations, then the majoritarians do not see the danger to the democratic system of a majority tyranny.

From this concept we can then see that the majority itself limits its power and, with that, a violation of the human rights of individuals or subordinate groups is not to be expected – provided that a fundamental agreement regarding the central conditions of coexistence appears within the community:

“Consensus, as we shall use the term, refers to the kind of fundamental agreement among the members of the community that exist when they feel for each other that minimum of mutual need that disposes them to conduct their discussion in...(a democratic way)”.¹⁰³

The fundamental agreement provides, according to the opinion of the authors, a guarantee for tolerant action on the part of the majority as well as the minority¹⁰⁴ - if every member of a community asks what is best for the community and, accordingly, not what is best for the individual.¹⁰⁵ In such a manner the members of the community would then anticipate whether a certain quantity of common values exists inside the community.¹⁰⁶

It is supposed that every individual desires the welfare of all, as the deliberations of one person are beneficial to everyone in the decision-making process. However, the majority acknowledges the minority because they depend on the fact that all members of the community participate in the political decision-making process, therefore decisions can be made that are oriented towards the welfare of the entirety.¹⁰⁷

¹⁰² Ranney/Kendall, *Democracy*, p. 47

¹⁰³ Ranney/Kendall, *Ibid*: p. 54 and p.67

¹⁰⁴ Ranney/Kendall, *Democracy*, p. 48 et seq.; Spitz speaks about self-limitation.

¹⁰⁵ *ibid.*, p. 54

¹⁰⁶ *ibid.*, p. 470

¹⁰⁷ „He [each member of the community] needs the community, needs the continued participation of all its members and therefore has good selfish reasons to regard them with respect and treat them well”, Ranney/Kendall, *Democracy*, p. 54

In conclusion, it can be ascertained that the theory of the “majoritarians” does not negate the relevance of the question as to why a majority is voluntarily willing to obey. It still must be clarified whether firstly, the prerequisites for this justification can be accepted, and secondly, whether this justification is felt to be sufficient by the subordinate minority. Several critical comments regarding Ranney’s and Kendall’s conception of democracy should be mentioned:

1. Criticism of the “majoritarians” position.
2. Criticism of the presupposed will towards self-restraint.
3. The will towards self-restraint for the welfare of the whole.

These theses are often met in the criticism of Ranney and Kendall in the discussion of political science. The initial hypothesis of the critics can be seen in the basic refusal of unlimited power.

“It is in the nature of power to seek generally to augment itself”.¹⁰⁸

Consequently, it can also be expected that a majority will not show self-restraint in every situation;¹⁰⁹ it is indeed possible for the sovereign to do good as much as to do something bad.¹¹⁰ Therefore, a limitation of the power of the majority is required.

¹⁰⁸ McClosky, Herbert, *The Fallacy of Absolute Majority Rule*, (in: Journal of Politics 11 Jg. 1949), p. 647, Cf. Tocqueville Alexis de, *Über die Demokratie in Amerika* (Hg. Von Jakob P. Mayer), Stuttgart 1959, p. 291. Cf. auch Madison James, *The Federalist*, No. 10, in: Hamilton Alexander/Madison James/Jay John, *Der Föderalist* (Hg. und eingel. Von F. Ermarcora) Wien 1958, p. 73 et seqq. Madison mentions two reasons for the aspect that the sources of the danger of a dictatorship of the majority cannot be exterminated: First the circumstance that there is a connection between the insufficient reason of humans and their self-love and second, that it is in the nature of the people to be different and have different abilities to gain property and belongings, which causes a division of society in different groups and parties based on the individual interests.

¹⁰⁹ McClosky, *The Fallacy*, p. 648.

¹¹⁰ Thoroson Thomas Landon, *Epilogue on absolute Majority Rule*, (in: Journal of Politics, 23. Jg., 1961), p: 557

A conclusive construction of a fundamental agreement that can dispel fears of a majority tyranny should be examined to see how the justification as a fundamental agreement of the “majoritarians” can fulfill such an expectation. A requirement for this, that is, that a consensus as a “kind of fundamental agreement” can exist, is – as stated above – a virtuous way of thinking and acting which motivates the willingness and the ability of the majority towards self-restraint.

From this arises the following pragmatic problem: in the indicated prerequisite of Ranney and Kendall, it must be assumed in every majority decision that there is likewise a quality of the question of conscience. There is, however, no conceivable operational criterion with the help of which judgments of conscience can be differentiated from diversely motivated judgments.¹¹¹ The willingness is conceivable as a single possible criterion of differentiation, for that which is commanded by the conscience accepts considerable disadvantages.¹¹²

However, such a willingness, which in this situation would be expressed as the willingness of the majority to lose the majority of voters, is not proved assuredly. Even if such a majority loses power in this way, this is no indication that the majority is sticking to a decision which it sees as correct, since such a loss can be a result of a miscalculation of the will of the voters.

Aside from this, such willingness may only be – if at all – belatedly assessed and could, therefore, make it implausible to determine the vote of the potential minority at the time, for which reason they should definitely take part in the vote.

Besides this objection, a further central, normative point of criticism should be added: the authors make the existence of a consensus dependent upon the existence of a shared identity,

¹¹¹ Spaeman Robert, *Die Utopie der Herrschaftsfreiheit*, in: *Merkur* (26 Jg. 1972, Nr. 12), p. 751

¹¹² *ibid.*

not upon a process of the plebiscite, or, for example, a constitutional order acting as a factual consensus.

The consensus of the “majoritarians” is fictional and can only be conceptually presumed. Accordingly, it is also lacking in control mechanisms, especially to demonstrate the majority’s willingness towards self-restraint to the expectant minority. This means that minorities can never be entirely certain of their protection. However, the majority also has no guarantee that elite under the appeal of the will of the majority will not pursue their intended interests.

The “popular consultation”, with its three attributes of decision-making,¹¹³ tries to differentiate between democracy, tyranny of the majority, and the kind of system in which an elite representing the majority opposes the existing, elementary voter interests,¹¹⁴ proves not to be a practical criterion for the differentiation between democratic systems and tyranny. The question that opened this line of query is whether Ranney and Kendall’s conception of democracy in which the subordinate minority provides a sufficient justification for the recognition of the majority’s decisions, should be combined therewith.

3.1.4 The Approach of Max Weber

One of the most famous German philosophers of the 19th century, Weber's definition of democracy and legitimacy was paramount in today's understanding of the nation-state and how and by whom it should be governed. Weber's ideas were somewhat ambiguous, thus

¹¹³ 1) on matters of public policy there must be a genuine popular will 2) the officeholder must be aware of what that will requires and 3) having ascertained the nature of the popular will, they must then faithfully invariably translate it into action, Ranney/Kendall, *Democracy*, p. 28

¹¹⁴ Political systems and Regimes which use rigged elections for example, or in which the groups of the oppositions have no access to elections.

meaning his ideas are often misinterpreted or misused (his ideas appeared in Nazi propaganda, for example, although he never identified himself with the far right)¹¹⁵.

Weber believed that democracy was a good method of selecting a strong leader. In his view, a democracy should be a country where a “demagogue imposes his will on the masses”¹¹⁶. His ideas alienated him from the political left, who found his ideologies to be a breeding ground for strong right wing political figures. Furthermore, although Weber was in full support of strikes and labour unions for the working class, his will to see the democratic liberalisation of the working class was not through compassion. He believed that the success of the expansion of Germany lied within the middle classes; the working class were to him nothing more than a tool to achieve this goal.

Weber defined ruling a state as ““a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory “ Unlike other philosophers, Weber included democracies within this definition. In Weber's opinion, a democracy was just another way for a group of people to gain authority over a state. Although he did not reject the idea that the political elites could be freely elected and wanted by the electorate, he did not think that domination over a nation was avoidable.

Weber defines three “ideal types” of legitimate domination: rational or legal authority, traditional authority, and charismatic authority. Weber concluded that legitimacy is the idea that most of the demands made by the ruling body will be obeyed, as long as they are valid.¹¹⁷ The ruling body should be able to call upon their legitimacy as the ruling entity by using on of the above types to justify why their demands need to be carried.

¹¹⁵ Desfor, L. *Sociological Theory in the Classical Era: Text and Readings* New York: Sage Publications, 2005. Pp 156 -240

¹¹⁶ Desfor, L. *Sociological Theory in the Classical Era: Text and Readings* New York: Sage Publications, 2005. Pp 156 -240

¹¹⁷ Desfor, L. *Sociological Theory in the Classical Era: Text and Readings* New York: Sage Publications, 2005. Pp 156 -240

These types manifest themselves in the run up to elections in democratic countries, as a tactic to gain the votes of the electorate. Legal-rational authority as a type of legitimate domination is the prevailing type in most Western democracies today. Rational-legal democracies are based “on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands”¹¹⁸. This type of leadership means that one does not have to answer to an individual, but to the office which he/she represents. The right to exercise power of the people is annulled once the politician leaves office. In times of war or crisis, the reminder of the legitimation of the elected body can be seen as a justification for his/her actions.

Take the example of George Bush in 2001 in justifying the “War on Terror”. Throughout his speeches president Bush was all too keen to remind his audience of the prevailing need for democracy and freedom.

The second type of legal domination as defined by Weber is traditional authority. This type of authority is often seen as dated and is indeed no longer common in Western democracies. “Traditional”¹¹⁹ authority means authority that has been passed down from generation to generation, without the possibility to vote to change it. Traditional leaders are never elected; their legitimacy to power derives through nepotism or rites of passage, and traditional leading is often described as living in “eternal yesterday”. The premise of traditional leading is that it has always been that way., therefore it should not change.

These leaders are more often than not monarchs. This is not always the case, however, as in today's North Korea, the Jong-Il family are what could only be described as traditional leaders – they were not leaders due to their charisma, nor were they freely elected. In times

¹¹⁸ Desfor, L. *Sociological Theory in the Classical Era: Text and Readings* New York: Sage Publications, 2005. Pp 156 -240

¹¹⁹ Klein, Steve. *Max Weber, „Democratic Theory, and Political Economy“*, prepared for the University of Chicago Political Theory Workshop, March 4th 2013. <http://ptw.uchicago.edu/Klein13.pdf> (7 May 2014).

of crisis in the country, they point to the fact that they are leaders due to their superiority over their people.

The third case of legitimate leadership is “charismatic” leadership¹²⁰. Leaders that can be defined as charismatic are leaders that managed to persuade the public to allow them to be a leader. It differentiates itself from traditional leading because the charismatic demagogue does not cite old traditions as to why he/she should be in power, instead loyalty is demanded of the people due to the “genuineness” of the charismatic leader¹²¹.

Examples of charismatic leaders appear throughout history. They see themselves as “heroes and prophets” and seek to radically change the current political situation of their country. The word “charismatic” typically has a positive connotation, although this is not always the case. Examples of charismatic leaders include those who advocated for positive change, like Gandhi or Martin Luther King, but it also includes those who advocated for negative change, such as Joseph Stalin or Adolf Hitler.

Weber recognised the fundamental flaws of charismatic leaders. Their rule was flimsy; they could only remain in power as long as they were able to convince their people they were capable of carrying out the promises they originally made. As soon as the electorate begins to see that the leader is not capable of change, his/her legitimacy begins to wane. Furthermore, even if the leader manages to keep their promises throughout their reign, they will eventually become too ill to lead. More often than not, the death of the main figure in a charismatic leadership results in a decline of interest in his/her cause¹²².

1 Desfor, L. *Sociological Theory in the Classical Era: Text and Readings* New York: Sage Publications, 2005. Pp 156 -240

2 <http://ptw.uchicago.edu/Klein13.pdf> (Zugang 7/5/2014)

¹²⁰ Thomas, J. J. R. “Weber and Direct Democracy”. *British Journal of Sociology* Vol. 35, No. 2 (1984) pp. 216-240.

¹²¹ Thomas, J. J. R. “Weber and Direct Democracy”. *British Journal of Sociology* Vol. 35, No. 2 (1984) pp. 216-240.

¹²² Desfor, L. *Sociological Theory in the Classical Era: Text and Readings* New York: Sage Publications, 2005. Pp 156 -240

3 Thomas, J. J. R. "Weber and Direct Democracy". *British Journal of Sociology* Vol. 35, No. 2 (1984) pp. 216-240.

3.1.5 Logical Objections against the Position of the “Majoritarians”

A central criticism is that the principle of the majority inherently has limits.¹²³ For reasons of logic, the majority cannot eradicate every regulation that has conferred their lawful power,¹²⁴ thus the majority must “proceed from the validity of the principle of majority and yet all at the same time negate this validity through the content of their ruling”.¹²⁵ Therefore, there must be a guarantee that the majority cannot abolish every rule in order to enforce its power.¹²⁶

To conclude, it should be established that the position of the “majoritarians” firstly cannot be just due to the actual expectations of the voting participants and secondly, that logical doubts must be brought up. The position of the “majoritarians” brings about the corollary that the democratic system is not conceived for individuals, but rather as a closed system.¹²⁷ Dahl, in this context, says appropriately that it is an exercise in axiomatics.¹²⁸

It should be stated therefore that no one can aim to be unconditionally involved with a rule for collective decision-making – aside from consensus decision-making, which must be used for political reasons.¹²⁹ In other words, the system needs a standard of majority rule with regards to content. This gives rise to the consequence that a stringent, methodical separation between form and content is not possible because no individual person would capitulate to sheer form without considering possible content. This means that the limitations of the rules of procedure must be fixed insofar as every individual’s existential entities are protected.

¹²³ McClosky, *The Fallacy*, p. 643, Vgl. Auch Kielmansegg Peter Graf von, *An der Grenze der Mehrheitsdemokratie*, Opladen, west deutsche Verlag 1984, ders., in: *Das Experiment der Freiheit*, Stuttgart 1988, p. 104

¹²⁴ The noted regulations contribute specifically to the rights of free voting, free opinions and the freedom of the press as well as the guarantee for all individuals, to freely gather for the buildup of majorities and minorities. McClosky, *The Fallacy*, p. 642

¹²⁵ Kielmansegg, *An den Grenzen*, p.104

¹²⁶ McClosky, *The Fallacy*, p. 643

¹²⁷ *ibid.*

¹²⁸ Dahl Robert A., *Vorstufen zur Demokratietheorie*, (Tübingen Mohr,1976), p. 59

¹²⁹ Cf. Kielmansegg, *An den Grenzen*, p.104

The consideration should warrant the investigation into the underlying issue, which, apart from the formal aspect, also implies the content facet of majority rule.

Following the remarks about the “majoritarians” position, the results should be briefly summarized and consequently open questions then formulated:

- 1) No member of a democratic community will capitulate to a constitutional reform without considering the possibility content, that is, the desire for certainty about certain parameters, for example, the protection of existential rights, not only at the time of the ballot, but also guaranteed beyond that.
- 2) The principle of majority rule therefore needs definite legal limitations.
- 3) Consequently, the concepts of “the principle of majority rule” and “democracy” cannot be placed on the same level.

In this context, the question is posed as to the reasoning behind the assumption that no one wants to get him/herself implicitly involved in the role of decision-making. A central hypothesis of the critics is founded upon the premise that the character of humans restricts the content of possible arbitrations.¹³⁰

Hence, their concept of “democracy” is also related to definite political content, namely, the protection of civil and human rights.¹³¹ This means that democracy is understood as a compromise between the authority of the majority and the authority of the minority. This, likewise, implies the compromise between the political equality of all adult citizens on the

¹³⁰ Cf. Spitz Elaine, *Majority Rule*, New Jersey 1984, p.112

¹³¹ McClosky, *The Fallacy*, p.642

one hand and the desire to restrict their sovereignty on the other.¹³² Justifiably, the “majoritarians” consequently indicate that such a request to limit the authority of the majority makes a conclusive answer necessary as to who should be authorized to determine such legal boundaries.¹³³ In this case, it can be assumed that this individual will not perpetually be accepted as legally representative.

Moreover, this pertains to the nature of legislation that has a static character because it refers only to established situations.¹³⁴ Thus, the authority to modify legal boundaries must be determined somewhere. In this context, five possibilities are conceivable:¹³⁵

- 1) Every individual decides for him/herself when the majority has overstepped the limitations of their powers. This, however, involves a regulation of individual conduct, not collective rulings.
- 2) A consensus exists in the community regarding the behavior of the majority which should be omitted. This possibility is not plausible for the logical reasons that a majority that nourishes its aim to enforce freedom-limited measures would annul such a consensus.
- 3) Logical concerns are also offered regarding the third possibility, namely that the majority should overrule the posited limitations. Here, one would leave the authority to the majority, which one previously intended to take.
- 4) A particular group – a minority, devolves the authority, which puts the politics of the majority in their place in certain situations. A minority that is granted such powers would stand in obvious contradiction to the concept of democracy underlying the normative postulates.

¹³² Cf. Dahl, *Vorstufen*, p. 4

¹³³ Kendall Willmoore, *Prolegomena, To any future work on Majority Rule*, in: *Journal of Politics*, 12.Jg. 1950, p.707, Cf. Spitz, *Majority Rule*, p.112

¹³⁴ Cf. Spitz, *Majority Rule*, p.113

¹³⁵ Cf. Dahl, *Vorstufen*, p. 22 et seq.

- 5) Another suggestion for a solution could convey the assumption of a population's fundamental rights – even their human rights – which must be revoked in sharing the authority; thereby a ruling can be accepted by the inferior minority. In the following chapter, an attempt will be made to resolve the contradiction between popular sovereignty and human rights. It succeeds in an area of indeterminability and volunteers a link to the question, which will be discussed later, of whether the controversial rule of the majority should belong to every indeterminable area.

3.1.6 Human Rights as Limit of the Principle of Majority Rule

Human rights can generally be regarded as determined standards for humans,¹³⁶ namely such standards whose fulfillment creates the primary conditions for the possibility to discuss humanity in a useful manner:

“The satisfaction to demand such standards and the intention to gratify them is an indispensable condition of humans”.¹³⁷

Hence, the standards of human rights are usually founded in the humanity of the individual. From such a tautological definition of human rights arises the question of the criteria with whose help, the notion of implicit worth of the human can be ascertained,¹³⁸ and with it, the exact content of such questions.

Both questions make it clear that the concept of “rights” contains two aspects: firstly, the tangible condition being implemented, that is, the adherence to specific rights. The second is the hypothetical standard as an abstract position, which arose from philosophical reflection¹³⁹ and comprises definite notions regarding the reason for commitment to standards of human rights.

In this context, human rights can be adjudicated as having a “dual nature”. On the one hand, the reason for human rights is “state transcendent” and consequently revokes the state.

¹³⁶ Schwartländer Johannes, *Demokratie und Menschenrecht im Horizont sittlich-autonomer Freiheit*, in: ders. (Hg.). *Modernes Freiheitsethos und christlicher Glaube*. Beiträge zur Bestimmung der Menschenrechte, (München, Kaiser, 1981), p. 36

¹³⁷ Cortina Adela, *Diskursethik und Menschenrechte*, (in: Archiv für Rechte und Sozialphilosophie, 76 Jg. 1990, Nr 1), p. 45

¹³⁸ Bruger Winfried, *Menschenrechtsethos und Verantwortungspolitik*, Max Webers Beitrag zur Analyse und Begründung der Menschenrechte, (Freiburg/München Alber, 1980,) p. 33

¹³⁹ Kasper Walter, *Vernunft und Geschichte*, in: Schwartländer Johannes (Hg.), *Menschenrechte. Aspekte ihrer Begründung und Verwirklichung*, (Tübingen, Attempto Verl. 1978) p. 232

However, on the other hand, it urges standards of human rights with their affirmativeness since the enforceability of human rights is derived “from the deed of the national statute”.¹⁴⁰ In his famous text, Jellinek characterized human rights as “right in the state and at the state, which does not arise from the state”.¹⁴¹

Fundamentally, the standards in concrete rights can be distinguished in two concurrent perceptions. Does it involve rather arbitrary contents, which are dependent on temporal and societal conditions, in relation to human rights in their blank formulae that are first filled by a concrete situation and a definite time? Or does it perhaps involve a more or less definite catalog of inherent and socialized rights, which may not be suspended?¹⁴²

Closely linked to these two questions is the deliberation of whether human rights involve the rights with a universally valid claim, which can be experienced neither in the changes of the synchronic or diachronic perspectives. If, in this situation, no conclusive answers to these questions can be reached, several remarks should be added to more closely determine the notion of human rights.

In studying the historical emergence of human rights it becomes apparent that the research of the implementation of definite standards of human rights can be interpreted as a “crisis phenomenon”¹⁴³ which dispatches a response of “exemplary experiences of injustice”.¹⁴⁴

In order to assert the normalized standards of human rights – mostly encountering resistance by those in power – they must be struggled and fought for, which likewise means that the

¹⁴⁰ Folkers, Horst, *Zur Theorie der Menschenrechte – Perspektiven ihrer Weiterentwicklung*, ARSP 76 (1990), p. 21

¹⁴¹ Jellinek Georg, *die Erklärung der Menschen- und Bürgerrechte in: Schnur, Roman (Hg.), zur Geschichte der Erklärung der Menschenrechte*, Darmstadt 1964, p.63

¹⁴² Die Vorstellung von angeborenen bzw. Natürlichen Rechten (die jedoch nicht notwendigerweise umwandelbar sein müssen) entstammte dem Geiste der Naturrechte und wird daher von Naturrechtstheoretikern vertreten; vgl. den Gesetzestext der Virginia Bill of Rights vom 12.6.1776, in: Commichau Gerhard, *Die Entwicklung der Menschen- und Bürgerrecht von 1776 bis zu Gegenwart*, (5. Auflage, Göttingen/Zürich 1985), S.52, Die Französische Verfassung von 3) 1795, p. 55

¹⁴³ Brugger Winfried, Max Weber und *die Menschenrechte als Ethos der Moderne*, in: Schwarztländer Johannes (Hg.), *Menschenrechte und Demokratie*, (Kehl/Straßburg, Engel, 1981), p. 228

¹⁴⁴ *ibid.*

norm arose from a range of rival names.¹⁴⁵ The war for the abolition of slavery in the American Civil War can be named as an example of this, in that it resulted in the emancipation of the slaves. Hence, human rights are “no perpetual self-evident achievements of humanity”,¹⁴⁶ but rather must be claimed in practice in order to be able to be effective. In this context it is understandable that the catalog of human rights standards to date differ from one another.

Coincidentally, the existence of a human rights requirement does not itself necessarily mean that the standards are of the same content. Here, the claim to freedom can be mentioned as a well-known example and can be understood formally as protection of assets and thereby as resistance to state encroachments,¹⁴⁷ or materially as the production of societal terms for the development of character.¹⁴⁸ It can, therefore, be assumed with good reason that the formulation of human rights standards is dependent upon definite historical-societal situations,¹⁴⁹ which thus proves that human rights are quite mutable.

Still, nothing is revealed in this statement regarding whether the catalog of human rights standards can be thought of as completely open¹⁵⁰ since it could be possible that the same basic standards can correspond to various intellectual traditions, distinct status of information, and always varied standards.¹⁵¹

Firstly, in contradiction to such an opinion; human rights standards are already justifiable as a general rule from their conceptual purpose with evidence of their universality. This likewise means that they can prove themselves to be argumentative as universalized interests

¹⁴⁵ Cf. Sinha Prakash, *Freeing Human Rights from Natural Rights*, in: Archiv für Rechts- und Sozialphilosophie, 70 Jg. 1984, Nr. 3, p. 365

¹⁴⁶ Ölmüller Willi, *Versuch einer Orientierungshilfe für sittliche Lebensformen*, in: Ölmüller Willi/Dölle Ruth (Hg.), *Philosophische Arbeitsbücher*, Bd.2, Diskurs; Sittliche Lebensformen, 2. Aufl. Paderborn u.a. 1980, p. 81

¹⁴⁷ Cf. Kriele Martin, *Freiheit und Gleichheit*, Köln, p.80-89

¹⁴⁸ Cf. Art.25 der *Allgemeinen Erklärung der Menschenrechte der Vereinigten Nationen vom 10.12.1948*, in: Kühnhart Ludger, *Die Universalität der Menschenrechte*, Bonn 1987, p.312

¹⁴⁹ Cf. Topisch, *Menschenrecht*, p. 87

¹⁵⁰ Ryffel Hans, *Philosophische Wurzeln der Menschenrechte*, in: Archiv für Rechts- und Sozialphilosophie, 70 Jg. 1980, Nr. 3, p. 413

¹⁵¹ Patzig Günther, *Realismus und Objektivität moralischer Normen*, in: ders., *Ethik ohne Metaphysik*, Göttingen 1971, p. 92

in comparison to a particular interest. The possibility of this can be verified by the use of the evidence of both the international human rights declaration of December 10, 1948 and the two detailed Covenants adopted on December 19, 1966.¹⁵²

The second point opposing the idea of human rights as an empty formula is that the existing continuance in the history of human rights contradicts a complete mutability of their contents. Generally, a question of the tendencies toward sovereignty in the widest sense can already be understood in the requirement of adherence to and the implementation of certain human rights.¹⁵³

Furthermore, as basic rights, imparted human rights can obviously not be placed very easily in the arrangement, if nothing else because they provide the usually subjected individuals with an assessment scale for state actions. The existing continuity should, for the time being, be explained in a purely pragmatic manner. Should the stipulated standards of human rights fulfill their function in enforcing definite rights, they must be referred to by already accepted values and standards and are accordingly established in intellectual-historical traditions. Therefore, the requirements can also claim actual universal validity and, hence, a wide public realm can be obtained.

