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CONSTITUTIONAL LIMITATIONS OF SOVEREIGNTY