This deliberation, which was already being referred to in the early American and French human rights declarations from historical-intellectual traditions, is based on the study of human rights ideas. Those intellectual requirements are recognized in the Christian mindset the doctrine of natural law developed by the classical Greek Sophists in the fifth century B.C.E.¹⁵⁴ The Christian natural law of the medieval scholasticism also played a central part in the development of human rights. They bound together both intellectual roots in the

¹⁵² *Universal Declaration on Human Rights*. 10. Dezember 1948

¹⁵³ Kriele Martin, *zur Geschichte der Grund- und Menschenrechte*, in: Achterberg Norbert (Hg.), *Öffentliches Recht und Politik*, Festschrift für H.U. Scupin Berlin 1973, p.194

¹⁵⁴ Oestreich, Gerhard, *Geschichte der Menschenrecht und Grundfreiheiten im Umriß*, Berlin 1968

notion of the native equality of all humans, as well as the reformist mindset, which anticipated the ideas of popular sovereignty and religious freedom.¹⁵⁵

These intellectual-historical traditions have left attitudes about their reflections on the equality of humans and can be regarded as the premise for the orientation of natural law social contract theorists who first sought to generate proof of native rights of humans – to the individual. The history of human rights can, therefore, be regarded as that which is related to political history as well as intellectual history and, hence, philosophy.¹⁵⁶

The description of human rights as a crisis phenomenon to accentuate not only their historical and societal determination, but also the functional aspect of human rights, has so far only ascertained one aspect of human rights: human rights as standards of distinct rights. Simultaneously, they were pragmatically clarified in the history of human rights' discernible continuity in the declaration of human rights and their intellectual-historical traditions.

¹⁵⁵ Jellinek, *die Erklärung der Menschen- und Bürgerrechte*, p. 1-77

¹⁵⁶ Schwartländer, *Demokratie*, p. 44 et seq.

3.2 Natural Law and Legitimacy

3.2.1 Natural Law Rationale of Human Rights

Thus far, the position of the “majoritarians” regarding the existing human rights has been opposed. It should, however, not suffice in the context of the central query regarding the legitimacy of the majority rule concerning the normativity of the real. Instead it is necessary in this correlation to establish the question wherein exists the reason for commitment to human rights.

The attempt at an explanation of a human rights standard should supply the prerequisite for the question which will follow later of whether the standards of human rights should be broad. The questions should particularly ask whether a principle of responsibility can be founded, and also whether from such a principle a “responsibility for future generations” and responsibility for the natural world can be deduced. In this manner, the premise should be created for contentions between natural law and ecological ethical requirements grounded in rational law, which are found in the current discussion.

Hence, the question now stands: how can the commitment to human rights be substantiated? In other words, is it not possible to specify an intersubjective binding justification in which a decisive majority rule is considered to be legitimate due to its content?

A positive response to this question would require that it is possible in the philosophy to attain proper methodological and evident material standards – a requirement that casts strong doubts onto contemporary philosophy. On the other hand, in contrast to this, for many years it has been the case that profound reflection upon the history of political ideas serves the common good in the societal and national unions of human co-existence. At the same time,

objections of contemporary philosophy against the possibility of producing material standards seem to be so serious that it should not be adequate in this situation to be able to acknowledge humanity's search for just acts as evidence for the foundation of native rights in definite standards.

The following remarks, therefore, engage in an attempt at a balancing act between the relativistic abandonment of human rights standards on the one hand, and an absolute extinguishing of the justification of standards from the historicity of reason on the other.

The attempt to find national evidence is understood in the word "justification", for which the human rights standards are bound to every person, also those with differing opinions. Subsequently, two varied basic approaches to justification should be critically considered: John Locke's natural law justification for human rights and the Kantian justification through rational law.

The theological rudiments are not discussed because the criticism of the natural law justification is partially aligned with the objections which oppose theological justifications for human rights. This, on one side, does not bring about the deficiency of a religiously-grounded obligation to human rights with which humans inhumanely treat each other in national communities, and on the other side, indicates that the Church itself, despite its adherence to the concept of God as a foundation for human dignity, has, for its part, been violating fundamental rights.

Furthermore, the rudiments of ethical discourse are also not discussed. The "expertise in communication"¹⁵⁷ is seen as being too narrow a foundation for the reason for human rights. It comprises only one aspect of human dignity, which is too restrictive, in which we

¹⁵⁷ Cortina Adela, *Diskursethik und Menschenrechte*, p. 44 et seqq. Apel Karl-Otto, *Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik*, in: ders., *Transformation der Philosophie*, Frankfurt am Main, 1973, p. 400

acknowledge individuals who do not have this ability at their command. A further argument against human rights founded upon ethical discourse is shown through “transcendental reflections”¹⁵⁸ for which reason Riedel’s formulated accusation of the “two class model”¹⁵⁹ also pertains to this topic.

Otfried Höffe’s formulated rationale of human rights as transcendental interests, which assumes to explain itself in a transcendental exchange and which consists in the preservation of freedom of action can only be found in marginal regard. Against this rationale, it is also argued that that which provides a too narrow foundation for human rights underexposes the issue of equality. For example, the ban on slavery for him belongs to basic civil right and not to human rights, and therefore, not in the realm of human rights ethics,¹⁶⁰ but rather in that state and public ethics.¹⁶¹

Höffe’s notion of reciprocally realized interests, which are likewise rules of wisdom, remain in a contractual construction, which is not able to be clarified. It should not be surrendered into particular historical situations or be used by the powerful in order to violate the interests of minority groups.¹⁶² The unique difference between minority and majority groups is that with this they are only inadequately resolved. Additionally, Höffe does not provide sufficient reasoning for those in power to not overestimate their positions and rescind the argument.

It is impossible to convey a complete systematic overview of the rationale for human rights which has been established up until now, which should have been made clear through the previous remarks, but this simply aims to indicate the basic problem in the foundation of human rights standards.

¹⁵⁸ Cortina, Diskursethik, p. 44

¹⁵⁹ Riedel Manfred, *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy*, Cambridge, 1984

¹⁶⁰ Höffe considers Human Rights as socialized / nationalized rights.

¹⁶¹ Cf. Höffe

¹⁶² Höffes „Gefangenendilemma“ processes the example of two landlopers, who are both in the same situation.

This means it succeeds in advancing the fundamental objections to the premise of the descriptive nature of humans, which brings forth the consequence that the nature of humans as a premise of existence cannot also be suitable as grounds for the justification of the right of future generations and the (living) natural world.

A similar situation exists in natural law and theological approaches, which recognize the concept of God as the reason for human dignity. Seen from a different perspective, it can appear as a connecting factor for the question of a possible expansion of the limitations of the principle of majority rule. It succeeds in finding a plausible approach to the justification of human rights; that is, in this context it exists in order to verify the possibility of whether feasible rights of the unborn and distinct rights for nature can be derived from such a justification.

3.2.2 The Concept of Natural Law

The concept of natural law is decidedly ambiguous. As a result of his sophisticated typology of the doctrine of natural law, Erik Wolf states that the possibility for interpretation of the concepts is “narrow due to the linguistic-conceptual barrier in the use of the words ‘nature and right’, which denote disparate and contradictory content of thought like of feeling”¹⁶³ Subsequently, three similarities in the view of natural law, albeit oversimplified, should be mentioned:

- 1) The fundamental concern is the same, “namely, that the objective reasoning of a social order”,¹⁶⁴ at the foundation of the positive right can be rated as legitimate or illegitimate.¹⁶⁵

¹⁶³ Wolf Erik, *Das Problem der Naturrechtslehre*, 3. Aufl., Karlsruhe 1964, p. 193 et seq.

¹⁶⁴ Böckle Franz, *Wiederkehr oder Ende des Naturrechts*, in Böckle Franz/Böckenförde Ernst-Wolfgang (Hg.), *Naturrecht in der Kritik*, (Mainz ,Mattias-Gruenewald Verl.1973), p. 304

¹⁶⁵ Höffe Otfried, *Politische Gerechtigkeit*, Grundlegung

- 2) A doctrine of natural law claims either “an absolute, true commitment, independent of time, place, or other factors, substantiating the worth of human co-existence”,¹⁶⁶ or “at the very least an inaccessibility which turns against all political rulings which are subject to the prevalent beliefs and balance of power which back them”.¹⁶⁷
- 3) The ground of validity is also similar, which manifests itself in the concept of “nature” specifically, a particular reasoning of natural law exists if one convenes on “nature” as a premise and wants to deduce from this normative conclusions.

The two possible meanings of the concept of “nature” in this framework should not be discussed as taking from the natural law: the normative conception of “nature” as the totality of moral standards of right (rational law of nature – reason – right). Concerning its central role in the question of the foundations of human rights, rational law is discussed in another place with a separate consideration.

¹⁶⁶

ibid.

¹⁶⁷

Höffe, *Politische Gerechtigkeit*, p. 102

3.2.3 Locke's Natural Law Justification of Human rights

The following passage should be treated as an example of justification for human rights based upon the Lockean approach to natural law. Also, the question of whether those contained within caused him to create breaches and inconsistencies which bring about difficulties in classifying his thoughts is discussed:

“In Locke's reasoning of natural laws, it is characteristic that it matches the stoic Christian tradition and likewise the modern bourgeois doctrine of natural law in the style of Hobbes, therefore without that the Lockean Text would put under constraint...”¹⁶⁸

On the other hand, the appeal of Locke in this context provides that his emphasis on the subjective rights has sustained an enduring importance in political philosophy:

“Everywhere that the constitutionality gets into danger because the political power beings to be concentrated in the hands of a single political institution, the basic principles of Locke's political philosophy comes into play...”¹⁶⁹

Insofar that Locke had substantially contributed to “the development of the basic principles of a liberal representative democracy”, ¹⁷⁰Locke's intellectual historical importance lies within the foundations of human rights, which has associated the rights of the individual with his or her humanity, that is, his or her personhood.

¹⁶⁸ Euchner Walter, *Naturrecht und Politik bei John Locke*, (Frankfurt am Main, Europ. Verl.-Anst. 1969), p. 8. In his study demonstrated that Locke differed in relation to three key aspects of the traditional natural law abiding social philosophy, namely, first, by its modern epistemology, second, by the doctrine of the motivation of human beings, the natural norms are no longer valid, the conscience is implanted and through the reinterpretation of the position of the individual in the system of natural rights and duties that put the right to self-preservation in the foreground.

¹⁶⁹ Euchner Walter, Einleitung des Herausgebers, in: Locke, John, *Zwei Abhandlungen über die Regierung* (Hrsg. und eingel. von Euchner Walter, 7. Auflage, (Frankfurt am Main Suhrkamp, 1998), p. 59

¹⁷⁰ *ibid.*

“The human is not more intrinsically determined – as had been thought for centuries-long accordance with Aristotle’s theory – in that he is born as a member of a polity, a region, a status, a profession, a confession and accordingly has all particular laws and rules therein, but he, most importantly, determined by his humanity and the associated rights which come with it”.¹⁷¹

On the other hand, Locke differentiates his perception of the human as a person from which Kant later formulated: the human as a person in Locke is to be understood to mean that the human exists “not only of his own willing ... but rather, he is the end in itself in a higher sense because he represents the infinite and the absolute”.¹⁷²

Likewise, Locke also had an effective influence during his time, considering that the demands of the civil liberation movement were engaged at this time and obviously undertook practical efficacy from the Lockean body of thought. The following passage written by Thomas Jefferson on July 4, 1776 in the American Declaration of Independence is strongly reminiscent of Locke’s model.

“We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among there are life, liberty and the pursuit of happiness”.¹⁷³

This renders it understandable as to why Locke is often referred to as the “co-founder” of the “classical civil rights and liberties”- life, freedom, property.¹⁷⁴

¹⁷¹ Hüllern Jürgen, *Die Entstehung des individualistischen (personenhaften) Naturrechtsdenkens: John Milton und John Locke als Wegbereiter*, in: *Menschenrechte*, (Bd. 1, Historische Aspekte, Berlin 1981,) p. 76

¹⁷² Detjen Joachim, *Naturrecht in der pluralistischen Demokratie?*, in: *Aus Politik und Zeitgeschichte*, 41 Jg., 1991, B 33, p.20.

Detjen sees a fundamental difference between classic and modern ideas of Natural Law.

¹⁷³ Laqueur Walter/Rubin Barry (Hg.), *The human rights reader, a unique sourcebook on documentary history on the issue of human rights*, (New York 1979), p. 107

¹⁷⁴ Cf. Oestreich, *Geschichte der Menschenrechte*, p. 41, Rosenbaum Alain, s. Introduction: The Editor’s Perspectives of Human Rights, in: ders. (Hg.) *The Philosophy of Human Rights*, (London 1981), p. 12

Subsequently, the Lockean basis of the idea of human rights as “inalienable rights of human as humans”¹⁷⁵ should be outlined. Locke views the conception of the objective natural order as standing entirely in the tradition of natural right permeated by the “law of nature”,¹⁷⁶ from which the will of God is arisen and all humans are subject to in the same measure.¹⁷⁷ The principle of nature commands humans to maintain for themselves what, for Locke, also involves the preservation of fellow man.¹⁷⁸

The nature of humans is, hence, that which contains norms and consequently does not act as a purely descriptive premise in his justification of human rights. With this conception, Locke formulates a contradiction to his epistemological reflections which interpret human reason solely as the mind.

The right of self-preservation, that is, the duty of self-preservation, can be referred to as the “fundamental law”¹⁷⁹ of the cosmic system, which is “written in the hearts”¹⁸⁰ of humans, and around which the political system is organized.¹⁸¹ This means that national laws are only valid if they do not contradict the law of nature. This also defines this standard as the purpose of the state. This description denotes Locke as one of the thinkers bound to traditional natural law.

However, Locke deviates from this position in that he negates the existence of inherent practical principles¹⁸² and recognizes reason in a descriptive manner as an “implement which

¹⁷⁵ Hüllern, die Entstehung, p. 73

¹⁷⁶ Locke John, *Essays on the Law of Nature. The Latin text with a translation*, Introduction and Note, together with Transcripts of Locke's shorthand in his Journal for 1676 (Hg. Von W.V.Leyden), (Oxford, Clarendon 1954)

¹⁷⁷ Cf. Locke, Second Treatise, § 6, p. 203

¹⁷⁸ Cf. Locke, Second Treatise § 135, p. 284

¹⁷⁹ Cf. Locke. Second Treatise § 135, p. 285

¹⁸⁰ Cf. Locke, Second Treatise, § 11, p. 206; Cf. First Treatise § 86, S.136. On the contradiction of these statements with the epistemology formulated in the “Essay Concerning Human Understanding”, Cf. Euchner, *Naturrecht und Politik*, p. 65 et seqq..

¹⁸¹ Euchner Walter, *Naturrecht und Politik bei John Locke*, Frankfurt am Main 1969, p. 69

¹⁸² Cf. Locke, *Essays concerning, Essay III*, and Locke, *Essays on the Law of nature*, p. 124

enables knowledge”.¹⁸³ In this context Locke represented the concept that moral standards could be deductively developed in accordance with the strict rules of nature, in the same manner as mathematics. He also shares the idea with Spinoza that morals can be demonstrated, which is grounded in the philosophy of Descartes.

Locke’s epistemological doctrine stands in contradiction to his thesis of the implanted instinct of self-preservation, which he considers to be inherent. The concept of human rights is thereby not developed from a descriptive premise of humans as it is in Spinoza, but rather here Locke falls back on the pre-structured, standard-based impression of humans.

3.3 Relations of National States and Human Rights

3.3.1 The Boundaries of National Power

The fundamental law of self-preservation provides the key to comprehending the Lockean concept of human rights, which includes the protection of the triad “life, freedom and property”.¹⁸⁴

The natural law guides Locke on a direct path to the right to life, but also to the basic, inalienable right to freedom, which Locke defines as freedom “from the constraint and violence of another”. The existence of this is required in a legal system and is accordingly defined as:

“Freedom, within the permitted boundaries, every law which he (the human, author’s note) is subject to, to command over his person, his conduct, his possessions, and the entirety of his

¹⁸³

Euchner Walter, *Naturrecht und Politik bei John Locke*, Frankfurt am Main 1969, p. 137

¹⁸⁴

Locke, *Second Treatise*, § 135, p. 284

property, and hence to do what he likes without being subjected to the unauthorized will of another, but rather to be free to follow his own.”¹⁸⁵

The right to freedom is therefore justified not by the human physique, but rather by his rational nature and the submission of a child in respect to his parents is justified.

The right to property is also to be understood as a fundamental standard in this context:

“Since the exceedingly strong instinct to preserve his life and his existence, has he from God himself been planted as a principle of the trade? Could he only teach and convince reason as the voice of God within him that he, in the compliance with this natural inclination, to have received his existence to develop those creatures from which he could realize, based on his reason and his senses, that they were suitable for his purposes. Therefore, the property of humans of the creatures was grounded in his right to exert on all things for which his existence was necessary or useful.”¹⁸⁶

The fundamental right to property therefore obtains its meaning as a prerequisite for the fulfillment of the right to self-preservation, whereby the right to property is elevated to “the same rank as the supreme subjective rights”.¹⁸⁷ The right to property is thus a component of the human rights triad, but is also a fundamental standard¹⁸⁸ of his or her “property, that is, his life, his freedom, and his possessions”.¹⁸⁹

It is this accentuation of property rights on the one hand and the neglect of social aspects on the other, which allows Locke to appear as one of the theorists shaped by bourgeoisie class

¹⁸⁵ *ibid.*, § 57, p. 234

¹⁸⁶ Locke, *First Treatise*, § 86, p. 136

¹⁸⁷ Euchner, *Naturrecht und Politik*, p. 81

¹⁸⁸ Cf. Locke, *Second Treatise*, § 123, p.278

¹⁸⁹ Locke, *Second Treatise*, § 87, p. 253. The right to ownership through work is derived here, because the "destruction of the substance of work that is owned by the workers, is also the product of the work as the property of the owner of the work."
Cf. Euchner Walter, Maier Hans, Rausch Heinz, Denzer Horst

interests. Although his foundation for fundamental rights,¹⁹⁰ that is, the limitations of national power, likewise indicates that Locke had still not entirely detached himself from tradition.

“Since the human has no authority over his own life, he cannot make a difference through a contract nor through his own acceptance of slaves”.¹⁹¹

The trade of humans is basically contiguous to the implanted principle of self-preservation and likewise the “inherent” principle of pursuing happiness and the aversion to misfortune.¹⁹² Thereupon, Euchner pointed out that, in this manner, the Lockean reasoning is supplemented by a hedonistic level.¹⁹³ Even if Locke had never explicitly declared a right to happiness, such a position can be assumed because Locke treated the principle of self-preservation analogously and deduced the natural right of the individual to self-preservation from the implanted instinct of self-preservation.¹⁹⁴

In this context, the inherent pursuit of happiness is important because elsewhere Locke established his postulate of religious freedom upon this concept. Since a natural pursuit of happiness is inherent to humans in this life and next, the state may not intervene in personal matters of faith, because every individual is responsible for their salvation.

“In this manner, no-one is obliged to constitute the admonitions or the impertinences of others regarding his own convictions beyond obedience. Every individual has the highest and

¹⁹⁰ Euchner Walter, Einleitung in: Locke John, *Second Treatise on Government*, 4. Auflage, Frankfurt am Main, 1989, p. 59

¹⁹¹ Locke, *Second Treatise*, § 23, p. 214

¹⁹² Locke John, *Über den menschlichen Verstand*, 1. Buch, 2. Kapitel, Berlin 1962, p. 54 et seq. Cf. Ibid. Locke distinguishes between the inclinations of desire, which he recognizes as innate practical principles and "the intellect impressed truths", meaning the moral rules that must be proven and therefore cannot be inherited. p. 5

¹⁹³ Euchner, *Naturrecht und Politik*, p. 96

¹⁹⁴ *ibid.*, p. 97

unconditional authority to judge for themselves. Namely for the reason that other is concerned, yet come harm can be suffered from the observed behaviour”.¹⁹⁵

As a further reason for the right to religious freedom, Locke states that the social contract as an expression of the imminent aim of the nation excludes questions of faith.¹⁹⁶ Nevertheless, the authority infringes upon the right to religious freedom, thus warranting the opposition of the people.¹⁹⁷

Indeed, the right to religious freedom is not unconditionally valid; it ceases where opinions stand in opposition to the human society or in which the maintenance of rules is necessary for civil society.¹⁹⁸ Locke declared himself against the papists that resort “*ipso facto* to the protection of and in the service of other rulers”, as well as against the “atheists who turned against the source of all rights”.¹⁹⁹

3.3.2 The Purpose of the State

The concept of an objective world order standing in the tradition of natural law, which finds its extension in the hedonistic motivational doctrine of human activities, led Locke to the conjecture of socialized basic rights in the form of the right to resistance, from which the organization of the political community must be conceived.

For Locke, only a state based on the consent of the male property owners is legitimate. Women and men without property are not awarded citizenship, which demonstrates that one

¹⁹⁵ Locke John, *Ein Brief über Toleranz, English-Deutsch* (übers. und eingel. und in Anmerkungen von J. Ebbinghaus), (Hamburg,Meiner, 1957), p. 83

¹⁹⁶ *ibid.*, p. 87

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*, p. 91

¹⁹⁹ *ibid.*, p. 95

cannot conceive of Locke as a democrat in the contemporary sense of the word. He left the terms of the plebiscite undetermined²⁰⁰ however, the goal of the association, namely, the maintenance of property,²⁰¹ stood firm since this was the reason for individuals to abandon the natural state and to affiliate themselves into a political body.²⁰²

Concurrently, hedonistic undertones are repeatedly found in Locke's description of the emergence of political bodies, of which the deduction outlined from the objective principle of self-preservation contradicts the boundaries and function of the authority of the state.²⁰³ Referring back to the ideal of a comfortable and agreeable life as the goal of society, this hedonistic level forms the conclusion for understanding the motivation for human trade for Locke.²⁰⁴ The authority of the state ceases if the citizens revoke their confidence in the state. This is because the legislature is "only an authority which relies upon trust and deals with definite objectives. However, the people remain the highest authority to recall or to change the legislature if there is the opinion that the legislature contravenes that in which they have a firm trust."²⁰⁵

Hence, the citizens are permitted a right to resistance when it is particularly justified, for example if the state counteracts their founding objective and arbitrarily has command over the assets of its subjects or wants to withdraw part of them at their convenience.²⁰⁶ This likewise includes the collection of taxes without consent.²⁰⁷ The legislature is also not entitled to use force against the "life and fate of the people"²⁰⁸ or to infringe upon "existing

²⁰⁰ Euchner, Locke, p.19

²⁰¹ Locke, Second Treatise, § 124, p. 278

²⁰² According to Locke, *the state which saves and protects the ownership of goods and land was necessary because through monetary systems and economies in the second phase of the natural state, the instincts for self preservation changed. Cf. Locke, Second Treatise, § 27, p. 223*

²⁰³ Locke, Second Treatise, § 95, p. 260

²⁰⁴ Euchner Walter, Individuelle und politische Macht: Der Beitrag John Lockes im Vergleich zu Hobbes und Spinoza, in: Gebhardt Jürgen/Münkler Herfried, Bürgerschaft und Herrschaft, Zum Verhältnis von Macht und Demokratie im antiken und neuzeitlichen politischen Denken, Baden Baden 1993, p. 290

²⁰⁵ Locke, Second Treatise § 149, p. 293 et seq., § 142, p.290

²⁰⁶ *ibid.*, § 138, p. 288

²⁰⁷ *ibid.*, § 142, p: 191

²⁰⁸ *ibid.*, § 135, p. 284

and publicly known laws”.²⁰⁹ At the same time, the “legislature of the authority to legislate” may “not be transferred into the hands of others”.²¹⁰

Although Locke cannot be construed as a democrat in the contemporary sense, as he advocated only the interests of the bourgeois and neglected the female population and those without property, his reflections regarding the conditions of national power remain important to the present day. Amongst these is, in particular, his adherence to inalienable human rights, which he confirmed as the basic rights that should be granted within any political system. In this context, the question must be posed as to whether his rationale of rights that are an antecedent to the state can satisfy contemporary claims about a theoretical foundation of human rights.²¹¹

3.3.3 Human Rights in Kant

For Kant, a human is one with reason and an entity endowed with free will that must be attributed as a prerequisite for the quality of freedom and should not be a “thing without meaning”.²¹² Using this definition for humans, there are still certain attributes that are in need of explanation: free will, reason, freedom / autonomy and dignity.

For Kant, reason is a universal condition of human existence: “Everything in nature operates according to laws. Only a reasonable being has the ability to deal with the notion of laws, that is, the principles, or a will”.²¹³ Kant explains that in order for a human to really be considered a human, they must possess reasonable thought. His rationale behind this stems

²⁰⁹ ibid. § 137, p. 287

²¹⁰ ibid. § 141, p. 290

²¹¹ Grabner-Haider, Anton, *Die Wichtigsten Philosophen*, (Wiesbaden: Marix Verlag GmbH, 2006), p. 104

²¹² GMS IV, p. 446; Cf. p. 448

²¹³ GMS IV, p. 412

from the idea that reason is necessary in order to comprehend the idea of laws and order. And it is this order that makes us human and separates us from animals.

Reason may be absolute, “the capability of legality”,²¹⁴ which could alone provide the basis of moral obligation.²¹⁵ A basis of his consideration is pure reason, which he refers to as a “fact” and that alone could yield the awareness of the obligation to ethical dealing:²¹⁶ “One can call the consciousness of this basic law a fact of reason, because one cannot reason it out of the reasoning which preceded it”.²¹⁷

Kant does not regard as objectively demonstrable this fact of pure reason as the awareness of moral laws, therefore it is regarded as “apodictically certain”²¹⁸ and thus “underivable”.²¹⁹

In humans, ethical awareness, and hence, an expectation is presumed. This makes is another central condition of humanity and that the will is based on moral consciousness and therefore, must be thought of as a good will: “It is nothing overall in the world, certainly in general not possible to think of what could be held as thoroughly good, apart from a good will”.²²⁰

The will in itself definitely is morally good through pure reason and is toward “pure will”.²²¹ This means nothing other than that the will is construed as the ability to act in accordance

²¹⁴ Schwartländer, *Demokratie und Menschenrechte*, p. 49

²¹⁵ The concept of reason can be described as an asset, to discover the checked and outstanding nature of man to in the first place and to design it further. Maihofer Werner, *Menschenwürde im Rechtsstaat*, Hannover 1967, p. 62

²¹⁶ Cf. Heinrich Dieter, *Der Begriff der sittlichen Einsicht und Kants Lehrer vom Faktum der Vernunft*, in: Prauss Gerold (Hg.), Kant. Zur Deutung seiner Theorie vom Erkennen und Handeln, Köln 1973, p. 247

²¹⁷ Kritik der praktischen Vernunft (KpV), V, S.31. Even if the concept of "fact" seems to refer to reality, Kant uses it against such a view: for him the moral consciousness comes from non-empirical experience, thus Kant calls it "almost" as "fact" (KpV) p.47, and that "the sole fact of pure reason", which has the quality of a "fundamental moral experience" (Schwartländer Johannes, *der Mensch ist Person, Kants Lehre vom Menschen*, Stuttgart 1968, p. 124)

²¹⁸ *ibid.*, p. 47

²¹⁹ Schwartländer, *Der Mensch*, p. 124. Schwartlander speaks about the fact of reason and points out two other attributes. The understanding of the fact that pure reason works as basic moral experience and that pure reason will show up again and ask for its essential rights. Man cannot escape this, according to Schwartlander. The fact of reason is therefore not only to be "deducible" but also "unavoidable". At the same time it may get the attribute of "singularity" awarded, which means that the claim is made and remains even if the claim already got fulfilled once.

²²⁰ GMS, IV, p. 393

²²¹ Cf. GMS, IV, p. 412

with the notion of a law, for this for Kant is the law of the essence of reason.²²² The will is objectively determined, not materially, but rather through the law, as a formal principle of the will.²²³ Such laws in Kant can only be a possibility as categorical imperatives of an objective rule of human dealings.²²⁴

These alone can be unconditionally valid when the basis of their obligations lies in themselves, namely in the “universality”²²⁵ of the claim which effected the obligation.²²⁶ The established formulation exhibits the principle of all categorical imperatives:

“Act only according to that precept through which you would likewise want that it be a general law”.²²⁷

The will is considered good in this context because of the sentiments in which it sets its objectives and not through the success of its actions.²²⁸ The agent manifests the categorical imperative as “perspective”,²²⁹ from which in a thought experiment he can judge whether he would want the sentiment in question implemented. Therefore, the categorical imperative is so reflectively executed.²³⁰

²²² Cf. Schwartländer, *Demokratie und Menschenrecht*, p. 51

²²³ GMS, IV, p. 400 Cf. Högemann Brigitte, *Die Idee der Freiheit und das Subjekt*, (Königstein, Hanstein, 1980,) p. 48 et seqq.

²²⁴ Kant distinguishes between hypothetical and categorical imperatives. Because hypothetical imperatives are not really a law but they rule in that way that certain actions prescribed only under the condition that you want to achieve certain goals, which are determined subjective, for Kant just categorical imperatives are real laws.; Cf. KpV, V, p. 20

²²⁵ GMS, IV, p.421

²²⁶ Cf. Patzig Günther, *Die Begründbarkeit moralischer Normen*, in: ders., *Ethik ohne Metaphysik*, (Göttingen, Vandenhoeck&Ruprecht, 1971), p. 57

²²⁷ GMS, IV p.421

²²⁸ This explains the self sufficiency of self-giving law of good will. Kants' turn in the assessment of the relationship between will and desired contents got described by him as copernican. Cf. Hentel Erich, *Gesetz und Gewissen*, in: Schwartländer Johannes (Hg.), *Modernes Freiheitsethos*, p. 229-233

²²⁹ Kaulbach Friedrich, *Immanuel Kants „Grundlegung der Metaphysik der Sitten“*, (Darmstadt Wiss. Buchges.1988,) p.32

²³⁰ Against this background, the question arises why the mental performance of the categorical imperative can be thought of as possible. For Kant a "synthetic practical proposition a priori" is possible. (Cf. GMS, IV, p. 453 et seqq.). This means that man perceives the Must as its own original Will.(p. 455). Cf. Schwartländer, *der Mensch*, p. 147 et seq.

To answer the question of how it comes to a mandatory effect of the will, that is, how the practical reason of the will can be determined, Kant implements the notion of “duty” that is contained in a good will.²³¹ Kant defines “duty” as the necessity of an act in deference towards it in order to allow it to be determined through the principle as the essence of reason. Thus obedient acquiescence is expected from humans, which is, however, not synonymous with blind, weak-willed obedience. Instead, both concepts, that of duty and the obedience to it, are bound to autonomy.²³²

For Kant, freedom is not deducible “from certain perceived experiences from human nature”,²³³ rather the human is certain through the absolutely valid imposing moral law of freedom, namely in the manner that he knows about the possibility *a priori* “without even realizing because it is a condition of moral law”.²³⁴ In this context it is clear that freedom and moral law belong together, both being “fact so to speak”.²³⁵

In this context, the question of how conceivable the compulsion of the will is may be posed. For Kant, freedom is to be understood as a “quality of the will”.²³⁶ This likewise means that the reasonable nature is related to the notion that the “idea of freedom”²³⁷ is based on action. Kant’s conception of freedom as a property of the people directly refers to the concept of “autonomy” in the sense of the authority of self-legislation because the will (in the context of the fact of moral principles) is only really free if it can be a law in itself.

Hence, “freedom” and distinct “legislation” are interchangeable terms.²³⁸ As a result, the individual moves himself up to the status of a legislature thus gaining for himself an absolute

²³¹ GMS, IV; p.397

²³² GMS IV, p. 400

²³³ KpV., V, p. 4

²³⁴ *ibid.*

²³⁵ The moral law is "the condition under which we are first and foremost conscious about freedom" (KpV, V, p. 4a). Yet, the condition itself is freedom of the moral law (KpV, V, p.4).. Cf. Schwartländer, *Der Mensch*, p. 148

²³⁶ GMS, IV, p. 447

²³⁷ *ibid.*, p. 448. Cf. Prauss Gerold, *Kant über Freiheit als Autonomie*, Frankfurt am Main ,Klostermann,1983, p. 63 et seqq.

²³⁸ GMS, IV, p. 450

worth,²³⁹ a value grounded in his autonomy. Therefore, autonomy is “the reason for the dignity of human and every reasonable nature”.²⁴⁰

Kant’s notion of autonomy has become the core of all contemporary claims to human rights and therefore several more remarks regarding his understanding of autonomy should be added. Kant identifies the concept of freedom, and implicitly autonomy, as well as with the “purpose in and of itself”²⁴¹ which he again deduced as an underlying premise for the moral principles. Only by virtue of his or her morality can one gain the dignity which is grounded in autonomy. For Kant, human dignity is something that humans must give proof of through his or her actions; that is, a duty and not a claim to urge implementation.²⁴²

The human deals morally and thus, in unity with his or her dignity according to the following principle, which Kant referred to as the “principle of autonomy”: to choose nothing than that in which the precepts of his or her choices are simultaneously understood in the same will as a general law.²⁴³ The idea of autonomy makes it necessary to comply with the categorical imperative, hence the notion of autonomy is also associated with that of duty.

The human is obliged to subjugate his subjective will to a general legal order. The autonomy of the human is thus based on the position as legislature that he or she has given himself or herself, which implies the consideration of another as a legislature. When Kant determines that the person gains dignity, then this means that he or she gains dignity in his or her social surrounding as a standing subject in relation to his or her fellow human beings. The relationship between humans and things such as nature, which will be in lieu of interests later, is therefore not deliberated by Kant in this context.

²³⁹ GMS, IV, p. 428

²⁴⁰ GMS, IV, p. 436

²⁴¹ GMS, IV, p. 429

²⁴² Cf. Höffe Otfried, *Christliche Sozialethik im Horizont der Ethik der Moderne. Zum Problem der Menschenrechte*, in: *Aus Politik und Zeitgeschichte*, 41 Jg., 1991, Bd. 20, p. 37

²⁴³ GMS, IV, p. 440

To conform to the principles of autonomy is to acquire dignity; one will lose this by counteracting the principles of autonomy and therefore simultaneously conflicting with reason. This means that dignity can only be destroyed by the individual who possesses it.²⁴⁴ Following the above remarks, three central characteristics of the notion of autonomy will be emphasized in the subsequent discussion.

a) Formality

In the foundation of human dignity from his or her autonomy, there is still no criterion noted regarding the determination of the notion of human beings with regard to content. This means that the definition is “not an issue of a theoretical subsuming to definite content, but rather the practical recognition”²⁴⁵ which for Kant is certainly never a mere arbitrariness, but instead this implies a matter of practical reason.

b) Subjectivity

Yet, on the other hand, the notion of human beings is determined in content by that of autonomy, namely, in the manner in which the human is seen, not as a being of arbitrariness, but rather of reason. “Namely not in a foreign reason of the body which comes from the outside or societal regularities, but rather from himself or herself, from his or her own staid reason”.²⁴⁶ From this, the conclusion can be drawn that the content of the will does not emanate from reason, “but is founded in the empirical subject: the human being in his or her corporeality and sociality”.²⁴⁷ In other words, only in this does the human become a person who bears dignity that he or she, in contrast to an unreasonable nature, has the possibility to have command over himself or herself. Only as an autonomous subject can the human really

²⁴⁴ Cf. GMS, IV, p. 439

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ Schild Wolfgang, *die Menschenrecht als Sinnräume der Freiheit und ihre Sicherung im Recht*, in: Schwartländer Johannes (Hg.) *Modernes Freiheitsethos und Christlicher Glaube*, (Muenchen. Kaiser 1981) p. 49

be considered to be free. This means that he or she possesses the capability “to reflect upon his or her standing in nature and society, thereby enabling him or her to view this objectively and to define himself or herself”.²⁴⁸

In this manner, Kant recognizes the plurality of the subjective precepts of action based upon the prerequisite that they pass the conceptual test of the possibility for objectivity.²⁴⁹

c) Accountability

Autonomy as self-determination certainly does not imply rigorous self-assertion, but rather the capability to responsible self-legislation. Individual autonomy is based upon the recognition of its basis in the purpose in and of itself, thus inevitably bringing out the imperative that the other also must never be treated merely as a resource, but, likewise, always as a purpose.²⁵⁰ This imperative consequently functions as an equivalent to the notion of dignity, so to speak. In this sense, the imperative and, therefore, the notion of dignity, imply two different things: the principle of reciprocity and the precept of generalization of actions, which are consecutively obtainable at the present.²⁵¹

Because no criterion can be given for Kant’s notion of humans, all human beings must gain dignity, however nothing is stated regarding whether they all gain this equally.²⁵² These three aspects of the notion of autonomy will be discussed once again in a later section, when the question of possible rights for future generations will be addressed and the intrinsic laws of nature will be discussed.

²⁴⁸ Schild, *Systematische Überlegungen*, in Schwartländer, Tübingen, 1978, p. 38

²⁴⁹ Cf. hierzu Brugger Winfried, *Menschenrechtsethos und Verantwortungspolitik*, Max Webers Beitrag zur Analyse und Begründung der Menschenrechte, (Freiburg[Breisgau]München Kaiser,1980,) p. 250 et seqq.

²⁵⁰ Cf. GMS, IV, p. 437

²⁵¹ Apel Karl-Otto, Diskurs und Verantwortung, das Problem des Übergangs zur Postkonventiellen Moral, Frankfurt am Main 1988, S. 193; Jonas Hans, Das Prinzip Verantwortung, Versuch einer Ethik für die technische Zivilisation, (Frankfurt am Main ,Suhrkamp,1988); p. 35 et seq.

²⁵² Cf. hierzu Spaemann Robert, Über den Begriff der Menschen würde, in: Böckenförde Ernst-Wolfgang/Spaemann Robert (Hg.), Menschenrechte und Menschenwürde, (Stuttgart Klett-Cotta,1987), p. 304 f.

In Kant's image of humanity, particularly in the perception of the autonomy of human beings, we encounter a contradiction to that of the political reality of people who lived at that time. In this context, it was obvious to develop the idea of a constitutional state, which likewise shows that Kant definitely deliberated upon the problem of the actual obligation of the notion of human dignity.

d) The Human right to Freedom

The previous depiction provided a rudimentary reconstruction of Kant's efforts to establish the dignity of human beings; that is, to constitute a reasonable being, that it "obeys no laws than those that it, likewise, created itself".²⁵³ In this sense, the notion of autonomy as a basis for human dignity has an eminent political meaning, as will be demonstrated in the following section.

Having said that, the question of what connection exists between Kant's formal ethics and justification for human rights should be addressed. One such conjunction already exists therein, namely that the notion of autonomy contains obvious implications in the area of rights. Kant sought to justify freedom in his formal ethics, that is, autonomy as the last principle, so this must also have consequences for those in a national community and, consequently, also for the people who live under the official laws, who should not live in discrepancy with his or her dignity. Hence, Kant interprets freedom not as a mere moral requirement, but also simultaneously through the perspective of philosophy of law as a legal requirement, namely, as the sole original legal requirement.²⁵⁴

A consequence of the premise of freedom, that is, the autonomy of the human being, is that the state is only conceivable as "an assembly of a quantity of people under laws of right",²⁵⁵

²⁵³ GMS, IV, p. 434

²⁵⁴ Cf.. *Metaphysik der Sitten* (MS), IV, p.237

²⁵⁵ MS, VI, p.313

because the individual should be able to live in freedom, compliance with the laws of right must be able to be enforced.²⁵⁶

Kant understood law to mean the “embodiment of conditions under which the arbitrariness of one with the arbitrariness of the other can be unified according to a general law of freedom”.²⁵⁷ Only under such conditions is the individual free in his or her actions. Thus, the notion of law also simultaneously contains a restriction of freedom on the conditions of the law and, hence, of reason.²⁵⁸ This is that which Kant understands as the only human right, that is to say, the right of limitation to the exterior freedom of each one to the conditions of reason”.²⁵⁹

Analogously, the Kantian notion of human rights is construed as rights in a legal order in the sense of the above mentioned legal definition. Sovereignty is accordingly always merely worth being recognized as restricted sovereignty.²⁶⁰ The objective reason for the limitation can only be grounded in human rights as the sole original law. This law becomes operative through those human rights derived from the basic rights that Kant referred to as *a priori* principles (see below), which can make their influence effective as a positive law.

Here it is particularly clear that Kant considered human rights, that is, basic rights, by no means as laws to be fabricated from the governmental side, but rather as the objective notion which every existing legal condition must take into consideration.²⁶¹ In this sense, human rights are understood as “original”.

²⁵⁶ MS, VI, p.312

²⁵⁷ MS, VI, p.230

²⁵⁸ Cf.. Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis, VIII, p.289 et seq.

²⁵⁹ Ebbinghaus Julius, *das Kantische System*,(Berlin, Luchterhand, 1964), p. 34

²⁶⁰ Höffe Otfried, *Die Menschenrechte als legitimer und kritischer Maßstab der Demokratie*, in: Schwartländer Johannes (Hg.), *Menschenrechte und Demokratie*,(Kehl am Rhein {u a } Engel,1981), p. 253

²⁶¹ Cf. Über den Gemeinspruch, VIII, p. 290. The term “anterior to the state” in this context is misleading because it implicates the concept of some kind of natural state. This however can only be thought of as a contrariness to the reason of man within Kants’ logic.

At this point, one can take on the question of under which conditions basic rights can be allowed these restrictive powers. Information about this yields another aspect of the notion of autonomy. A second national policy consequence that results from the notion of autonomy is that the legislative authority could correspond only with the will of the people”.²⁶²

An actual coalition is not meant here, but rather,

“...a mere idea of reason, which has its undoubted (practical) reality: namely, to forbid every legislator to give his laws as though they could have emerged from the unified wills of the entire population and every subject, so far as he wants to be a citizen to look at, as if he had been in accord with one of such wills”.²⁶³

Kant does not connect the unity of the general will with actual uniform will, but rather it is relevant to “the consensus of freedom for all, which is only possible if the coexistence of the individual spheres of freedom accept the necessary limitations of freedom for everyone”.²⁶⁴ The purpose of the unification “is the right of human beings under compulsory public laws through which every individual determines his law and can be assured against any interference”.²⁶⁵

For the imperative of such a fiction, there is an objective reason: that the human has an inalienable right to live in freedom, in “independence from another’s coercing caprice, provided they can exist together with every other freedom according to a general law”.²⁶⁶ Thus he or she simultaneously has a duty to this right, to which he or she must concede.²⁶⁷

²⁶² MS VI, p. 313

²⁶³ Über den Gemeinspruch, VIII, p. 297

²⁶⁴ Rödl Wolfgang, Rationalistisches Naturrecht und praktische Philosophie der Neuzeit, in: Riedel Manfred (Hg.), Rehabilitierung der praktischen Philosophie, Bd. 1, Freiburg im Breisgau 1972, p. 285

²⁶⁵ Über den Gemeinspruch, VIII, p. 289

²⁶⁶ MS, VI, p. 237

²⁶⁷ Cf.. über den Gemeinspruch, VIII, p. 289 f, hierzu Schwartländer Johannes, Staatsbürgerliche und sittlich-institutionelle Menschenrechte. Aspekte zur Bestimmung der Menschenrechte, in: ders. (Hg.) Menschenrechte. Aspekte ihrer Begründungen und Verwirklichung, Tübingen 1978, p. 88f.

Such a unification of the will of all national citizens, which can be referred to as the will of basic legal rights corresponds to legislative authority, as previously discussed. In saying this, Kant has still not voiced an option for a definite form of government. In other words, Kant did not seek to provide an objective justification for the democratic form of government.

It is crucial whether the kind of governance complies with the general law of reason, so the spirit of the original accord²⁶⁸ is applicable as the “touchstone for the legitimacy of all public laws”.²⁶⁹ In another respect, the Kantian dictum about the legislative authority of every citizen still requires a more detailed explanation: Kant explicitly excludes the right of the individual to oppose a revolution because it contradicts the general law as a principle of reason.²⁷⁰

Therefore, no-one may make a stand if his or her basic rights are violated either, which Kant deduces from the treaty which establishes human rights; through the treaty, all humans, that is, all adult males who hold citizenship, will be distinguished by the “attributes” of “freedom”, “equality”, and “independence”. These do not involve laws given by the state, but rather basic tenets of reason, the *a priori* principles.²⁷¹ In Kant’s refusal of rights of resistance, as well as in his notion of “human dignity”, it is obvious that Kant still had no concrete, enforceable demand for human rights in mind.

²⁶⁸ Cf. MS, VI, p. 340, Kant states clearly that he considers a Republic as the best form of government. Cf.. MS, VI, p. 340 et seq.

²⁶⁹ Über den Gemeinspruch, VIII, p. 297

²⁷⁰ Über den Gemeinspruch, VIII

²⁷¹ Über den Gemeinspruch, VIII

4. Empirical Studies: Self-Determination re-visited

The principle of self determination originates in World War I. To be exact, it was first introduced by Woodrow Wilson the President of the USA at the end of the war in 1918 at the Versailles conference. During this reconciliation conference Wilson spoke about the principle of peace, and more specifically about self determination for the people and about the creation of a league of free and public nations.²⁷²

This principle of self determination can be considered an echo in the international community of that time because of the striving of many nations for independence and freedom due to the effects of World War I and decaying relations between colonies and their colonial empires. The founding of new nations and states directly after the war due to the fall of empires like Germany, Austria-Hungary, Russia and the Ottoman Empire accelerated this drift in awareness. The new states as well as the major established ones accepted and welcomed the concept of self determination because of their own agendas but also because of the inspiring spirit of freedom and independence.²⁷³

This principle of self determination vanished after World War II because many states, especially multi minority states, were against it as it endangered their own nations unity or was able to threaten their sovereignty or could even destabilize whole political regions.²⁷⁴

Therefore this principle was no longer protected by many states, which led to discord between the people who strove for independence of their own and the supporters of state

²⁷² Erez, Manela, *The Wilsonian Moment: self-determination and the international origins of anticolonial nationalism*, (Oxford, Osford Univ. Press: 2007). p. 26.

²⁷³ Colak, Ferdo, *Das Voelkerrecht als Spielball der Grossmaechte*, (Offenburg, Selbstverl. Colak: 2011.) p.19-22

²⁷⁴ Bruehl-Mose, Denise, *Die Entwicklung des Selbstbestimmungsrechts der Voelker unter besondere Beruecksichtigung seines innerstaatlich-demokratischen Aspekts und seiner Bedeutung fuer den Minderheitenschutz*, (Basel: Helbing & Lichtenhahn Verlag, 1994).. p. 39-42.

sovereignty. Even later in the UN, this controversial matter is still an aspect of international politics that is almost always debatable.

Minorities were the constant losers in those discussions over time. They and other peoples who demanded freedom and independence in many countries were not always motivated by the intention of the full-scale overthrow of governments and sovereignty, just the thirst for a better life in liberty and dignity. Those who profited from this stagnancy of international politics were the sovereigns, especially the more authoritarian regimes. Examples like Hussein in Iraq or Milosevic in Serbia showed how authority and suppression could lead to the abuse and the exploitation of whole countries in favor of a small group of leaders and their supporters and on the back of the common people and the ones who strive for freedom.

Despite having rigorous security agencies that use all kinds of methods of suppression, most authoritarian governments were and still are able to withstand external international pressure, are even acknowledged by the international community within the UN and maintain relatively normal relations to other nations and states. However, the principle of self determination was raised again in the new millennium due to ongoing problems and renewed strive of different minorities in many states that causes internal as well as external conflicts with dangerous potential. The question arises: why at this time?

Many arguments and aspects can be brought together to try to answer this question. For many people it is a mixture of economics and the ongoing effects of globalization as well as the huge advancements in information technologies, media and especially the internet. The so-called “Arab Spring” in many countries²⁷⁵ in North Africa and the Middle East is a good example for current trends that perpetuate the use of technology and new forms of communication for rebels and uprising people to withstand censorship and authoritarian methods in various governments.

²⁷⁵ Countries like Tunisia, Egypt, Libya, Yemen and Syria.

Without a doubt, people in many parts of the world strive for freedom and democracy and a better life, especially in developing countries such as the Near East region and Arab countries. Following the colonial era, presidential (individual, authoritarian, and national) political regimes took control, exploiting and damaging these countries. Dictators acted in the interest of their own families or government parties and military armament, as in the case of the Hussein regime in Iraq (1979-2003) or the Assad regime in Syria, also in Libya and Tunisia.

Forbidden political opinions and expression, parties of the opposition, lack of free press and media along with a security crackdown against their own citizens and an absence of human- and minority rights caused opposition and led to mass protests. Other significant factors were the corruption of government bodies, low gross domestic product and economic mismanagement and maladministration. External grounds for distrust and discontent include major political change and democratization of East European countries after 1989, also during worker and political asylum seeker migration of people from Arab countries to Western Europe and within Arab countries. In addition, exposure to information and ability to connect and communicate through internet and media motivated individuals and groups of the Arabic population to initiate change in their own systems. All these factors were causes for the Arab Spring, Arab uprisings and revolutions

Many countries such as Tunisia, Egypt, Libya and Yemen have successfully changed governments, yet other Arab countries continue to experience political unrest and strive for change.²⁷⁶

²⁷⁶ Lynch, Mark. *The Arab Uprising: The Unfinished Revolutions of the New Middle East*. New York, Public Affairs: 2013. (p. 9-11)

4.1 Right of Self-Determination as the Right of Secession

Self-determination right implies the right of secession after referendum, allowing minorities to claim their own region within a country or granting them the right of secession, changing the nation's boarder and also the integrity and sovereignty of the state.²⁷⁷

Thilo Marauhn defines secession as:

“the separation of part of the territory of a state carried out by the resident population with the aim of creating a new independent state or acceding to another existing state [...] in the absence of consent of the previous sovereign”.²⁷⁸

This statement addresses the fact that there is, indeed, a rift that must be considered between the right of self-determination, the secession of the citizenry, and national integrity with the disintegration of the government and the laws which it upheld. This, undoubtedly, has an effect on the rights of the population, whether it is civil rights, the rights of minorities, or the right of secession in the future.²⁷⁹

The right of self-determination here refers to citizens as a whole, rather than as individuals. Resolution 1541 (XV) of the United Nations General Assembly determines that the right to self-determination applies to a “territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”.²⁸⁰ Commenting on this resolution, Rosalyn Higgins indicates that “the concept of self-determination, as envisaged by the drafters of the [United Nations] Charter, did not refer to the right of dependent

²⁷⁷ Colak, Ferdo, *Die Selbstbestimmung der Voelker zwischen Recht und Machtpolitik*, (Zagreb, Selbstverl.: 1996) p. 59-65.

²⁷⁸ Thilo Marauhn, „Anspruch auf Sezession?“, *Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt*, Eine Welt: Texte der Stiftung Entwicklung und Frieden, Band 2, editiert von Hans-Joachim Heintze [„Right to Secession?“, the People's Right to Self-Determination – Challenge to the World of States, One World: Texts for the Foundation of Development and Peace, Vol. 2, ed. Hans-Joachim Heintze], Bonn, Verlag J.H.W. Dietz Nachfolger, 1997, p.106.

²⁷⁹ Marauhn, p. 105 et seq.

²⁸⁰ *ibid.*, 107

peoples to be independent, or indeed, even to vote”.²⁸¹ This indicates that even if established civil rights remain in place, some groups of citizens, particularly the minority groups, may not be explicitly included in these political rights.²⁸²

Before examining the rights of minorities, if such a situation should develop, one must first inquire as to what is meant by right of self-determination from the perspective of the United Nations. This concept is defined by the UN General Assembly as “the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people”.²⁸³ The Charter then goes on to add that “nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”.²⁸⁴

In this statement, one may remark that the United Nations has perceived the disastrous civil and minority rights atrocities, which have the potential to take place during the upheaval of the government and the assertion of the right of self-determination. Or, as it may be more clearly stated, the right to secession does not preclude acts that are contrary to the population’s civil rights.²⁸⁵ The United Nations, however, endorses the right to self-determination in specific situations in which the rights of the people are being violated. In circumstances, such as those in which the state is flagrantly abusing human rights or enacts a massacre of a certain group of people, the right of secession is legitimate. Indeed, the United Nations may only intervene in “an altogether exceptional situation, a last resort where the State lacks the will or the power to enact and apply just and effective guarantees”, and if it is possible to seek assistance within the nation itself.²⁸⁶

281 *ibid.*, 109
282 *ibid.*
283 *ibid.*, 108
284 *ibid.*
285 *ibid.*, 111
286 *ibid.*, 110 et seq.

Furthermore, the right to secession involves the protection of sovereign states regarding their right of territorial self-determination, that is, to be under “a government representing the whole people belonging to the territory without distinction as to race, creed or colour [*sic*]”.²⁸⁷ That is, to prevent the discrimination against ethnic groups in case of blatant abuse of the group’s basic, fundamental rights. This statement clarifies that the right of self-determination should be interpreted as a right to resist the oppression of the state, or as a right of the citizenry to defend itself. Thus, the right of secession may be more clearly stated as that which combines the right of self-determination with the concept of sovereignty of the people, therefore taking the designation of “inner self-determination”.²⁸⁸

However, according to Marauhn, inner self-determination contributes to the inherently problematic nature of secession, in that it conflicts with the concept of territorial integrity of a State. He defines the inner right to self-determination as that which involves the presence of a government which protects the interest of the people, regardless of race, belief, or skin color.²⁸⁹ The primary objective of this concept is to qualify the principle of human rights, in respect to the quality of its norms, that is, on the universal level. Effectively, inner self-determination is a question of the legitimacy of the state authority regarding the treatment of minority groups.

This means that a consensus must exist among the citizens, which shows approval for the government’s legitimacy and its performance in terms of its democratic function.²⁹⁰ Therefore, the national integrity, here clarified as the interests of the people, may contradict with the inner self-determination in the instance of secession from the current government, in that the state ruling party may ignore inner self-determination in favor of maintaining national integrity.

287 *ibid.*, 111
288 *ibid.*, 111
289 *ibid.*, 112 et seq.
290 *ibid.*, 113

These circumstances will then call for the right to secession, which falls under the right of self-determination, but is only to be used in extreme cases, such as those human rights violations which were covered in the previous sections.²⁹¹

Overall, the United Nations views the right to secession as a tool only in a minimal number of political situations, but it does advocate its use when it is necessary to protect the people. There are various criteria for its use; if the population is oppressed, persecuted, or exiled, if there are no minority rights or if these rights are not recognized (culturally, from within the state), the minority has the right to demand a referendum and to internationalize the political process through international observations of the UN. This process and criteria will be discussed in detail in the following pages.

The United Nations Charter, however, envisions its parameters not as those which apply to only to conditions of colonialism, for which they were originally drafted, but rather as principles which may be enacted in the future – beyond the end of colonialism – in order to put a stop to illegitimate governments and rulers.²⁹² The people as a group, in this manifestation, wield the power to decide for themselves whether or not the state is properly representing their interests. In this sense, the original intentions at the time at which the Charter was written, namely the application of the right to self-determination as a basis of decolonization, have mutated and concern also the removal or fall of a government.

²⁹¹ *ibid.*, 113 et seq.

²⁹² *ibid.*, 109 et seq.

4.2 Provisions and Safeguarding Guarantees of International Organizations

This section will discuss the two aspects of the protection of minority rights which would exist in an ideal multicultural nation with the backing of international organizations. For such a situation to be realized certain provisions must be made by the international organizations and the conditions of such must be enforced by institution that exist on the regional or federal level.

The participation of the national government is integral in the protection of minority rights, as it is responsible for the integration of international provisions into federal laws, particularly in regions containing groups of varied ethnicity, who are more likely to come into conflict with each other. Above all, the national government must be based upon democratic principles and controlled by a central organization with specific branches in different regions of conflict in order for the concepts presented by international provisions to be properly enacted.²⁹³

Addressing the issues of the provisions of minority protection on the international level, it must first be noted that the League of Nations created the initial procedure to guarantee the protection of minorities.

In the United Nations' conception of minority rights guarantees, the steps enacted by the League of Nations were not established due to the fact that the UN considers human rights to pertain to the individual, and, as a result, the regulation of the protection of groups was given a lower priority.

²⁹³ Günther Baechler, *Minderheitenschutz durch internationale Schutzgarantien und innerstaatlichen Föderalismus*, Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt; Eine Welt: Texte der Stiftung Entwicklung und Frieden, Band 2, editiert von Hans-Joachim Heintze (Protection of Minorities through International Guarantees of Protection and National Federalism), the People's Right to Self-Determination – Challenge to the World of States. One World: Texts for the Foundation of Development and Peace, Vol. 2, ed. Hans-Joachim Heintze (Bonn, Verlag J.H.W. Dietz Nachfolger, 1997, p. 248)

For this reason, the United Nations Charter regarding issues of minority groups in the chapter regarding the right to sanctions simply states that the violation of minority rights can be hazardous to the state of peace in the country or may adversely affect human rights.²⁹⁴

This absence of an official position statement regarding the rights of minority groups was discovered early on, when the United Nations was confronted with the problems of decolonization, but did not have the tools to properly deal with the great empires, due to the lack of guarantees in Chapter 7 of its Charter. S. Baechler calls to one's attention an incident in which guarantees by the UN were not sufficient to protect minorities by citing the example of the conflict between Ethiopia and Eritrea during the 1950s.

In this case, the United Nations General Assembly advocated that Eritrea should become an autonomous entity, but should remain under the sovereignty of Ethiopia. Despite the UN's efforts to create an Eritrean constitution with the help of one of its commissioners, the situation escalated and led to a three decade war of liberation.²⁹⁵ The author includes the comments of the Eritrean case study writers, in which they noted that "if Eritrean autonomy were to have been given any chance of survival, adequate international guarantees should have been provided. Unfortunately, this was not the case".²⁹⁶

Today, the international protection of specific groups of people within existing nations is correlated with the provisions of autonomy in the areas influenced by the former Soviet Union, principally in the areas which now form the Commonwealth of Independent States. These provisions pertained to the conflicts in Azerbaijan, Georgia, and Ukraine, among others. Also, in Kosovo, international guarantees were called for, but were not sufficient to

²⁹⁴ Baechler, p. 249

²⁹⁵ *ibid.*, p. 249

²⁹⁶ *ibid.*, p. 249 et seq.

quell the people's frustration due to the lack of action by international organizations with regard to their claim to the right of secession.²⁹⁷

The present-day protection guarantee for minority groups is accounted for on three different levels, most of which the Organization for Security and Cooperation in Europe (OSCE) can become actively involved with, if it is necessary to enact the guarantees. These levels may be defined as follows:

- 1) Obligations in a state treaty
- 2) Obligations due to the state's membership in the OSCE or due to declarations which are mandatory under international law
- 3) An agreement between the nation and the minority group in question, which enables the OSCE to actively intervene.²⁹⁸

In order to explain these three levels, particularly the second and third, the subsequent section will elaborate upon the provisions, using examples of the United Nation's activities. These will serve as case studies indicative of the OSCE's engagement with the international guarantees of protection.

Firstly, the OSCE acting as a agent of a minority group, focusing on the Tamil minority in Sri Lanka, is discussed, before I move on to the case of the Albanians in Kosovo, in which the OSCE indicates the extent of guaranteed protection. Finally, the concept of *de facto* autonomy will be typified in addressing the Kurdish minority in Northern Iraq.

²⁹⁷ *ibid.*, p. 250

²⁹⁸ *ibid.*, p. 251

In the case of Sri Lanka, India took action against the oppression of the Tamil people by sending troops to instill peace. According to the peace treaty, which was put in place by India in 1987, the Tamil minority was to be recognized as an independent ethnic group, and obtained the right to act autonomously from the central government. Through these actions, India was viewed as the third country agent of the minority group, which was to ensure the physical safety of the people in the Northern and Eastern provinces of Sri Lanka from the encroachment of military troops. This embodies the declaration of supervision over the implementation of a peace accord.²⁹⁹

The failure of the Tamils' autonomy and the beginning of the civil war in 1990 was traced back to the fact that the minority group itself had no recognition role in the formulation of the peace treaty. Additionally, it was contributed to the absence of any permanent international political bodies, which should have been installed in order to supervise the fulfillment of the provisions of autonomy. This lack of a regional and international system of accountability for the implementation of the protection provisions demonstrates that a country that acts in the role of a third-party agent of the minority group must remain present and committed to the attainment of autonomy.³⁰⁰ Indeed, Nirmala Chandrahasan agrees, writing that "third states still have a role to play in advancing the human rights of minorities to autonomy and self-government. This may be achieved through treaties, as in the case of the India-Sri Lanka Peace Accord."³⁰¹ However, the eventual absence of the protective third state allows for the option of the disintegration of a peace treaty if the minority group has not been properly represented and permitted protection by permanent international organizations.

In the example of Kosovo and the protection of the Albanian minority from the Serbian government, one finds that international organizations instituted a protectorate in order to

²⁹⁹ *ibid.*, p. 251 et seq.

³⁰⁰ *ibid.*, p. 252

³⁰¹ *ibid.*, p.252

end the abuses of human rights, rather than taking over the entire workings of the government, which could lead to further national violation of these rights.³⁰²

The statement regarding the organization's involvement in Serbia clarifies that an "international mechanism through the Conference on Security and Cooperation in Europe (CSCE), the United Nations or the European Union to create 'a viable international protectorate' to shield the Kosovo Albanians from further persecution by Serbia" was to be implemented through the installation of a designated prime minister to act as a trustee.³⁰³

Although the actions of the international organizations were not regarded as being sufficient from the perspective of the Albanian minority,³⁰⁴ the intervention of the international community as well as the enactment of a conditional trusteeship over the activities of the Serbian government presented fewer risks to both the Serbian people and the Albanian minority than an overthrow of the state, which could eventually lead to an even more detrimental situation.

If a situation exists that presents a threat not only to human rights, but also to the peace, it becomes necessary to implement immediate provisions of autonomy through the intervention of humanitarian organizations. Such a case appeared in the Kurdish communities of Northern Iraq, in which the autonomy of the minority group was entirely dependent upon international powers intervening in the conflict.

Although sanctions were imposed in order to address the oppression of the Iraqi people and the violations of human and minority rights, it was necessary to put pressure on the government both militarily and politically in order to resolve the situation. This United Nations resolution, which was created in order to allow the use of force to obtain human

³⁰² *ibid.*, p. 252 et seq.

³⁰³ *ibid.*

³⁰⁴ *ibid.*, p. 253

rights for the oppressed citizenry of a particular nation, is a crucial moment in the history of the UN's protection guarantees, as it was the first time that abuses of human rights were perceived to be a threat to world peace and security.³⁰⁵

Continuing the discussion of the involvement of international organizations in the protection of human and minority rights, one must address the manner in which such provisions and guarantees are enforced. Therefore, the guidelines, criteria and suggestions from the OSCE for the implementation and execution will be outlined.

Examples of this include the conditions of sanctions, the provision of autonomy, and development of the OSCE. With this, one can gain an informed perspective on the function of the OSCE in the protection of minorities, in addition to understanding the difficulties and advantages of its current state.³⁰⁶ Since international guarantees were conceived of as independent provisions, they may not influence or undermine the constitution of the nation in which the measures are being implemented, but it often occurs that the former precedent is enacted.

Therefore, it is logical for the OSCE to put more pressure on the democratization of the state and society. The difficulty in this occurs when the process of democratization and the guarantee of protection conflict with each other, that is, when a nation which is considered to be incapable of forming a democratic system has it forced upon them through the provisions of autonomy.³⁰⁷

The enforcement of rules upon a state, which calls for international involvement within the action due to the abuses of civil or human rights, is manifested through sanctions. The

³⁰⁵ *ibid.*, p. 253 et seq.

³⁰⁶ *ibid.*, p. 258-262

³⁰⁷ *ibid.*, p. 258 et seq.

achievement of the guarantees is dependent upon the plausibility of individual provisions, rather than the method through which the OSCE intervenes.

The following types of sanctions are currently in use or may become a possibility in the future, if the situation requires them:

- 1) Provision of a fact-finding mission, in which the issues are to be clarified.
- 2) Provision of aid, if it is suggested within the scope of the discussion regarding “good governance”. Further cooperation depends upon the adherence to stipulations
- 3) The deployment of permanent monitors of autonomy, to be made up of civilians or police contingents.
- 4) Designation of special envoys, who, for example, may preside over commissions as a representative of various parties or the OSCE.
- 5) The administration of knowledge regarding the violations of a treaty through the special envoys’ permanent council. They may adopt recommendations regarding the conflicting parties.³⁰⁸

Amongst the sanctions, the OSCE must take into consideration the direct and indirect protection caused by the provisions that have been enacted. Therefore, the subsequent suggestions, in view of the OSCE’s involvement in the conflicts that occurred in the Commonwealth of Independent States. The advised measures include the following:

- 1) The countersigning of a treaty

³⁰⁸

ibid., p. 259

- 2) The consigning of a treaty to the OSCE
- 3) An operative role in the monitoring of a treaty
- 4) Specific measures if the violation of a treaty occurs
- 5) *Ad hoc* measures such as periodic inspections, verifications and fact-finding missions
- 6) The monitoring of the initial elections in the newly autonomous state
- 7) Programs coordinated in order to ensure the rebuilding of the economy
- 8) Subsidies provided by the OSCE and monitoring of the situation by the head commissioner of national minorities.³⁰⁹

The conditions under which a *de facto* provision of autonomy may be installed has previously been described through the example of the Kurdish minority in Northern Iraq, as well as the precedent set by the United Nations' response to the human rights violations.

With the experience gained by this and other implementations of autonomous states through international guarantees, the OSCE has collected factors which are necessary in order to create successful autonomy through these provisions.³¹⁰ These components are explained below:

- 1) A regime should be able to exist with approval of a third nation if the regime striving to be autonomous is that of the same ethnic minority or that which has a close connection to such a group.

³⁰⁹ *ibid.*, p. 260

³¹⁰ *ibid.*, p. 260

- 2) Terms and mechanisms of peaceful dispute resolutions that are negotiated between the central government and the local authorities should be established in the most precise and detailed form possible.
- 3) The chances of a provision's success appear to be much greater if both the central government as well as the autonomous authorities of democracy feel liable.
- 4) Every regime which contains a regional autonomy must guarantee that human rights, including the principles of equality and non-discrimination will be respected.³¹¹

In its attempt to adapt to new political situations and improve upon its current state, the OSCE has compiled a list of viable options, which can help to expand upon the scope and efficiency of their operations.³¹² The following list contains the self-critical assessment of the OSCE that may be utilized in order to expand their future influence:

- 1) The express responsibility of the OSCE regarding the monitoring of the autonomy agreements is still to be determined. These claims lead to the fact that the international autonomy safeguarding provisions are rooted in an international document.
- 2) The reinforcements of the elements of collective safety constitute a prerequisite for an efficient safeguarding of autonomy.
- 3) Decentralization, regionalization, and federalization are to be encouraged as elements of a democratic state.

³¹¹ Ibid., p.260 et seq.

³¹² Ibid., p. 261

- 4) Existing mechanisms of the OSCE, especially on the “Berliner” crisis mechanism and the “Muscovite” human rights mechanism are, on the one hand to be simplified, and on the other hand to be extended into an applicable, operative mechanism.³¹³
- 5) The extension of the high commissioner for national minorities’ mandates is so that the commissioner may receive individual grievances from members of the afflicted minority community, or that these have allowed him to become concerned with the conflicts in which “organized terrorist acts” occur. Therefore the high commissioner cannot otherwise “become concerned with dangerous minority conflicts and, in this instance, cannot exercise his early warning function.”³¹⁴
- 6) The role of professional non-governmental organizations (NGOs), such as “Minority Watch Groups” have to date been systematic in anchoring the safeguarding guarantees, especially in regard to their monitoring function.³¹⁵

313 *ibid.*

314 *ibid.*

315 *ibid.*

4.2.1 The Role of the UN

“There is one universal organization in the world today that can set globally accepted standards and norms of behavior. That is the United Nations. And its normative power resides not only in the Organization as a whole, but also in its individual programs, funds, and the international agreement that fall under its auspices.”³¹⁶

The UN, as the largest and most comprehensive international organization, plays a unique role in the establishment of legitimacy of states. Resolutions from the Security Council are binding on members, and as such, in combination with the UN Charter, they represent one of the most important sources of international law. In this chapter, I will elaborate the history and structure of the UN in order better to explicate the role it has played in the past and continues to do so today.

4.2.1.1 Establishment of the UN

The principle behind the establishment of the UN was the idea, after the fall of the League of Nations, which played its role in the inter-war period but failed to prevent the outbreak of the Second World War, of establishing a new international organization with the key role of maintaining the peace and security in the world that emerged from the end of the War. In order to proceed with the establishment of this organization, the Allied forces held a meeting in Moscow on October 30, 1943 during the Second World War. Amongst the attendants chosen to participate were the Foreign Ministers from USA, Russia, Great Britain and China. This idea was confirmed during the Tehran Conference, which lasted from November 28th to December 1st 1943. The great powers taking part in this conference were represented by Churchill, Roosevelt and Stalin; their purpose was to ratify this treaty.

³¹⁶ Sills, Joe: *The Role of the United Nations in Forming Global Norms*, in International Relations Studies and the United Nations Occasional Papers, 2002 No. 2

The experts representing these four governments then gathered in Dumbarton Oaks District in Georgetown, from August 21. until October 7, 1944, in order to discuss and specify the details of the design of this soon to be established organization. Despite this being a long procedure containing countless details, the negotiations that were agreed upon by the involved participants were to form, or rather configure and create, based on various different proposals and drafts, a general international organization. This was published and submitted by the Governments of the Allied States. The Dumbarton Oaks Proposals, led the by the great powers in the Yalta Conference from the 4th to the 11th of February 1945, were essential to the resolution of some controversial issues.

As agreed by all three leaders, Churchill, Roosevelt and Stalin, decisions about the voting procedures in the Security Council were also made. Before the Second World War finished, on April 25, 1945, the United Nations Conference concerning the international organization began in San Francisco. Eventually, during the conference, fifty states participated in discussions concerning the basis of the organization in numerous commissions and committees formed by the draft statute of the great powers. This conference included many hundred of thousands of suggestions that were supplemented and modified.

The principal compromise was that the central point in different point has been changed by becoming bigger. But, although there was still a lot of criticism, what had been agreed and decided on in Yalta by the big powers about this Veto right stayed in power. The final Charter was adopted unanimously on June 25, 1945 under the name United Nations Organization, and the signature occurred one day later in San Francisco. There were 51 participating members. (Only Poland was not present but signed later.)

The Charter was introduced on October 24th, 1945, and its entry into force in international law was on that date. But the first meeting of the United Nations did not take place until January 10, 1946 with the General Assembly in London under the leadership of Belgium.

Paul-Henri Spaak presented his work and on January 17, 1945 the Security Council in London also started its activity.

4.2.1.2 The structure of the UN

After different Conferences and Meetings the UNO was established and signed by fifty members at San Francisco in June 1945. Its growing importance has attracted a principle of consensus. Essentially, this principle corresponds to the structure of an international society that allows all members an equal participation. This principle has also supported the effectiveness of the decisions made by the Security Council, although the veto right accorded to the Permanent Members has made reaching a decision challenging in more controversial cases.

The principles of consensus have increased their (means) after 1964/65 and particularly following the Middle East crises in 1967/68 (particularly with reference to the Six Days War in 1967 among Arab states, Egypt against Israel)³¹⁷ Therefore this principle led to a unanimous decision in the Security Council that supported the weight and considered the Security Council Resolutions that were controversial among the members.

4.2.1.3 Organs

The United Nations Organization was established with different Organs, Committees and Commissions, each one having its own function. But the most important and significant are six Organs and these Organs are as follows³¹⁸:

³¹⁷ 3.5 Repertoire 1966-1968, vom 9.6. 1967 .also Chronique Mensuelle 1976, Nr.6, S. 5-18.

Konsenerklaerung in gleicher Angelegenheit vom 11.11.1976, a.a.O., Nr, 11, S. 5

³¹⁸ Krasno, Jean E., *The United Nations (Confronting the Challenges of a Global Society)*, 2004 USA, pp 40-47

1. The Security Council
2. The General Assembly
3. The Secretariat and Secretary-General
4. The Economic and Social Council
5. The Trusteeship Council
6. The International Court of Justice

The first of these committees represents the key player in the United Nations because international crises, struggles and tensions are first considered in the Security Council. The decisions this Council reaches can in theory resolve conflicts but how and by which members are these decision made, and under which conditions and according to which principles? In order to answer this question, I will concentrate especially on the Security Council during the following.

4.2.1.4 The UN Security Council

The most influential legislative Organ in the UN Charter is the Security Council because it is responsible for maintaining peace and security. According to international law, the statutes of the UN Charter, specifically in Chapter 7, articles 39-51, permit the Security Council to implement the use of force in order to establish and maintain security. It therefore has the theoretical capability to resolve wars. The Security Council has the competence to disarm and carry out an arms limitation, a competence required by the Soviet Union when the UN Charter was signed.

The Security Council consists of five permanent members and, before 1965 six non permanent members, thereafter amended to ten non permanent members. The Voting Process functions as follows: the great powers, as permanent members (USA, Great Britain,

Russia, France and China), have priority and advantage because they have a fixed seat in the Security Council and have a Veto right. The non permanent members are to be elected through the General Assembly by a secret ballot, depending on a two thirds majority for two years. Articles 10 paragraph 2 and article 23 paragraph 1 and 2 of the UN Charter emphasize the criteria that the Candidate States have to safeguard peace and security in the world and also respect the objectives of the Organization, while other criteria such as their financial position must be considered. Equally, consideration must also be taken of the geographical distribution of the non-permanent members.

According to article (23), after the resolution number 1991 A (XVIII), dated 17th December 1963, the number of non permanent states increased from 6 members to 10 members, with the result that the main Security Council members (both permanent and non permanent) comprise fifteen member states, with the following geographical distribution:

1. The African Group receives three seats
2. The Asia-Pacific Group receives three seats
3. The Eastern-European Group receives two seats
4. The Group of Latin American and Caribbean States receives two seats
5. The Western European and Others Group receives five seats

The five regional groups have more latitude and therefore have better candidate chance compared to in the previous system, as now it is rather the regional groups who decide on their candidates. The social states of Africa or the Asian States, for example, have to agree on which state represents the region, allowing candidates like Cuba and Colombia in 1973 to occur. Candidates for the Latin American region from 1980-1981, for example, had the seat in the Security Council for non permanent states.

Undoubtedly, that the number of members increased in the Security Council was a positive step, as more participating states in the Security Council take the decisions that influence the state of peace, freedom and security in the entire world.

After the increase in the number of non permanent members, many states demanded that the number of permanent states should also be increased. The candidate states for permanent membership include Germany, India and Brazil; there are also other suggestions of adding one state representative from the African Continent, with possible candidates being Nigeria, Egypt and South Africa. Also other candidates have been mentioned, such as Japan, Australia and Indonesia.

Actually, this could be dangerous for the Hegemonic Sovereignty, as a regional struggle could increase tension and then threaten peace and security. But on the other hand, it is better for the populations and states with more representative states to balance the influence and power in the Security Council during the Security Council. This would increase the trust and credibility of UN work and duties and of its Organs, as well as the legitimacy of the Security Council. The whole of the UN could be seen as more legitimate given this sovereignty, and therefore receive powers which are more reliable and more effective.

Unfortunately all UN reforms in the conferences after 1965 (after the increase of the non permanent members from six to ten), have failed. Since the turn of the millennium, the main articles of the UN Charter have not been changed, because the great powers (i.e. the permanent members of the Security Council) do not wish to reduce their political weight, but would rather retain the veto right in the Security Council during decision making.

4.2.1.5 The Summary and criticism of the UN system:

There is no doubt that the establishment of the UN during and in the aftermath of the Second World War was at a time of change in international policy, which began to tend towards democracy, human rights and a wish to maintain peace, security and freedom of the future of the world.

In actuality, it was not only the continuation or successor of the League of Nations, but instead it can be seen as marking a new era in the history of international organizations. The UN is a large organization with different organs; the organization functions with many officers and staff in different States - not only in Headquarters in New York, Geneva, Vienna and Nairobi - but it works in different regions and territories in the world.

The Charter functions as a constitution for legitimacy and legality, especially given that all members have accepted and signed the Charter in the San Francisco Conference in June 1945. Not only that, but the UN Charter has remained in its core sense exactly the same since the establishment of the organization. This is despite the fact that the functions and tasks of various organs, especially the General-Assembly and Security Council, and their competences, rules and procedures such as membership, elections, Veto right and, in the case of the Security Council the number of permanent and non permanent members (although this latter was increased from 6 members to 10 members in 1965), have remained the subject of much debate and argument since the conception of the organization! In addition, the finance crises the UN has faced, due to increased costs, especially by intervention the blue helmet troops in crises region, have also received much negative attention. Furthermore, in some cases the membership contributions are paid late, as certain member states with a lot of leverage due to a larger contribution use this to put pressure upon the organization.

It has to be considered that there are instances when a decision of the Security Council has been disregarded by a number of nations on a collective basis. This occurred, for example, in 2003, when the USA declared war on Iraq despite the fact that a majority voted against it in the Security Council. This resulted in a large crisis for the UN. Supporters as well as critics of the war considered this to be a failure of the UN. This was due to two central arguments. Firstly the it was criticized that the UN did not want to support an intervention that would free a people from a brutal regime. Support from the UN would mean legitimacy in an international context. Secondly the supporters of the Iraq war were convinced that the UN was not capable of preventing an illegal war. In the USA the UN was even considered irrelevant.

Having discussed the procedures of the international organizations responsible for the establishment of safeguarding guarantees in nations, which are abusing human and minority rights, one may begin to examine the role of government as far as installing federalism, in relation to these aforementioned international organizations such as the United Nations.

4.3.1 Self-Determination Rights in the League of Nations

US President Wilson wanted to separate the self determination right and the right to secession for countries from each other. He did however speak very openly about the need for autonomous development for populations in trouble. Due to the fact that it seemed as if he was taking two different sides on the same issue, the resulting effect was completely different from that originally intended by him. Self determination rights for the state and self determination rights for the people do not run parallel, but rather intersect at various points.

Within the League of Nations, the self determination principle was not explicit enough to effect any drastic change, although outwardly present in Art. 1, paragraph 1 and 2 (naming as central aims of the charter the assurance of peace, cooperation, the assurance of human rights along with self-determination rights) and in Art. 73B, sovereignty and integrity of the state have always remained of high importance.³¹⁹

After the First World War, these principles of self-determination from Wilson were used to repair damages done to large empires (Austrian Empire, Russian Empire, Ottoman Empire) and implemented for minority groups (Kurdistan, 1925), however, in the interest of Great Britain and at the cost of the Kurdish people³²⁰. The principles were also used in the case of states of multiple ethnic groups. Many countries were under colonial occupation, their resources and citizens exploited, and did not achieve self-determination in practice. Still it is a source of great controversy to define and undertake the process of self-determination of states, as the principles of sovereignty and integrity of the state remain central.

However, at the Freedom Conference in Paris, the League of Nations created a Peace Treaty to found the rules for changing existing borders for a country. This can be seen with the establishment of the minority protection treaty and the arrangement of the plebiscite in different territories and regions. Examples of this include the border regions in Germany and

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Colak, Ferdo, *Die Selbstbestimmung der Voelker zwischen Recht und Machtpolitik*, (Zagreb, Selbstverl., 1996) p. 26..

³²⁰

Sluglett, Peter, *Britain in Iraq: 1914-1932*, (London, Ithica Press, 1976). p. 116-125

Austria and also in the southern part of Kurdistan after the fall of the Austro-Hungarian Empire and the Ottoman Empire, respectively.³²¹

League of Nations created a resolution. This was an aspect that President Wilson was not able to successfully finish. One problem that arose within the League of Nations is that the Council could very easily be blocked by a powerful state. This could be seen during this time with the extremely powerful and influential country of Great Britain.

Thus, in order concretely to secure self determination rights for the people, the British exercised their influence in the conflict in Mosul in 1925 in the southern part of Kurdistan. As a response to this conflict with Turkey, (the new republic after the Ottoman Empire) as well as in the case of Aaland³²² and in various other cases, the League of Nations Council ordered a plebiscite with regards to the conflicts arising from territorial disputes. These incidents were not easy to handle on an international scale at that time because delegates from remote countries were not able to attend due to the poor long-distance transportation structure, including non-existent or not easily accessible air travel.

Another huge influence on the failure of the commissions was due to the ignorance of the people at the time. The level of knowledge at that time was simply not anywhere close to the present level around the world. The citizens were not aware of any problems or why the commission was formed, or even that there was such a commission at all. This can be traced back to the lack of media and communications during this period. Radios were not readily available in countries like Iraq. And, in addition, any communications that were being distributed throughout the country were heavily controlled by the government. This of course engendered great difficulties in the uncovering of the truth to the general population, should it be deemed harmful to the regime in power.

³²¹ Partsch, Holb, p. 746. In the additional areas the right to self-determination principle was not able to establish itself. The colonies of the Allies were untouched. Furthermore the Allies were not included in the system of minority protectors. Substantial areas of the Axis were given to other countries without questioning of the specific population. Cf. Partsch, Karl Josef, Selbstbestimmung, in: HdB VN, p. 745-752 (zit HdB VN).

³²² Cf. The Aaland Islands Questions. Report of the Committee of Jurists. League of Nations, Official Journal, Oct. 1920. Spec. Supplements Vol. 3&5.

A second factor was the member influence and pressure within the League of Nations Council for delegation commissions in conflict regions,³²³ specifically in plebiscite and referendum cases. The members of the commission had deep-rooted personal interests in these cases, and they were accordingly more interested in how the cases would play out for their own country and were sometimes indifferent concerning cases with little relevance to their country. An example of this can be seen with Great Britain using their influence to persuade the commission in their direction, as in the aforementioned case of Mosul.

Important to mention is that Wilson did not intend to implement any kind of right to secession. Instead, he constantly discussed a development of autonomy for affected people. As a result, the effect was completely different to that intended, because the right of self determination differed in its meaning with reference to states and with reference to individuals or peoples.

³²³ Cf. Hu, Chou-Young. 1972. Das SBR als eine Vorbedingung des Völligeren. Genusses aller Menschenrechte. Eine Studie zur Art. In der beiden Menschenrechtskonventionen vom 16. Dez. 1966. Dissertation. (Zürich.Schulthess, Polygraphischer Verl.1966)

4.3.2 Self-Determination Rights after World War I

After the First World War, many new small to medium sized countries were founded, especially in the areas of Eastern and Southeastern Europe and in the Middle East. To be able to inspect more closely such endeavors, it is important first to consider the details around the act of nation establishment and the creation of states:

As elaborated in a previous chapter, according to the Montevideo Convention there are four critical aspects in creating a state. The first three are governed people, a claimed region or territory and some kind of governmental structures. The fourth aspect is the capacity to enter relations with other states, which follows from acknowledgment and recognition from different states, especially through countries that are considered great powers with a large influence over others via political, economical and/or military might. Recognition by the UN can also be considered a part of this fourth aspect.

Cases such as the one concerning the Aaland Islands³²⁴ can be seen as predecessors to more successful conclusions regarding the handling of self determination issues. However, the struggle between the legal level of the sovereignty of a state and the self determination or the secession claim remained controversial. In particular, the balance between the wishes of a minority or even larger parts of any population, and the dominating governmental structures which consider their sovereignty to have been placed under doubt, is a thin line to walk and finding the correct balance can prove challenging. Every case is different, depending on the region, the states involved and their agendas, and the different populations, which are also reasons why there was and still is no international, general valid consent regarding the treatment of or conduct in such cases.

³²⁴ The Aaland Islands question concerned the debate about the autonomy and neutrality of the Aaland islands, which was established by a League of Nations decision in 1921.

4.3.3 Self-Determination Rights after World War II

After the rise and fall of the right to self-determination over the course of the inter-war period, the different interpretations of the right to self-determination and the main directions that international law took in those years shared common characteristics and were divergent over time. The starting point of this ascent and decline of right to self-determination was the conception of the term itself. It had different meanings and the more commonly used principle of the national self-determination itself also had varying interpretations from the very start. Therefore, various nations used those terms for their own purposes and goals in order to fulfill their individual agendas. This was possible partly due to the fact that even Woodrow Wilson, who had spent much time in furthering the acknowledgment of the right to self-determination, used it inconsistently.³²⁵

The employment of the right to self-determination began in the aftermath of World War II during the San-Francisco-Conference in 1945 and was pushed, especially on the part of the Soviet Union, into the UN Charter.³²⁶ In Art. 1 and Art. 55 the term receives explicit mention. In addition, its mention in Art. 1 of the Human-Rights-Pact followed, as well as in the Friendly Relations Declaration of 1970. Due to the codification and the improvement in definition that the term gained in the decolonization period worldwide, the right to self-determination is now considered a basic and undisputed core component of international law.³²⁷ The term plays a major role in the interpretation and explanation of valid international law, and acts as a rule and legitimizing foundation for further development.³²⁸

The fate of the right to self-determination in its affirmative interpretation before its appearance on the international stage was not clear, especially because its destructive

³²⁵ Wilson used the term of self-determination rights in four different variations. Cf. Cassese, Self-determination of peoples, p. 20 et seq.

³²⁶ Ibid.

³²⁷ Cf. Dahm, Georg / Delbrück, Jost / Wolfrum, Rüdiger: Völkerrecht, 2. Volume, Berlin, 2002.

³²⁸ Cf. Thürer, Daniel: Das SBR der Völker. Bern, 1976. Cf. Bernhard, Rudolf: Encyclopedia of public international law. Vol. 4, 2000, p. 364-374

elucidation of the thoughts that stood behind it were not visible until World War II. However the integration of the term into positive international law follows the basic definitions to a certain degree, even if it is true that some questions of practicality and some unclear legal classification issues remain unresolved.³²⁹

From another point of view, the possibilities of employing the right to self-determination as a political instrument to prevent conflicts and perpetuate autonomy were accepted. The conflict between the Kurdish people who demanded freedom and independence can be used as an example for this aspect of the concept. They fought in the southern part of Kurdistan with other groups against the Iraqi regime.³³⁰ A thorough investigation of all activities and on the basis of international law is still ongoing.³³¹

All considerations of autonomy that have their starting point in the right to self-determination are always cases in which two sides have their guarantees granted by international law. In most cases, it is a question of which is taken into account with more weight, the sovereignty and territorial integrity of a country or the right of a considerable part of the people to secession.³³² This appears particularly problematic considering the individual character of minority rights and their application in international law.

After the Second World War, with the conference of San Francisco in 1945, the principle of self-determination emerged once again on the stage of international law. Here, after pressure from the UdSSR, this principle was adopted in several paragraphs of the United Nations Charter: article 1, paragraph 2 and article 55 name the principle of self-determination explicitly. At a later stage, this basic principle was also recapitulated in article 1 of the

³²⁹ Cf. Dahm, Georg / Delbrück, Jost / Wolfrum, Rüdiger: *Völkerrecht*, 2. Volume, Berlin, 2002.

³³⁰ After ten years of war between 1960 and 1970 between the Kurdish democratic party (led by Mustafa Barzani) and the Iraqi regime, the Iraq granted the Kurdish people autonomy in March 1970. The gathering of autonomy was set up in a process of four years (1970-1974). However in the last year of the process the Iraqi government refused to grant all rights and reversed the process to keep the hold on the Kurkuk region which was a vital and crucial area for the oil industry. Therefore the war started all over again from March 1974 till March 1975. Officially the Iraqi government won that internal conflict but the Kurdish people started a Guerilla war that lasted till the end of the first US engagement in the region.

³³¹ Cf. Hannum, Hurst: *The concept of Autonomy in international Law*. Lillich, Richard: 74 AJIL 858, 1980.

³³² Blumenwitz, Dieter: *Minderheiten- und Volksgruppenrecht*. (Bonn, Kulturstiftung d. Dt. Vertiebenen 1992), p. 72 et seq.

human rights packages from 1966, as well as in the “Friendly Relations Declaration“ from 1970.³³³

Self-determination has reached a much higher qualitative value than in the inter-war period, especially concerning aspects of international law. Nevertheless, some elements and facets of self-determination which had been typical before the war emerged once again after the war: the affirmative method of interpreting the right to self-determination after the collapse of the minorities protection system experienced a kind of Renaissance.

Although leading to an almost complete avoidance of any thoughts of specific minorities protection, the failure of a minorities-regulation by the Paris Peace Treaty lead eventually to an internationally established individual human-rights protection.³³⁴ In the course of time, however, particularly in the context of decolonisation, it came to be accepted as truth that safeguarding individual rights does not do justice to interests of any associations, specifically not to those groups of non-organised peoples or nations, and ethnic, religious or cultural minorities, so one has started to search for solutions within the frame of self-determination principles. Thereby, in a very ironic way, self-determination rights became the successors of minorities' rights.

In the post-war period, the prevailing view was that peoples under colonial sovereignty, understood as an organization and with no regard to their ethnic or other homogeneity, have the right to self-determination, the implementation of which would entail independent statehood. For this reason, the exertion of self-determination would be synonymous with the exertion of secession. In this way, a moment of conceptually intrinsic tenseness was created due to a destructive interpretation of self-determination: how could international law acknowledge a right to self-determination connected to secession and guarantee territorial

³³³ Thürer, Self-determination, in EPIL IV, S. 365 f.

³³⁴ Thürer, Self-determination, in EPIL IV, S. 368 f.

integrity at the same time?³³⁵ Ultimately state-sovereignty gained the upper hand: in the state code of practice there is no actual acceptance of secession-right outside decolonization.³³⁶

In this regard, in all cases in which peoples appealed to their right to self-determination after the end of colonial sovereignty for separating from their recently originated states in order to establish a distinct state, the U.N. refused to support this sort of self-determination because of the controversy with the principles of integrity and sovereignty of the state.³³⁷ Therefore, self-determination is seen as a part of prevailing international law, but is limited in its extent and forms of implementation to a lower level than the right to secession.³³⁸ Therefore, the right of self-determination remained, both in the pre-war era, as well as in the post-war period in the same position, outside international law, both in matters of its subject, its content as well as the circumstances of practice.³³⁹

Regarding the definition of potential legal entities, the discussion during the inter-war period has yielded some important results which are still relevant today; nevertheless the questions left unsettled at that time still remain open today.³⁴⁰ Even though norms of international law, according to their wording, contain an explicit and emphatic acknowledgement of this right, these norms are, due to political-law, as well as dogmatic and political reasons, highly controversial in both their material and procedural content.³⁴¹

The practical questions and juridical problems of delineation, which inter-war period authors were unable to solve, have still not disappeared, even though self-determination was accommodated into positive international law after the Second World War. As recent crises in the area of former Yugoslavia have shown, these issues have returned yet again in a new guise. The current cases of Kosovo and South Sudan have thrown a whole new perspective on the matter and have revealed a new dimension of self-determination within international law.

³³⁵ Dahm/Delbrück/Wolfrum, *Völkerrecht*, S. 273 ff, S. 286.

³³⁶ Thürer, *Self-determination*, in *EPIL IV*, S. 367.

³³⁷ Dahm/Delbrück/Wolfrum, *Völkerrecht*, S. 287.

³³⁸ Thürer, *Self-determination*, in *EPIL IV*, S. 367; Dahm/Delbrück/Wolfrum, *Völkerrecht*, S. 287

³³⁹ Thürer, *Self-determination*, in *EPIL IV*, S. 368.

³⁴⁰ Dahm/Delbrück/Wolfrum, *Völkerrecht*, S. 273 f.

³⁴¹ Dahm/Delbrück/Wolfrum, *Völkerrecht*, S. 273 f.

In the case of South Sudan, according to the Comprehensive Peace Agreement of January 2005, a referendum was held from January 9-15, 2011, to decide the question of South Sudan's independence. The population voted with an overwhelming majority of over 98% in favor of independence, and in July 2011, South Sudan was established as an independent state. This referendum marked a turning point in the understanding of the right to self-determination in the international community, as its acceptance by the ruling parties in the former Sudan was a step forward in the permitting of an ethnic group to decide on its own fate.

Kosovo represents a different form of the right to self-determination. In this case, Kosovo firstly declared independence from the Republic of Serbia on February 17, 2008. The former Finnish president Martti Ahtisaari, after his visit to Kosovo, proposed a settlement plan for Kosovo involving future plans and proposed method of government, that was submitted to Secretary-General of the UN Ban Ki-moon in February 2007³⁴². At the time of declaring independence, it was disputed as to whether the declaration of independence was in accordance with international law, and as such an advisory opinion was requested from the International Court of Justice (ICJ). On July 22, 2010, the ICJ gave the opinion³⁴³ that the declaration of independence was not a violation of international law, as it did not contravene previous UN Security Council resolutions on the issue, specifically UN Security Council Resolution 1244. However, it should be noted that Judge Yusuf raised the reservation that the Court did not sufficiently deal with the question of the right to self-determination in detail, and rather restricted the scope of the question of whether the declaration of independence itself was a violation of international law. Krueger argues that the case has not set a precedent and does not constitute a change to customary international law such that

³⁴² Geldenhuys, Deon, *Contested States in World Politics*, (New York, Palgrave Macmillan, 2009), p. 115-118.

³⁴³ <http://www.icj-cij.org/docket/files/141/16010.pdf>

ethnic groups have the right to secession, due to both a lack of state practice as well as a legal opinion (*opinio juris*).³⁴⁴

³⁴⁴ Krueger, Heiko (2009), "Implications of Kosovo, Abkhazia and South Ossetia for International Law – The Conduct of the Community of States in Current Secession Conflicts", *CRIA* 3 (2): 121–142

4.3.4 Self Determination Rights in the United Nations Organization

Before the foundation of the UN, many conferences involved the discussion of topics relating to right to self-determination, from Malta, Moscow, Yalta, Potsdam, Cairo, etc and in particular the Atlantic conferences as well as most pertinently the San-Francisco-Conference. The power of the allied countries was a dominant aspect of this latter conference and of course of the founding of the UN but also the principle of the right to self-determination in policy practice were gained from that moment in history.³⁴⁵

The Atlantic conference at the time at which the Charter (Atlantic Charter) was established had three fixed articles containing the principle of right to self-determination.³⁴⁶ Fifty states accepted this specific charter as well as multiple different international agreements. Especially in articles 1, 2 and 3 of the Atlantic Charter, the right to self-determination was implicitly recognized and the connection between the right to self-determination, peoples and democracy, gave the term a deeper meaning than ever before.³⁴⁷

However after World War II this charter lost its significance because the right to self-determination was neither able to provide solutions for non-territorial and national conflicts nor was it a practical tool for the implementation of democratic processes and similar governmental forms in general. However the victorious allies emerged from the chaotic times of war and attempted to implement similar principles regarding determination during the Yalta conference in February 1945. However, the principle of the right to self-determination lost its equality to the countries; real ambitions due to the power play in strategies of politics and military might between the divided Allies.

³⁴⁵ Cf. Thürrer, Diss. P. 35 et seq.; Cf. Heidemeyer, p. 121 et seq.; Cf. Hu Chou-Young, p. 52 et seq.; Epil, p. 10 et seq.

³⁴⁶ Cf. Hu Chou-Young, 1972. P. 52 et seq.

³⁴⁷ „Third they respect the right of all people to chose the form of government under which they will live; they are only concerned to defend the rights of freedom of speech and thought, without which such choice must be illusory“ cit. from Pomerance, p. 75

The political and military division of Europe between the Soviet Union and the western Allies under the leadership of the USA created this tension. The beginning of the Cold War and the creation of international blocs due to ideological differences of Eastern Communist doctrines versus the Western liberal democracies in particular allowed the right to self-determination and its further development to slip on the agenda of international priorities. With the founding of the UN on 26th of June 1945, countries decided that a new supranational organization should have a chance for the sake of peace and bigger interchanges between the countries of the world.³⁴⁸ The founding states of the UN stated in Art. 1 para. 2 of the UN Charter:

“To develop friendly solutions among nations based on respect for the principle of equal rights and self determination of peoples, and to take appropriate measures to strengthen universal peace.”

Chapter IX of the UN Charter, which concerns the international cooperation of economy and social development, includes Art. 55, which repeats this self-determination clause, by determining specifically:

“[...] with a view to the creation of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote [...]”³⁴⁹

From the substantial content of both articles, it also becomes apparent that, for the right to self-determination to be implemented, suitable measures for the constitution and consolidation of peace on an international scale must be found. These intentions are also

³⁴⁸ Fenske, Hans: Politisches Denken im 20. Jahrhundert. In: Politische Theorien von der Antike bis zur Gegenwart. München, 1991. P. 657-880

³⁴⁹ There is no major difference between the terms of the right to self-determination in Art. 1 para. 2 and Art. 55 despite of the additional mentioning of “friendly relations” that also have to be “peaceful” in Art. 55, because friendly relations are logically peaceful. Cf. Thürer: Diss. p. 73

clearly represented in other parts of Art. 1, 55, 73b and 76b in which the topic of the right to self-determination were addressed: Art. 1 provides the mentioning of peacekeeping, cooperation between the states, the respect for human rights as well as the above cited right to self-determination as an aim of the UN Charter. The appeal to the respect of the principle of equality of man and the self-determination of the people is also mentioned in Art. 55. According to Art. 73b the self-government of peoples has to be allowed. The will to develop areas of trust in political, social, economical and educational fields ought to be in harmony with the particular conditions and requirements of the supporting populations, as stated in Art. 76b.³⁵⁰

The spirit and practical issues of these terms was tested in the immediate aftermath of World War II and the founding of the UNO due to the rising tensions between the East and West Blocs, the constant global build-up of arms, and the decolonization processes in Africa and Asia. The formation of the so-called “Third Bloc” (neutral bloc) in Indonesia in the 1950s, in which many developing countries participated, was also important regarding this issue. Crises such as the Korean War from 1950 to 1953, the erection of the Berlin Wall in 1961 and the Cuba Missile Crisis of 1962 were constant challenges for international relations and policies.

The principle of the right to self-determination in this era was therefore better positioned via the UN Charter. However, the practical issues concerning the fulfillment of its goals remained more or less as difficult as before. Nonetheless, the convention of economic and cultural rights of man and civil rights on December 16, 1966, provided the right to self-determination with a nominal status of a basic human right.³⁵¹ This was a controversial yet successful empowerment of the term.³⁵² The ban of colonial domination and exploitation,

³⁵⁰ Cf. Klein, Friedrich: Zur Rechtenatur des right to self-determination. In: Klein, F. / Kloss, H. et al.: Beiträge zu einem System des right to self-determination. Völkerrechtliche Abhandlungen, Vol. 2. Wien - Stuttgart, 1970, p. 6-28

³⁵¹ Cf. Hu Chou-Young: Das SBR als eine Vorbedingung des völligen Genusses aller Menschenrechte. Eine Studie zu Art. 1 der beiden Menschenrechtskonventionen vom 16. Dez. 1966. Diss. Zürich, 1972.

³⁵² Supporters emphasized the connection between humans and society: “The right to right to self-determination is the right of individuals in society”. The enemies of the addition of the right to self-determination to the human rights conventions questioned the jurisdiction of the commission in this issue because the right to self-determination is a “political collective law”. Cf. Klein, Friedrich, 1970, p. 11 et seq.

signed on October 24, 1970, can be considered as an additional trend-indicator regarding the international assessment of predominant relationships in the framework of the UN.³⁵³

³⁵³

Hu Chou-Young, 1972, p. 94 et seqq.

4.4 Legal Contents and Legitimacy of Self-Determination Rights

The legal concepts of the right to self-determination, the people and the council for protection of minorities overlap. This becomes quite clear in the practice of states as well as in the common literature³⁵⁴. In principle, there is no consensus regarding the question of whether the right to self-determination can be considered valid in minority cases. The unclear definition of the terms also arises from the problem of whether it is possible to give various minorities the right to self-determination which targets inner state issues.³⁵⁵

The dogma and principle of the absolute sovereignty of the state does not allow any right of secession; therefore the right to self-determination includes merely the self-determination and not any kind of right to obtain it.³⁵⁶ However this is not a new issue. The right to self-determination of the 1930s was also not clearly delineated and remained quite open for interpretation. There was also a juristic debate about the lack of exact parameters which would have been necessary in order to create legally distinguishable criteria with the result that one single right to self-determination could have served its purpose. After all, the main purpose of the right to self-determination of that time was targeted at the ethnic determination of nations and their right of secession.

³⁵⁴ Cf. A. Cassese. *Self-Determination of peoples. A legal reappraisal*. Cambridge, 1995, p. 348 et seqq.

³⁵⁵ Blumenwizz/Goring: *Minderheiten und Völkergruppenrecht in Theorie und Praxis*. Köln, 1933, p. 75 et seqq.

³⁵⁶ "The principle of sovereignty excludes the right to self-determination logically" Cf. Armbruster, Hubert, 1962, p. 243. Cf. Armbruster, Hubert, 1962, Article in: *Strupp-Schlochauer III*, p. 250-255

4.5 The Role of Referendums in the Right to Self-determination

In the context of the international system, referendums represent an important principle, or reason for the independence of peoples, in particularly oppressed minorities, for example, Kurds, as well as the people in South-Sudan and Kosovo. This principle is also important for democratic countries with regard to the right of secession, as various regions in Europe, such as Scotland, Catalonia, and the Basque region demonstrate. These latter examples are dealt with further in a later section. The main focus of this section is the Kurdish referendum, which took place in January 2005 in South Kurdistan and, despite the fact that over 98.8% of the voters voted in favor of independence from Iraq, has not received very much interest, nor is it perceived as being particularly important. This lack of interest can be noted both on the domestic level, as well as within international media and international organizations such as the UN.

The local Kurdish government did not have enough support to execute the referendum, neither politically, nor through the media, nor financially. In addition, the central government in Baghdad had no interest in instituting the referendum. As a result, the suggestion was not taken up by either local party (KDP and PUK), but instead was carried out by private individuals, who were not related to any political party. Neighboring countries also demonstrated very little interest in the initiative, and Turkey and Iran opposed the referendum outright. The great powers made no comment on the referendum, and no support for the referendum was offered; as such, the referendum was not recognized internationally at all.

As of early July 2014, Masud Barzani, the president of the Kurdish region of Iraq called for his parliament to prepare a referendum on independence.



The Federal Region of Kurdistan

As a point of criticism, one could argue that there had earlier been a missed opportunity for a more timely referendum. In spring 1991, after the mass fleeing of Kurds to the Turkish and Iranian borders after the Second Gulf War, the leaders of the two biggest regional parties, Barzanie of the KDP and Talabanie of the PUK, enjoyed good relations with the great powers, who were willing to help the Kurds against the oppression by Saddam Hussein. The Kurds received financial and political support from the USA, the UK, and France, as well as from the UN. As such, they could have enjoyed an opportunity, while receiving international media attention and support, to demand an independence referendum. However, this point was never considered by these two political leaders, who at the time were relatively inexperienced in international politics, and accordingly no such demands were made.³⁵⁷

Although it is not possible to judge whether an independence referendum would have been recognized internationally at that time, it seems reasonable to assume that the probability of a referendum having some sort of impact would have been higher at a time when the Kurds were receiving international political support, than in 2005 by which time the international

community had lost interest in their cause. This is one example which demonstrates the political nature of the right to self-determination, or specifically the right to secession, and the role of referendums therein. Referendums are not an automatic guarantee of international support for secession, and only in specific contexts will their legitimacy be recognized. This is much more likely when the minority in question is receiving support from the international community, or when the referendum is undertaken with the consent of the central government. This is shown by the cases of South Sudan, and the future referendum in Scotland, the latter of which is discussed later.

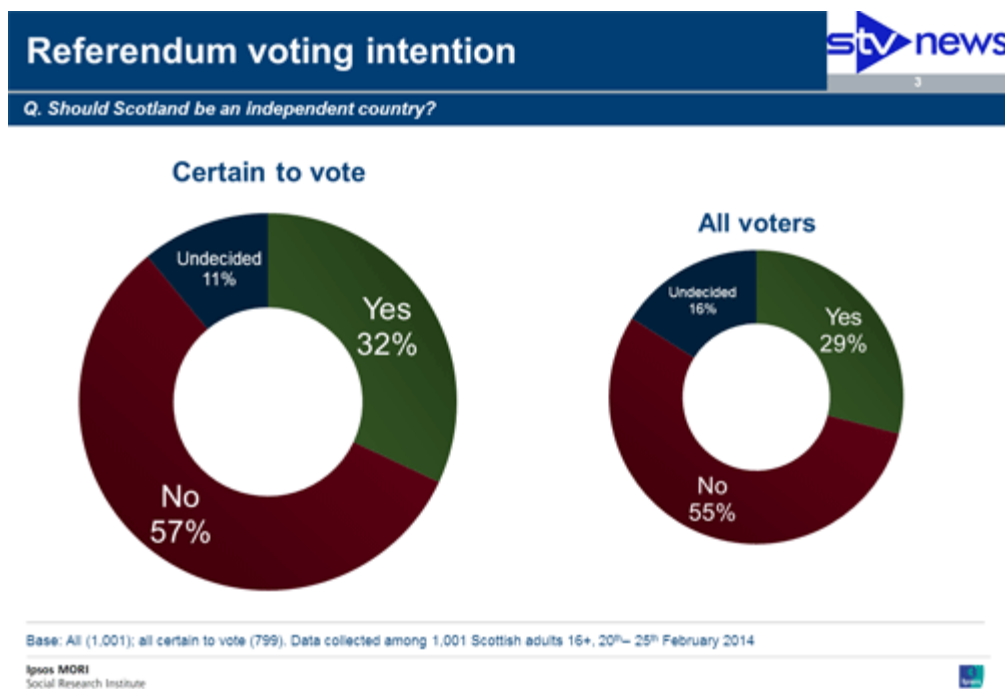
Quebec has also twice experienced a referendum; in 1980 and 1995. The goal was to negotiate a sovereign association with Canada by becoming an independent state, establishing a new economic and political partnership with Canada. The most recent referendum failed to pass by only a marginal amount of votes. French-speaking majorities in Quebec felt threatened by assimilation into Anglophone culture of Canada, and were partly seeking a way of justifying ethno-nationalist policies in Quebec, as well as simply retaining language, identity and culture. However, the language differences between Quebec and other areas in Canada is only a sign of larger cultural, social and political differences.

The independence referendum in Scotland is set to take place on September 18, 2014. Currently, the polls, which are analyzed below, put the 'No' campaign in the lead. However, should the voters decide to vote for independence, then this would represent a momentous occasion for the importance and recognition of referendums on secession in the wider international community. It could, for example, be used as a precedent by other regions in Europe which are currently trying to gain independence; in particular, the region of Catalonia will also have a referendum on self-determination in November 2014. However, this referendum has been declared illegal by the central Spanish government. In contrast, the Scottish referendum has been introduced in co-operation with the central British government. Artur Mas argued in an interview with the BBC³⁵⁸ that it is precisely because of the co-operation of the British government that the Scottish people are against independence,

³⁵⁸ <http://www.bbc.com/news/world-europe-25777467>, accessed 03/28/2014

and that the lack of co-operation by the Spanish government is part of the reason for the greater support for self-determination seen in Catalonia than in Scotland.

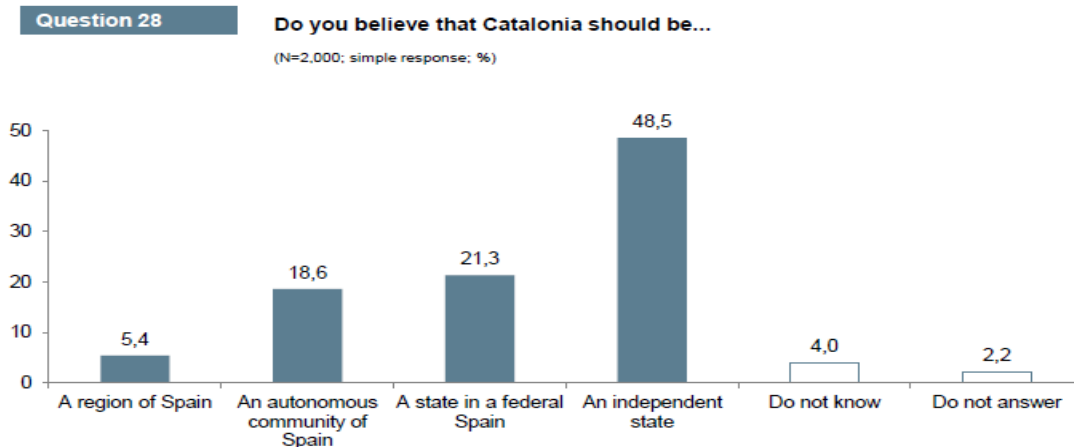
A comparison of recent polls in both regions lends credence to this opinion, at least insofar as it demonstrates a greater level of support for self-determination in Catalonia than in Scotland. The most recent IPSOS/MORI poll in Scotland³⁵⁹ shows that, of those certain to vote, 57% would vote 'No', while only 32% would vote 'Yes'. In total, the 'No' voters represent 55% of the whole, while the 'Yes' campaigners only represent 29%, as can be seen in the chart below. Although this poll was conducted 200 days in advance of the referendum and many things can change, the prospects for Scottish independence seem limited.



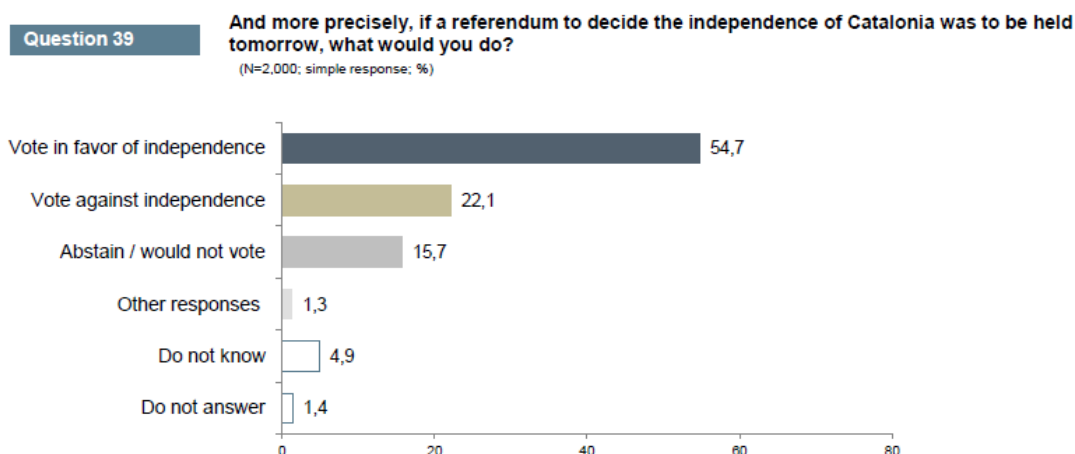
In contrast, the referendum in Catalonia seems to have a more positive outlook for those in favor of self-determination. A poll conducted at the end of 2013 showed 48.5% of Catalan

³⁵⁹ <http://www.ipsos-mori.com/researchpublications/researcharchive/3349/No-retains-lead-as-referendum-campaigns-enter-final-200-days.aspx>, Accessed 03/28/2014

citizens hoping for Catalonia to be an independent state, compared to just 5.4% hoping to see Catalonia remain simply a region of Spain.³⁶⁰ :



More strongly, the same poll questioned voting intentions, should there be an election tomorrow, which demonstrate a majority of support, with 54.7%, for independence³⁶¹:



These results could be taken as precedents for various minority groups striving for independence, both in Europe and in other, perhaps less democratic regions of the world, ranging from the Basque region or Corsica to Kurdistan, Tibet or Kashmir.

³⁶⁰ Baròmetre d'Opinió Política (BOP). 3a onada 2013 - REO 733, Abstract in English, p. 7. Retrieved 2014-03-28

³⁶¹ Ibid, p. 8.

By contrast, the most current issue concerning a referendum on secession concerns the region of Crimea. After the abdication of the Yanukovych in February 2014, the new government has attempted to ensure the unity of the territory of Ukraine. However, the autonomous government of Crimea considered the ousting of Yanukovych as an illegal coup, and argued that the new revolutionary government was illegitimate. It then carried out a referendum on March 16, 2014, asking the population to choose between a return to the 1992 Constitution, which would have granted the region greater autonomy, or becoming a federal subject of the Russian Federation. The result of the referendum showed overwhelming support for joining Russia, with 96.77% in favor.³⁶² Accordingly, Vladimir Putin proceeded to annex the region of Crimea.

However, disputes about the legitimacy of the referendum have been dominant in the international community. The European Union and the United States both claim that Russia's claim to Crimea is illegitimate, as the referendum itself was not legal due to the lack of consent from the Ukrainian central government. There were reports of Russian military presence on the day of the polls; however, it ought to be noted that election observers found no violations and confirmed that the referendum was conducted in line with European standards.³⁶³ The UN General Assembly passed a non-binding resolution calling upon states not to recognize the change in the status of the region of Crimea, with 100 votes in favor, 11 against, and 58 abstentions.³⁶⁴

The discussion about the legitimacy of the referendum reveals much about the role referendums can play in questions of self-determination or secession. Due to the manner in which the referendum was carried out, with great hurry and without the consent of the central Ukrainian government, the international community widely rejected the right to secession in favor of the importance of territorial integrity of a sovereign nation. In comparison with the referendum in Scotland, for example, the right of the people to secession has not been accepted. Instead, the international community is focusing upon the

³⁶² <http://rt.com/news/crimea-referendum-results-official-250/> Accessed 2014-03-28

³⁶³ <http://rt.com/news/international-observers-crimea-referendum-190/> Accessed 2014-03-28

³⁶⁴ <http://www.un.org/News/Press/docs//2014/ga11493.doc.htm> Accessed 2014-03-28

need for peace and stability in the region, and rejects the separation of a sovereign nation as a solution at a time of revolution and political instability. This shows that referendums can only be used as a means to self-determination or secession under certain circumstances, the most important of which being the recognition as legitimate of the referendum and the claim in general by both the international community and the central government, such as in South Sudan.

In the case of the situation in Kurdistan and other development regions, including South Sudan and Kosovo, the main political issues are considered to have greater significance compared to instances in other parts of Europe such as those in Scotland, Catalonia, and so on, since the issues in Kurdistan span from freedom (the end of suppression of the local peoples) and highly critical local financing of economic projects to other major issues, including the regions having multiple cultures, whereas the issues of self-determination (independence), pride and identity (nationality) of these peoples remains constant. On the contrary, the European referendums involve those situations in Scotland and Catalonia, to name but a couple, that involve prosperity as well as improving the economic situations of the local population. What these array of referendums have in common is their legitimacy and that they are recognized internationally. Exceptions would be those criminal referendums, like for example, that which Russia has attempted to execute with military troops, rendering such referendum illegitimate, which resulted in international embargos (USA with the EU) on Russia.

5. Perspectives on possible changes inside neo-patrimonial Regimes

5.1 Democracy as a global model?

Democracy is a form of legal governance which provides self-determination for all citizens in the sense of sovereignty, through free (and therefore competitive) and fair procedures (for example elections) and the chance of continuous influence over political decision-making. In general, control over political rule is thus guaranteed. Democracy is developed in three dimensions: political freedom, political equality and control.

As we are all aware, there were particularly over the course of the 20th century many examples of dictatorships, both left and right wing, from communism to fascism. The spectrum ranges from Stalin, Mussolini, Hitler, Franco in Spain, Salazar in Portugal, Tito in Yugoslavia, Ataturk in Turkey, Peron in Argentina, Park in South Korea, Mao in China to Castro in Cuba. These were all purely dictatorial regimes, including of course communist regimes on the left, systems supposedly for the proletariat and workers promoting revolution and socialist ideas, which in reality were a catastrophe for their people and particularly their minorities. On which socio-economic institutions were the new republics based? Which traditions of democratic enlightenment were they obligated to? For which criteria did they opt when they decided upon certain norms and discarded others? Which UN criteria and conditions did they fulfill on a political level with regard to human rights and the rights of minorities?

Hans-Jürgen Puhle concentrated on two questions in his work focusing on the authoritative regimes in Spain and Portugal.³⁶⁵ Firstly, with how little legitimation can such an authoritarian regime survive and how long can it last? Secondly, when and where does such an increase in legitimization, meaning more than diffuse support or contingent consent, change an existing regime or lead it to destruction? We should therefore ask the following question: Given massive tendencies towards individualization and ethno-cultural fragmentation, how can a relationship be created which guarantees the future of Western-style democratic constitutions?

After the Yugoslavian self-ruling socialism broke down and socialism collapsed,³⁶⁶ the conflict between East and West turned into a clash of civilizations, as described by Samuel Huntington. Meanwhile, Bassam Tibi raises the following question: how can the challenges of fundamentalist Islam be overcome with regard to ethical concepts such as the “multicultural society” or post-modern cultural relativism? Tibi shows not only how a conflict emerged between Islamic liberalism and Western democracy in an historical context, but he also analyzes the problem as to how far the fundamentalist doctrine of theocratic states is valid as a form of secularized totalitarianism.³⁶⁷

There is little difference between Marxism and its theories of class warfare and those of racial warfare which seemingly has replaced it. The Nazis reclaimed the racial paradigm for themselves by attempting to create a Germanic master race. Italian fascism justified its ideological program by harking back to the myth of the glory of Ancient Rome. It managed to gain great significance for its dictator, leading Mussolini to eventually claim in his racial propaganda from 1938 that the Ancient Romans were racist in the extreme.³⁶⁸

³⁶⁵ Puhle, Hans-Jürgen, *Autoritäre Regime in Spanien und Portugal. Zum Legitimationsbedarf der Herrschaft Francos und Salazars*, in: Richard Saage (Hrsg.): *Das Scheitern diktatorischer Legitimationsmuster und die Zukunftsfähigkeit der Demokratie*, Berlin, 1995, p. 191-205

³⁶⁶ Bermbach Udo, *Ambivalenzen liberaler Demokratien*, in: Saage (Hg.) 1995, p. 289-304

³⁶⁷ Bassam Tibi, *Fundamentalismus und Totalitarismus in der Welt des Islam. Legitimationsideologien im Zivilisationskonflikt. Die Hakimiy-yat Allah/Gottesherrschaft*, in: Richard Saage (Hrsg.): *Das Scheitern diktatorischer Legitimationsmuster und die Zukunftsfähigkeit der Demokratie*, Berlin, p. 305-318

³⁶⁸ Rigotti Francesa, Ornaghi Lorenzo, *die Rechtfertigung der faschistischen Diktatoren durch die Romanität*, in: Richard Saage (Hrsg.): *Das Scheitern diktatorischer Legitimationsmuster und die Zukunftsfähigkeit der Demokratie*, Berlin, p. 141-157

The principal difference between these dictatorships (left and right wing) with regard to their claims of legitimacy is described hypothetically in the following passage:

“Those at the right of the spectrum are more intense in enforcing their reasoning; nevertheless both methods of rule, especially in their totalitarianism, are interchangeable for the most part. Left-wing dictatorships, including Stalinism, claim to be acting for the disenfranchised and exploited of the world in order to collectively liberate them.”

In contrast, right-wing dictatorships justify their actions by claiming to stop emancipation in society or to revoke it.³⁶⁹

Considered from the point of view of legitimacy, this difference has far-reaching consequences. It means that in the first scenario, not only a new political system, but the whole of society, including property laws, economic order and human coexistence is at the center of the legitimacy context.³⁷⁰ In the second case, legitimacy is enforced through repressive measures in the political system.

The question should be raised as to how any dictatorial regime, whether on the left or right, could stabilize its power for the long term. The reasons could be defined as:

- a) Ideology - justifying itself through anti-individualism, anti-liberalism, anti-socialism, racism or the evocation of old orders.

³⁶⁹ Grebing Helga, Warum so viel "freiwillige Blindheit"? Betrachtungen zur Legitimation von kommunistischer terroristischer Herrschaft durch Intellektuelle, in: Richard Saage (Hrsg.): Das Scheitern diktatorischer Legitimationsmuster und die Zukunftsfähigkeit der Demokratie, Festschrift für Walter Euchner, Berlin 1995, p. 35-46.

³⁷⁰ Prpic Ivan, Die Herrschaft Titos und die Diktatur des Proletariats in Jugoslawien, in: Saage (Hg.), Das Scheitern diktatorischer Legitimationsmuster und die Zukunftsfähigkeit der Demokratie, Berlin, 1995, p.79-94

- b) Structure – social movements supporting dictatorships and parties, density of organization, capacity to mobilize etc.

- c) Acceptance – the population accepts dictatorial regimes in order to obtain peace and order.

When dictators abolish individual basic and human rights as a condition of their ruling systems, they remove one of the most important sources of social, cultural, scientific and economic innovation. During the 20th century, dictators were challenged by liberal democracy. The future will decide whether they are capable of solving these problems, which they have created themselves. Analyses by parties and associations will form an important focus in future. Despite differences in approaches to research they share an understanding for political participation. In this context Max Kasse³⁷¹ formulates a political type of participation in which citizens voluntarily work with the aim of influencing decisions on different levels of the political system.

The criterion of voluntariness aims at limiting political mobilization with which authoritarian regimes try to simulate mass support. However, these two phenomena cannot be entirely separated since there are pressure mechanisms in some democracies too (for example compulsory military service) whose importance must not be overrated. An important feature of this definition of political participation is its effectiveness.

Impulses are derived from society (private citizens) and try to influence political decision-making, either on the level of decision-making procedures involving certain issues or choosing people for jobs who are open to democracy. Political participation connects the societal with the political sphere and has an integrating effect. Its supposed input character remains central and constitutive for the act of participation. Impulses taking place within

³⁷¹ Kasse, Max, *Vergleichende politische Partizipationsforschung*. In(Berg-Schlosser, Dirk/Müller Rommel, Ferdinand 1997), p. 159-174

political institutions or by holders of political office are, therefore, not be taken into account in this framework.

5.1.1 The Burden of Democracy

The existence of powerful and influential groups beyond the political stage has great influence on the democratic process and is also a burden upon it. This does not automatically mean that electoral procedures will be manipulated, but it is simply grounded in partial or direct undermining of state jurisdiction. Decision makers are affected, as are those involved in administration. The process of formal decision making is thus disturbed, as well as the implementation of codes of practice and rules of procedure for the legislative and executive organs; the latter are thus hindered by an illegal election result and efforts towards equality and freedom and an effective self-determination are thwarted.

Criminal tendencies can be perpetuated through the use of corruption and violence (for example a threatened putsch). Formal decision-making is eroded in this way since the decision is aligned to informally infiltrating interests. Even when only a few policy areas are affected by this, democracy is very strongly damaged. In extreme cases democratic legitimacy is lost when central state organs are taken over for the benefit of particular interests and formal institutions exist only as a facade.

The effect of autocratic cliques is similar. Here also the logic of democratic decision making is markedly damaged. However, the undermining is carried out by the state itself and state institutions are occupied from within. The clique is able to manipulate events by using their control of public offices.

5.1.2 Civil Society

The concept of civil society has become incredibly popular during the past few years. Despite gray areas in its definition, the concept can be defined as the following:

Civil society describes that part of society which exists on a level between the private sphere and the state using voluntary associations and which articulates its interests using public means in order to control state power. At the same time, any civil society is coupled to citizens' attitudes, which are described as "citizenship".

Voluntary associations within a civil society occupy two important functions. Firstly, they act as an instrument of representation of interests and political control. Secondly, voluntary associations are an expression of the readiness of the population to manage their own affairs autonomously and independently.

According to Alfred Stepan,³⁷² the relationship between society and politics can be analyzed in three parts:

1. In the area of the state, with government, the legal and administrative system
2. In the area of politics whose aim is to govern. Political society is determined by elections in democratic nations. It expresses itself through the party system for the most part.
3. In the area of civil society and its voluntary associations, who aim to further their interests, but are not interested in governing.

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Stepan Alfred, *Rethinking Military Politics: Brazil and the Southern Cone*, Princeton, Princeton University Press, 1988

The concept of civil society is linked to the theoretical-analytical frame of reference with a normative orientation toward Western societies, designated by market economies and liberal democracy. This coupling of norms and analytical categories are what make Western political practices attractive. It makes sense because it contains a central element of democracy: democracy needs democrats. The general meaning of political participation and effect of political culture for the stabilization of political systems and the establishment of a civil society are not contested by researchers.

5.1.3 The Constitution and Democracy

Without a doubt, the ideas and principles of constitutional democracy are in favor of state and civil rights. Any constitution could be worth a great deal and could emphasize democracy.

As the German Weimar Constitution declared, the people must have the opportunity at all times to find their political conception of a constitutional state despite any restraints or hindrances which may have been built up. Democracy has to be saved by liberal thinking and actions in order to develop the constitution. Only in this way could the proletariat master the new political situation and political unity (of the German people) be realized.

Each democracy presupposes the homogeneity of the people. Only this type of unity can ensure political responsibility. In a situation such as today, where we have a heterogeneous mix of people, integration of these masses into a unified people must be our goal. A really democratic method is not one which integrates heterogeneous masses. Today's population is in many ways divided culturally, by class, socially, racially, and religiously. A solution must therefore be found outside of democratic-political methods.

The basic problem of Western legitimation problems is the problem of discontinuity. Either positivity or the legitimacy of law diverge (Rousseau, Kant, Fichte, Strauss) or legitimization is incompatible with the pluralism of legitimization, as in the theory of ultimate justification (Max Weber); or they are constitutively crisis-laden, because legitimization order and the legitimation of action are not consistent (Habermas)³⁷³. How can such a problem of discontinuity take on positive aspects in societies in which positivity of the law does not exist –and in which the difference between the concept of order and action is problematic,

³⁷³ p. Thesen, Alber, Die Grundidee von Habermas' Diskurstheorie des Rechts und des demokratischen Rechtsstaates, in: *Moral und Recht*, Brune, Jens Peter, Hg., (Freiburg im Breisgau, Verlag Karl Alber, 2010) p. 36-43.

consistency between legitimization and order being questionable? Examples for the latter come from different concepts from Weber and Levi Strauss concerning conventions. For Weber, convention means repetition, religion and established order. For Levi Strauss, it is in how protagonists act related to their will and determination, as well as in rituals.

An example for anthropological explanations in this context is the sacral monarchy whose legitimacy, as pointed out by Courtois, contains a notion of effectiveness, which does not however begin with the person of the king, but must be formulated in categories of objectively thought out processes. The basis for legitimization for a sacral monarchy is the power driving the king; it is the king's duty to remain on a supernatural plane.

Legitimization of power and law differ according to the type of society. The key for the character of a society and its forms of legitimization in particular lies in the relationship between two opposing concepts: order versus power and rights on the basis of collectivization versus rights as an external constraint. In a state monopoly of power, an extreme political-social gain in power meets a hugely increased responsibility on the part of the state for the protection of its citizens. It must be made clear here that even according to Hobbes, (the perceptive apologist of unlimited sovereign power), under conditions in which the state no longer exercises these protective measures, subjugation by state monopoly or by any agreement on subjugation between members of society and the ruler becomes invalid.

Max Weber places the legitimacy of rule as a central theme in his theory of the sociology of governance.³⁷⁴ This theory is famous for constructing a principle of the existence of a legitimate order in order to differentiate between types of rule. Weber's theory gives expression to a typical claim to legitimacy which is particular to different types and durations of rule.³⁷⁵ At the outset, Weber differentiates between two levels of the belief in

³⁷⁴ Trotha, Trutz von, "Streng, aber gerecht" - "hart, aber tüchtig". Über Formen von Basislegitimität und ihre Ausprägungen am Beginn staatlicher Herrschaft, in: *Wilhelm Möhlig und Trutz von Trotha* (Hg.): *Die Legitimation von Herrschaft und Recht*. Köln: Rüdiger Köppe, 1994c., p. 69-90

³⁷⁵ Cf. Stefan Breuer. *Max Weber Herrschaftssoziologie*, Frankfurt am Main, New York Campus, 1991, p. 19

legitimacy: between the belief in legitimacy on the part of rulers and their administration on one side and the belief in legitimacy of those ruled on the other.

Weber recognizes that the belief in legitimacy of the rulers and especially that of administrative staff is the key for the character and retention of power. Nevertheless he is of the widespread opinion that power is only sustainable when those ruled can be made to believe that the existing order is not only obligatory, but also exemplary. The stability of rule is therefore dependent upon both belief systems not diverging too much.

As is generally known, Weber notes that there are only three grounds for legitimacy: tradition, legality and charisma. Except for Weber's special theoretical interests, these three types can be seen as comprehensive structural principles. Violence can be used against legitimization which would undoubtedly be seen as illegitimate and unwanted by the rulers. There is no justification for naked violence – violence can only be justified when it is categorized as something else – a means to an end, defense against outsiders, overthrowing enemies or violence defined by domestic laws. This can be considered from the point of view of legitimization. Violence, in particular the power to kill, undoubtedly emulates from the natural world and is to be seen as a natural phenomenon.

The aforementioned comments do not presuppose that only certain forms of belief in legitimization (as described by Max Weber) are required for the stability of government rule and order,³⁷⁶ nor are sophisticated and complex theories of legitimization from political philosophers and lawmakers. Political rule is instead predominantly based on the presupposition that legitimacy develops from the basis and can be maintained as such.

I have defined six types of this kind of basis legitimization. The characteristic of these legitimacies is that they grow from the process of institutionalization of state rule, include

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Popitz Heinrich, *Phänomene der Macht*, Auflage 2, Tübingen, Mohr-Siebeck

rulers, as well as the ruled and are based on very different types of rule. Seen altogether, each basis legitimacy forms a kind of basis legitimization. We can see this order as the result of the accumulation of basis legitimacies.³⁷⁷ In the foreground of this future theory of basic legitimacy are:

1. a further differentiation of different forms of basis legitimacy;
2. the relationship between different types of basis legitimacies and their corresponding fundamentals;
3. a typology of types of rule on the foundation of order of basis legitimacies;
4. a step-by-step model of the accumulation of basis legitimacies;
5. the relationship between the types of basis legitimacies with specific forms of belief in legitimization in the sense that Max Weber described them, and other, specific theories of legitimization;
6. a theory of basis legitimacy and its corresponding orders of basis legitimacy with other central political processes and structures; above all the formation of and the collapse of state rule.

In a comprehensive field of research the aforementioned observations represent only a part - I have only dealt with the first of the above six types.

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Sternberger Dolf, Grund und Abgrund der Macht, Band 7, Frankfurt am Main, Insel.

5.1.3.1 Constitutional Models

One of the most important problems facing any “developing country” is the question of the system of government, in other words, the organization of its political, economic and social life. Through the break with colonialism from colonial custodianship or feudal/tribal systems these new states freed the way for autonomous formation of their state existence. However, the question as to the actual format of a future system of government has not yet been answered. Should native traditions, when existent, have been adhered to, or should “Western” or “Eastern” models have been absorbed? Were new types of government necessary, containing elements of the above, but without them being determinative for the character of the system? In other words, what kind of system of government is appropriate for each individual developing country?

This work will use Middle Eastern nations as an example in order to reply to this question. There will be a discussion on the general problem of transplanting a Western constitutional model into a sociological climate to which it is alien. Then I will turn to the specific question of the transferability of the two main variations of these models – parliamentary and presidential systems of government.

Any academic discussion on the internal organization of these countries and the situation arising from taking over foreign legal and constitutional models has at times played a subordinate role compared to other issues.

Firstly, we should state what is meant by a “developing country”. This was seen specifically as a “backward area”³⁷⁸ or a non self-governing area.³⁷⁹ This definition arose in the post

³⁷⁸ Behrendt Richard F., *Problem und Verantwortung des Abendlandes in einer revolutionären Welt*, Recht und Staat 191/2, Tübingen, 1956, p. 11

³⁷⁹ Shanon Lyle W., *Underdeveloped Areas*, New York, 1957, p. 464 et seq.

World War Two period. References to economic aid during this time made the term contemporary. Furthermore, the term “developing country” was replaced later by “Third World country”, indicating a certain type of political, economic and social governing system, differing from Western and Communist political systems.

At a later date, a new term, “Fourth World countries” also arose, referring to rich oil-exporting states, for example Gulf States such as Kuwait, Qatar, the United Arab Emirates and Saudi Arabia. After the fall of the Communist block and its ideology, the term Fourth World lost its meaning. It is more meaningful to use the term developing country with regard to these states.

The specific problems surrounding the generalized term “development” are connected to infrastructure, industrialization and economic expansion. These issues are of fundamental importance; however, too much emphasis must not be placed on economic aspects alone when discussing the complex of problems of developing countries, as this can lead to a negative outcome.³⁸⁰

When political problems in a developing country and ensuing questions surrounding the process of political decision-making are dealt with, certain political queries are pursued using methodology peculiar to this branch of science.³⁸¹ Insight and methods gained from other disciplines, especially from the areas of historical, sociological, economic and legal sciences will be drawn from and a one-sided generalization avoided in order to allow for an integrated point of view.

³⁸⁰ Department of Economic Affairs, United Nations, Vgl. Measures for the economic development of underdeveloped countries, Report by a group of experts appointed by the Secretary-General of the United Nations, Mai 1951, § 23, 24, 37 and § 39; ferner Spengler J.J., Economic Development, political preconditions and political consequences, in: The Journal of Politics, 1960, No. 3, p. 404 et seqq.

³⁸¹ Fraenkel Ernst, “Deutschland und die westlichen Demokratien”, in: Dokumente, 1960, 16 Jg., 2nd Vol., p. 95

The issue of problems in governmental systems in developing countries must be observed bearing in mind the fact that surrounding conditions influence a people's mentality and temperament. This also has a great influence on the content and form of their political life.³⁸² If one wishes to transplant a system of governance from its surroundings to other surroundings, it will take on different characteristics regardless of outward similarities. This assumption is valid even if such a transplant takes place between countries which on the whole are part of the same culture and civilization.³⁸³ The differences are amplified when these similarities do not exist. Alexis de Tocqueville³⁸⁴ and Walter Bagehot³⁸⁵ observed these problems at an early stage.

At the beginning of the twentieth century, Lord Bryce devoted a chapter of his famous book "Modern Democracies" to these questions.³⁸⁶ The former investigated the English system of government of their times, whereas the latter was principally interested in general problems occurring when Western systems were taken over by "backward races". The analysis of these problems, especially with regard to countries in the Middle East, is an important concern of contemporary political scientists.

The following will deal with the terms "Western democracy", "parliamentary" and "presidential" systems of government, as well as general characteristics of "developing countries". An attempt will be made to represent the consequences ensuing when Western constitutional models are taken over by a developing country and also the specific aspects of implementing a parliamentary or presidential system of government.

382 Rousseau, Du contrat social, Livre III, Ch. VIII.

383 Fraenkel Ernst, "Deutschland und die westlichen Demokratien", in: Dokumente: 1960, 16 Jg., 2nd Vol., p. 95

384 Tocqueville, Alexis de, De la démocratie en Amérique, Paris, 1951, 1 Bd., p. 7 et seqq.

385 Bagehot Walter, English Constitution, Oxford University Press, 1961, p. 235 et seqq.

386 Bryce James, Moderne Demokratien (deutsche Übersetzung), München, 1. (1923) u. 3. (1926)

5.1.3.2 Characteristics of Western Democracies and neo-patrimonial Regimes

As Ernst Fraenkel described in his essay “Deutschland und die westlichen Demokratien” (Germany and the Western Democracies)³⁸⁷, Western democracies have arisen through the approximation of English and French understanding of the law and the state institutions of both countries”. Western European countries are included among “Western” democracies; also the United States of America, Canada, Australia and New Zealand have proven themselves capable of democracy.

“Western” democracies fall into the category of “constitutional” states. Democracy in a Western sense must not be misunderstood merely as ruling over the people, which is the true linguistic meaning of the word “democracy”. Indeed the word “democracy” stems from Ancient Greece and from the ideas of its philosophers, amongst others, Socrates, Aristotle and Plato. Western-style democracy is a type of authority over the people in the sense that state authority is exercised by the people indirectly; in other words, the people are sovereign. Nonetheless, sovereignty alone is not a specific characteristic of Western democracy.

Far more decisive is the question as to how the will of the people arises. Rousseau states that the true will of the people is incarnated in a homogenous and *a priori* existing *volonté générale*, which must subordinate itself to the *volonté de tous*.³⁸⁸ Contrary to this radically democratic approach, Western liberal democracies assume that the will of the people arises from a compromise between the will of individuals from case to case. These differing characteristics of radical and liberal democracies were not initially seen as given and developed at a later date. Today it is perceived that both types of democracy have their roots in the French Revolution.³⁸⁹

³⁸⁷ Fraenkel, Ernst. Deutschland und die westlichen Demokratien. (Baden-Baden: Nomos 2011) 9. Auflage

³⁸⁸ Rousseau Jean-Jacques, Du contrat social, Livre II, Chap. III, Livre III, Chap. XV

³⁸⁹ Talmon J.L., Die Ursprünge der totalitären Demokratie, (deutsche Übersetzung),(Köln u. Opladen, 1961), S. 1 ff; ferner Herzfeld Hans, Die Moderne Welt, 1 Bd., Braunschweig, 1961, p. 1

If the will of the people is perceived to be predetermined, any interpretation of the will of the people must be arbitrary; an incumbent ruler may thus eliminate opposing forces. If the point of view is taken that the people are not capable of self-rule, so-called “educational dictatorships” may be legitimized – this scenario may endanger developing countries. An empirical will of the people, conversely, permits freedom of decision-making on the part of the population; in other words, of its component parts.

Western democracies presuppose differing *volontés particulières* which are considered to be interference in radical-totalitarian democracies. Contrary to the radical interpretation of a “prefabricated” will of the people, the liberal outlook never sees the *volonté générale* as defined by state authority or an individual, but rather as a product of endless dialectic altercations of *volontés particulières*.

What is the correlation between social order and type of government? A society which recognizes different *volontés particulières* is pluralistic. To the extent that modern societies developed their human potential economically, politically and intellectually, various groups arose; Laski saw this as proof of the collapse of the previously existing theory of sovereignty.³⁹⁰

A pluralistic society will grant all groups political, economic and cultural influence, in order to avert an omnipotence of the state. Regardless of whether the state recognizes the pluralistic nature of society as being self-evident, or equates its particular interests, the result is a Western pluralistic or totalitarian-monistic democracy.

In order to comprehend how Western democracies function, two aspects thereof must be pointed out: the resolution of conflicting interests must be carried out in accordance with the

³⁹⁰ Laski Harold, *A Grammar of Politics*, London, 1955, p. 67 et seqq.

rule of law, and an unwritten law of mutual tolerance and fairness must exist between interest groups. Only when these prerequisites are fulfilled can a pluralistic democracy be seen as functional.

Western and radical totalitarian democracies differ in their interpretation of the rule of law. “Monistic” democracies do not recognize opposing opinions and interests within societal and state structures. Opposing forces are not tolerated. They do not perceive the abrogation of written constitutions and laws as a breach of constitutional law, whereas in Western democracies the irrevocability of state law is seen as a self-evident norm.

The functionality of Western democracies depends on tolerance and fairness being practiced by those parties participating in the political decision-making process. Human imperfections and differences amongst people are a basis for this assumption. There is therefore no perfect state, only differing, but never attainable, ideals of a state. These notions of relativism existing in Western democracies stand in opposition to radical-totalitarian democracies and absolutist doctrines. To the latter, tolerance and fairness are alien concepts.

The following two most important constitutional models in Western democracies will be discussed: the Parliamentary system of government which was developed in Great Britain and other countries throughout Europe and the Presidential system of the United States of America.

The Parliamentary system is a great achievement of the British people. Its roots can be traced back to Magna Carta (1215) and the Model Parliament (1295) through which the monarch granted the right to raise taxes, which led to legislative powers being exercised by Parliament. Various other steps towards democracy took place in the 17th and 18th centuries, which however only benefited the upper and middle classes. The British Parliament became truly democratic through voting rights passed in the 19th and at the beginning of the 20th century. Constitutionally, the British Parliament is characterized by mutual dependence of

the Government and Parliament. The Government must resign in a case of a vote of no-confidence, whereas the Government may, under certain conditions, dissolve Parliament. Another vital component of the constitution is the compatibility of the Government office and parliamentary mandate.

In practice, constitutional function requires close cooperation between the Government and the parliamentary majority. The head of the Government is simultaneously leader of the majority faction. For a parliamentary system, “integration” of both interdependent organs of power – Government and Parliament – is typical. Another dividing line exists between Government and Parliamentary majority and the Opposition. Such a system can only function if stable majorities can be formed in Parliament. In a pluralistic society, this requires integration of various interests through compromise in order to allow functionality.

The British Parliament is at least on paper equal in status to the executive power. In reality, however, the Government “rules” over the Parliamentary majority through factional discipline and is strengthened with regard to the whole of Parliament through the Cabinet system. The essential dynamics lie in the interplay between Government and Opposition, whose result is determined by the voters.

We now come to the American Presidential system. The Founding Fathers of the American Constitution wanted to avert any possibility of tyrannical rule. They saw division of power as a means of achieving this. They were alerted to the dangers of uncontrolled power concentration by the example of the British monarchs. They recognized the importance of the division of power according to Montesquieu as a means of checking power, in other words, avoiding despotism on the part of the legislative as well as absolutism by the executive. This division of power was implemented by a system of offsetting power, of checks and balances, in contrast to the system used on the European continent, which meant to isolate the power holders as much as possible.

The President of the United States of American is elected directly for 4 years, and unifies the offices of Head of State and Head of Government. He/she cannot be removed from office, apart from the possibility of impeachment, which is practically meaningless. The impossibility of removing the President from office corresponds to the indissolubility of Congress.

The role of Congress remains important despite the President having expanded powers. There remain, however, huge differences between the U.S. Presidential system and European systems of parliamentary governance. Parliamentary systems require the formation of stable majorities. Therefore political parties must be strictly organized. Party discipline and factional restraints provide this. The American system, on the other hand, makes the formation of majorities unnecessary and practically impossible, other than in the election of the President – since the nature of American political parties as “platforms” excludes party and factional discipline. The supposedly heterogeneous character of American society as well as local dependencies on the part of Congressmen has favored such loose party associations. Since the U.S. did not have a class system, no political parties based on class were founded.

5.1.4 Political and Social Starting Positions of neo-patrimonial Regimes

Each kind of government is based on a certain value system and set of traditions. This “ideology” determines the way in which state and political life are organized and serves as legitimacy for institutions. Above all, an ideology may have an effect on national integration.

The ideology of Western democracy can be characterized as a synthesis of liberal, socialist and Christian ideas. Above all, it includes respect for the dignity of each individual human being and grants them space for personal development. In most developing countries collective national emancipation is seen as the highest priority. Traditional factors in Middle Eastern countries, especially of religion, play an important role here.

Religion and nationalism are two of the most decisive components in the ideologies of developing countries. However, it is questionable whether the term “ideology” can be used here, since in many developing countries there is no “unified system of ideas and viewpoints”.³⁹¹ The reason for the immense importance of religion in developing countries can be seen predominantly in the fact that the authority of the religious leaders of these states was not attacked before state emancipation took place. In Western democracies, when religious views are questioned, this often results in enlightenment and revolution, as well as political and economic development for the whole of society. The consequence was a “demystification” of the masses enabling them to be receptive of a political ideology.³⁹²

In contrast, the masses of people in developing countries have not yet been “demystified”. Therefore religions in these countries often have an integrating effect, but frequently hold them back, since religion is often used to stop progress. The problem of ideology in

³⁹¹ Loewenstein, K., *Verfassungslehre*, Mohr Siebeck, Tübingen, p. 10

³⁹² Weber Max, *Wirtschaft und Gesellschaft*, (Mohr Siebeck, Tübingen 1956), 1. Halbband, p. 308

developing countries is not only defined by the question of whether there is a unified system of ideas and viewpoints, but if the masses actually promote this ideology. When electoral reform took place in England at the beginning of the 20th century, the population could in fact be seen as supporting an ideology. This cannot be said for many developing countries.

Not only ideological, but also social and economic issues determine the political landscape of a country. Developing nations generally have low national income, overpopulation, a mainly agricultural economy, and a low level of savings. Efforts towards commencing industrialization were begun after the Second World War. Urban development was enforced quickly where primitive traditional communities had lived, and tribal clans ruled. The industrial revolution in Western Europe took place over a lengthy period and was accompanied by intellectual and social changes. Developing countries face the challenge of carrying out industrialization as quickly as possible without the social foundations required for it.

Some developing countries face the following problems: in rural areas traditional ideas reign, clans and cliques, sometimes hostile to change and progress, hold power, whereas progressive ideas and economic change are prevalent in cities and towns. These countries face dualism, rural areas are stagnating on the one hand, urban areas are becoming increasingly dynamic on the other.

How do these social structures affect political life, especially with regard to developing Western-style democracies? One aspect of Western democracies is the existence of public opinion. Does public opinion even exist in developing nations, and if so, how does it fulfill its duty?

The structure of society in developing countries does not allow for autonomous development of public opinion. As J. Lambert points out, public opinion can only arise in a socialized

milieu.³⁹³ In countries in which despotism rules, no importance is placed on public opinion. Public opinion is determined by others and thus abused. Accordingly, the basis for forming modern political parties, including interest groups, is sorely lacking in developing countries. Modern Western political parties are the product of mass society. Mass media and the internet as forms of public communication play large roles in the spread of information and public opinion. Habermas also confirms the important role of communicative exchange in social interaction, as it enables the processing of new experiences and forms new knowledge and identities.³⁹⁴ As long as mass society does not exist in developing countries, their political landscape will be determined by clans and cliques, with “born representatives” at their head. They are only willing to compromise by means of corruption and double-dealing.

³⁹³ Lambert J., *Structure sociale et opinion publique*, in: *L'Opinion Publique*, 2. Bd., Paris 1957

³⁹⁴ Gaus, Daniel, *Der Sinn von Demokratie. Die Diskurstheorie der demokratie und die Debatte ueber die Legitimitaet der EU.* (Frankfurt/Main, Campus Verlag GmbH, 2009) p. 103-104.

5.2 Parliamentary and Presidential Models

As long as the conditions required for a balanced parliamentary system are not given in a developing country, political instability will continue to provoke authoritarian forms of state, which fuels calls for the formation of an Opposition. This kind of power struggle tends to lead to presidential dictatorships in developing countries. This does not preclude, however, that a presidential regime cannot work together with a single-party Parliament. As long as the significance of the control of power is not omnipresent, parliamentary systems will continue to be under-represented in the Middle East, since opposition parties often do not exist.

When a presidential system is introduced into a developing country, political stability may be guaranteed to a certain extent, but at the cost of democracy. A plebiscitary dictatorship may result. Often, components of parliamentary systems are incorporated deliberately, partly to limit the powers of the president, and partly to support him/her. Sometimes this is done to appease the opposition. In this connection, a Cabinet may be set up (which enables dualistic executive power), and ministerial responsibility and interpellation procedures may be introduced.

Such attempts to minimize presidential power by introducing parliamentary components have no meaning in reality. It has been shown that presidential power is not weakened as a result. In practice, Cabinets have turned out to be no more than private secretariats of the ruler, or have been turned into committees.

Is one of the systems of government suitable for developing countries, or to be more exact, for the political development of developing countries? Can Western democracies find their way into developing nations through constitutions and governments? Can the dangers and

imperfections be removed which arise in parliamentary and presidential systems in a developing nation? Is a combination of these two types of government a possible answer?

This was indeed attempted in several developing nations. It may lead to differing scenarios, but they all have one thing in common – they result in dictatorship or instability. From the outset it must be asked if a constitutional mix of this type could work in a climate in which it has never been tried out. This type of presidential-parliamentary system has never been proven to work effectively in Western democracies (for example the Weimar Republic).

Therefore a mixed type of presidential-parliamentary government – seen from the viewpoint of constitutional reality – would probably not work. The frequency of changes in the constitution in developing countries is in most cases due to fluctuations between the two types of government.

By combining parliamentary and presidential components, a structurally deficient hybrid system must by necessity arise. The argument which maintains that such a system must function since it contains all prerequisites for a functioning system of government, cannot be upheld. In the face of this it is difficult to conceive that a combined system of this kind would work in a developing country. In the long run, a country implementing this system would be exposed to huge pressures and political instability.

5.2.1 Transferability Problems of Parliamentary and Presidential Systems

Any constitution can be tested by its effectiveness in reality. There are according to Loewenstein three types of constitution; normative, nominalist, and semantic. Which of these three categories can be transferred from Western democracies to developing nations? When a system is transplanted into an alien environment, the conditions for its normativity may be lacking.

This is especially true if an attempt is made to transfer an integral constitution to a developing country, i.e. into a completely difference social milieu. The question then arises as to the possibility of those specific Western intellectual, economic and social characteristics coming into existence in developing countries in the near or far future, thereby allowing harmonization of constitutional norm and constitutional reality.

Regardless of whether a Western system of government can be practiced effectively in a developing country, the question of moral justification and practical necessity of such a transfer must be examined. If something is seen as valuable and essential in the United Kingdom or the USA, this must not necessarily be the case in Iraq, for example, unless we assume a obligatory liberal-democratic natural rule of law. Can developing countries afford the luxury of Western governmental systems?

5.2.2 Authoritarian Trends

The realization of a system of governance based on division of power, and on an interplay between different authorities runs into huge difficulties in developing countries. Their constitutional reality is marked by fluctuations between two factors; dictatorships compounded by institutional guarantees and personal authority, and radical-democratic tendencies leading to permanent instability and often anarchy.

In order that a Western style of government may function in a developing country, the following is necessary: overcoming socio-economic stagnation, demystification of the masses, the formation of a political consciousness and the development of a broad ruling class for politics and administration.

If the population is excluded from the political decision-making process for a prolonged period of time, the danger of a revolution grows.. Military circles often made the case for steps towards democratization. They indeed dispose of the means necessary for enforcing such steps, and this political phenomenon has taken place in developing countries. They often use this measure for their own interests, in order to gain power for themselves, thus replacing one authoritarian regime with another. In addition, new authoritarian regimes may focus on other frameworks of issues and refuse to promote minority rights.³⁹⁵

³⁹⁵ Welhengama, Gnanapala, *Minorities' Claims: From Autonomy to Secession*, (Hampshire, Ashgate Publishing Limited, 2000) p. 15

5.3 Focus on North Africa and the Middle East

5.3.1 Problems Pertaining to North Africa and the Middle East

Philosophers have argued that a ruler, regime or government system will find it difficult in the long run to gain the conflict-management capability essential for long-run stability and good government. Stability of order may be achieved temporarily by use of intimidation or custom, and the best relationship between ruler and ruled is that in which the ruled accept the ruler's superior power as given.³⁹⁶

After identifying a number of common synonyms for legitimacy, such as "political community",³⁹⁷ it could be proposed that all regimes are legitimate to the extent that the population sees them as deserving of support.³⁹⁸ The extent to which regimes are perceived as such by the educated classes and the masses is what holds society together. A government which is genuinely national, which is a product of the nation's history and acts according to its values is likely to be seen as legitimate, even if its leaders are unpopular. A ruler who is not seen as legitimate is not able to function authoritatively.

The Middle Eastern world today faces the following problem of political legitimacy, which accounts for the volatile nature of Arab politics and the dangerous unstable nature of Arab governments. They are unpredictable and appear so to their own people and outsiders. The Arab political process is surrounded by obscurity and Arab politicians are often themselves insecure.

³⁹⁶ Heidorn, Joachim, Dr., *Legitimität und Regierbarkeit: Studien zu den Legitimitätstheorien von Max Weber, Niklas Luhmann, Jürgen Habermas und der Unregierbarkeitsforschung*, (Berlin, Drucker & Humboldt: 1982) p. 212-213.

³⁹⁷ Gurr Ted, *Why Men Rebel*, (Princeton University Press Princeton, 1970), p. 183 et seqq.

³⁹⁸ Maciver Robert, *The Web of Government*, (New York, Macmillan, 1947), p. 4 et seq.

If their behavior seems paranoid at times, this lies more in their situation than in themselves. Middle Eastern politicians must work in a political environment in which the legitimacy of rulers, regimes and state institutions is often sporadic. Considering these facts, irrational acts such as assassinations, overthrowing of regimes and state repression may arise from rational calculation.³⁹⁹

This behavior stems from the low level of legitimacy given to political processes in the Middle East, further adding to popular cynicism about politics in the region. They appear even more damaging when seen against nationalist values held by Arab peoples in the Middle East. These include the recognition of Palestine as a State, fulfillment of Arab national identity through integration of the numerous sovereignties and the establishment of democratic structures. Today many Middle Eastern peoples are clamoring for these, and these appeals have proved their political worth during the 20th century.

Many Middle Eastern politicians have been compelled to endorse these values and appeals, and even the more conservative support democracy and social justice. However, these ideals contrast with the realities of political life in these countries. This must only complicate the task of constructing a legitimate order. Arab leaders are caught between ideology and political realities. Their own bureaucracies are often corrupt and full of indifference. Ordinary people are often afraid of their governments. These attitudes seem to derive from unsatisfactory experiences with the authorities.

³⁹⁹ Schmidt, Helmut, *Die Selbstbehauptung Europas: Perspektiven fuer das 21. Jahrhundert*, (Stuttgart, Muenchen, Deutsche Verlags-Anstalt GmbH: 2000) p. 43-45

5.3.2 Structural Problems and specific regional features

In order to analyze the problem of legitimacy in the Middle East, we have to look beyond the region. Arab culture is indeed unique, but it is erroneous to assume that this uniqueness determines the structure of Arab politics. Universally applicable analyses must be employed.

The legitimacy problem in the Arab world is the same as that in other modernizing states. Dankwart Rustow has stated that the three prerequisites for political modernity are: authority, identity and equality.⁴⁰⁰ A legitimate order demands that people within a territory must feel a sense of political community which is not in conflict with other communities. In addition to this horizontal political axis, there must exist a strong authoritative vertical order between rulers and ruled. Without these political structures political life will turn out to be violent and unstable.

Equality is a product of modernity. Nationalist Arab ideologies beginning in the late nineteenth century and blossoming in the post-World War One period became increasingly liberal and radical. Freedom, democracy and socialism are indeed essential for legitimate political order in the Middle East, but are far from being realized in many areas. The failure to enforce equality can be seen as a great hindrance to the realization of legitimacy in many countries in the Middle East.⁴⁰¹

It can be argued that education, exposure to a global media and increasing urbanization are some of the factors which will contribute towards developing a civil, liberal political order, since they broaden people's identifications and influence their socio-economic behavior and

⁴⁰⁰ Dankwart Rustow, *A World of Nations: Problems of Political Modernization* (Washington, Brookings Institution, 1967), Chaps 2 and 3

⁴⁰¹ Hudson Michael, *Arab Politics- the Search for Legitimacy*, (London, Yale University Press, New Haven and , 1977), p. 4

cultural norms. Theoretically, it also increases the capability of government. Social mobilization may disrupt traditional politics since the newly-aware masses find these old patterns irrelevant; rapid social mobilization requires equality as a prerequisite for political legitimacy.

Arab politics should be analyzed in terms of a general framework applicable to all modernizing polities. Specific features of the Arab situation require more attention in order to understand it. It is not possible to examine the legitimacy problem of a single Arab state without touching on conditions common to all Arab states; otherwise only a two-dimensional result will be achieved. Factors external to the Arab world are critical when diagnosing the legitimacy of a particular Arab system.

External sources of legitimacy are of two kinds: the first we can call influence, defined usually as power, threats, promises and rewards from neighboring states and movements. In the past, Syria and Egypt have "interfered" in the affairs of neighboring Arab countries by attempting to enhance or reduce the legitimacy of certain politicians or regimes. The second kind can be described as a set of evaluation standards, or core concerns. The legitimacy of given leaders in a certain state is influenced somewhat by their fidelity to these core concerns. Palestine could definitely be included in such a list of core concerns.

The two dimensions of national identity and authority require particular attention. National identity in the Arab world is to a great extent multidimensional. Legitimate authority is difficult to develop within state structures whose borders are incompatible with those of the nation. State interests of particular nations are also incompatible with each other, so conflicts often characterize relations between Arab states. A perplexing feature of Arab politics in the 1970s in particular has been the growth, simultaneously, of cross-national behavior, such as trade, finance, development projects, and tourism, and tensions between states, which sometimes escalated into violence.

Sovereign power in the modern Arab world is distributed among several states, the legitimacy problem of each must be analyzed in its own territorial context, and the pan-Arab movements have played an important role regarding power and moral dimensions for intrastate legitimacy.

5.4 Paths of Legitimacy in Arab politics

In the Arab world, the problem of community and conflict arises from a lack of legitimacy which in turn is the result of deep changes occurring throughout Arab society. Three theoretical approaches can be defined which help to describe the implications of social change for constructing legitimacy.⁴⁰²

Each suggests different possibilities for a legitimate political order. “Transformation” examines the possibility of replacing traditional sociopolitical systems with rational ones through revolution which in turn is started by contradictions in a changing social structure. The “mosaic” model places emphasis on parochial loyalties even during periods of rapid modernization, and even predicts their strengthening under certain conditions.

Using this model, reconciliation and bargaining are the only practical course other than forced assimilation for achieving community⁴⁰³. As the third model, the social mobilization model deals with political outcomes, including legitimacy, as the product of a combination of social forces, not necessarily in harmony with each other, interacting with a given political culture. This version holds out the possibility of modernization leading to an educated, tolerant liberal society. Social mobilization is in fact changing the structure of Arab politics. There is a real possibility of nation-building, although this will take a considerable length of time. The outcome is the result of an interaction between an increasingly complex political arena on the one hand and the growth of government on the other.

⁴⁰² Rohwerder, Jan. Legitimation jenseits von Staatlichkeit. Nichtregierungsorganisation als Akteure der internationalen Politik, in: *Demokratie, Recht und Legitimität im 21. Jahrhundert*, Biegi/Foerster/Otten/ Phillip (Hrsg), (Wiesbaden, Verlag fuer Sozialwissenschaften, GWV Fachverlage GmbH: 2008. pp. 183-185.

⁴⁰³ Bender-Saebelkampf, Anna, *Demokratie der ethnischen Minderheiten*, (Wien, Facultas Verlags- und Buchhandels AG, 2012), pp. 26-28.

These processes will have huge implications for the development of government authority and also for political identity. It is a complicated matter to analyze the implications, given that there are differing levels of social mobilization in various parts of the Middle East.

Analyzing the struggle for legitimacy in different parts of the Middle East is easier than trying to predict whether Arabs are likely to develop more legitimate political systems in future. How can legitimacy be developed under difficult conditions? John Waterbury, in his discussion of corruption in Morocco, argues that for some regimes no legitimacy at all is developed.⁴⁰⁴ Waterbury suggested that the system's stability depended on its illegitimacy. Some Arab systems do have greater legitimacies than others and the legitimacy of certain ones change over time.

Leaders and regime cope in different ways, using the methods of legitimacy which they have at their disposal in varying combinations whilst attempting to keep a pool of support amongst the population. What kind of legitimacy reserves can they draw on? Weber writes that an order's legitimacy can be established by tradition, by positive emotional attitudes and by rational belief in its value, or recognition of its legality.⁴⁰⁵ He suggests that in modern societies belief in legality is the most usual basis of legitimacy. It is obvious, then, that Arab politicians will have problems in this regard. Arab society is no longer traditional – no large sectors are influenced by custom, or superstition. Too much social mobilization took place in the 20th century for this to have endured. Arab society is however not fully modern either.

Possibility of legitimacy based on rational belief in values, as for example the acceptance of natural law philosophy in the West in medieval times, is lessened in the modern Arab world because Islamic legislation declined as a factor in forming public policy. The weakening influence of Islamic authorities in politics reduces the significance of an Islamic type of Weber's "natural law".

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Waterbury John, Endemic and Planned Corruption in a Monarchical Regime, *World Politics* 25:4, July 1973, p. 533-555

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Weber Max, *The Theory of Social and Economic Organization*, (New York, Oxford University Press, 1947), p. 124 et seqq.

Attempts to develop legitimacy based on legality are fairly new. The Arab intelligentsia accepts that everyone should keep to the rules of society; however, these rules have not been clearly set down nor have they been permanently effective. It is hardly surprising, then, that what is perceived as regime support is strongly tainted by emotion and influenced by the charisma of the leader. It lacks substance since it is not supported by strong institutions.

Social change, radical ideas and problems of identity pose many problems for Arab politics and their low levels of legitimacy. The systems have two ways of coping: modern monarchies combine traditional authority with a kind of nationalism; the other kind is autocracy under a veil of democratic norms, supported by vociferous nationalism and a commitment to social equality. This type is practiced in Arab republics.

What kind of strategies can Arab politicians use to build legitimacy? How can they use resources to convince the population that the regime deserves of support? David Easton has a threefold classification for this purpose: personal, ideological, and structural resources for legitimacy.⁴⁰⁶ For example, a strong personal leader may create legitimacy for a regime.

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Easton David, *A Systems Analysis of Political Life*, (New York, Wiley, 1965), p. 278

6. Conclusion

Arab societies have undergone profound changes. However, the political order often lags behind instead of directing these changes into useful policies. It therefore cannot manage social conflicts which arise from these changes. Since they are unable to create structural legitimacy, Middle Eastern politics faces the following dilemma: Either “controlling” regimes will arise whose power will be based on coercion, or there will be political volatility such as that seen in the 1960s. What they lack is true institutionalized participation.

Theorists note that legitimate political orders are hard to achieve before political culture problems are solved. Agreement has to exist concerning national identity, the boundaries political communities must adhere to, and the most important priorities of the nation. If a nation is greatly divided along class or ethnic lines, or if an outside community makes particular demands on it, it will be difficult to create a legitimate order.

If historical developments have led to principles of authority being incompatible or if there is a huge gap between principle and practice, it will not be easy to establish democratic rule as opposed to one based on coercion. If traditional ideas are also incompatible with new modern ideas, things become even more complicated. New orders are generally based on equality and participation. But ideologies change faster than socioeconomic structures. Thus, demands for egalitarianism can mean that governments find it difficult to function.

In states in which conditions for legitimacy are only partly present, how can political communities modernize? The three models mentioned in previous sections provide an indication: the transformation model wants radical changes to establish orders and to create new ones. Analysts state that such transformations are indeed possible.

The so-called mosaic model⁴⁰⁷ foresees strengthening parochial elements in political culture. This model does not support the possibility of true radical transformations; instead, it states that traditional norms can be workable.

The social mobilization model takes a more complicated view of the range of political choices. Since the Arab world is extremely complex, national identity is affected by simultaneous but often opposing trends. Social mobilization has worn down some old structures and values, but it can also strengthen the government in the enforcement of its will.

Regardless of the environment of political systems, they develop certain processes to maintain a minimum of order, whether this is legitimate or not. Theorists state that there are personal, ideological and structural types of legitimacy. In underdeveloped states undertaking rapid modernization, structural legitimacy is hardest to realize. Regimes and oppositions are engaged in a struggle to develop strong legitimacy using these tools.

It may well be the case that the future of Middle Eastern politics will be based on social mobilization being able to increase the size of the politically aware population which will lead to more demands for socioeconomic development. The young educated elite and ordinary people will provide support for democracy and equal rights. This may be achieved without weakening communities or making popular religion relevant.

During the decades following post-World War Two, tensions were at work between pan-Arabists and critics on the left and right wings of the spectrum. However ideological legitimacy weakened as revolutions became less intense. Regimes, being wary of perceived

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Easton David, *A Systems Analysis of Political Life*, (New York, Wiley, 1965), p. 278

dangers in the political environment, have not experimented with structural legitimation by utilizing open political participation.

Nevertheless, some advances were made in security and welfare policy. Middle Eastern monarchies have also benefited from technological advance. The problems they face lie in the lessening belief that a monarchy provides the basis for legitimacy. They faced challenges from Arab nationalists in the 1950s and 1960s and responded by taking an assertive stance against Israel and by imposing the oil boycott. In this way royal families in Saudi Arabia, Jordan and the Gulf states supported the Arab nationalist cause. Of course, a monarchist form of government does not always have effective administration. The homogeneous nature of the population however, makes this problem more manageable.

A convergence between the actions of monarchies in the Middle East and revolutionary republics took place in the 1970s and 1980s.⁴⁰⁸ Republics became less radical, and the monarchies more nationalistic. It remains to be seen whether these developments will lead to Arab politics becoming more stable. Social mobilization is ongoing, yet it is influenced by traditional attitudes. Middle Eastern government bureaucracies, even if they grow, are vulnerable to opposition trends.

Monarchies will be challenged by youth, who see their claim to legitimacy as outdated. In the revolutionary republics, the population can see the discrepancy between the ideology of freedom and the reality of authoritative control. As we have seen in recent events in North Africa, populations have revolted against revolutionary leaders.

There still remain differences amongst Arab nations as to how to resolve the Palestinian issue, in particular in sight of the desire of that state to be recognized as a full member of the

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Hudson Michael, Arab Politics, the Search for Legitimacy,, (New Haven and London, Yale University Press 1977), S. 402-403

United Nations. Until this issue is fully resolved, regimes perceived as abandoning the Palestinian cause is often perceived as lacking even more in legitimacy by their populations.

The issue of Arab unity is also unlikely to be resolved in the near future. Arab political structures will then continue to affect each other, economically, structurally and culturally.⁴⁰⁹ Intrastate squabbles will continue to work to the disadvantage of established political systems. Populations will show little respect for regimes who continually quarrel with each other.

Continuing turmoil is to be expected in the Middle East before genuine structural legitimacy, and therefore democracy, can be realized. Broad participation in political processes is necessary, forcing the governments to respond to public opinion and to take it seriously.

The realities in some Middle Eastern countries make this ideal difficult to be implemented. Since new generations are on the whole better educated than previous ones, they will hopefully be able to participate in such a transformation. However, intelligent political activity and organization are also required since a certain level of risk taking is necessary for development in this area. This way, it may be possible to bring about legitimacy in Middle Eastern nations.

⁴⁰⁹ Jebb Cindy R., *Bridging The Gap, Ethnicity, Legitimacy, and State Alignment in the International System*, (Lexington Books, Lanham, Maryland, 2004), p. 225

7. Appendix

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7.2 List of Abbreviations

UNO	United Nations Organization	Page 2
NGO	Non Government Organizations	Page 23
PKK	Kurdistan Workers Party	Page 52
PLO	Palestinian Liberation Party	Page 53
KDP	Kurdistan Democratic Party	Page 54
PUK	Patriotic Union Party	Page 54
ISS	International Space Station	Page 63
BCE	Before Christian Era	Page 89
OSCE	Organization for Security and Cooperation in Europe	Page 125
right to self-determination	Self- Determination Rights	Page 138
USA	United State of America	Page 141

7.3 List of Media

Fig. 01: Ethnic groups of Iraq in percent. <http://krisen-und-konflikte.de/irak/land.htm> (Date: 20.03.2012) and <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html> (Date: 20.03.2012), p. 37

Fig. 02: Religious groups of Iraq. <http://krisen-und-konflikte.de/irak/land.htm> (Date: 20.03.2012) and <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html> (Date: 20.03.2012), p. 38

7.4 Curriculum Vitae

Personal Data:

Date of Birth:	December 28 th , 1962
Place of Birth:	Mosul, Kurdistan (Iraq)
Nationality:	Political refugee (asylum) since 1991 in Austria; since October 2000 Austrian citizen
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EDUCATION HISTORY:

1968 – 1974	Primary School in Mosul
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1978 – 1981	High school in Mosul
1981 – 1988	Baghdad University (Law and Political Science College), Obtained degree: MSc in Political Science in 1988
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7.5 Non-Plagiarism Statement

By this letter I declare that I have written this thesis completely by myself, and that I have used no other sources or resources than the ones mentioned.

The sources used have been stated in accordance with the rules and regulations that are applied at the University of Vienna. I have indicated all quotes and citations that were literally taken from publications, or that were in close accordance with the meaning of those publications, as such.

Moreover, I have not handed in an essay, paper or thesis with similar contents elsewhere. All sources and other resources used are stated in the bibliography.

Name: Salim Atroshy

Place: Vienna, Austria

Date: _____

Signature: _____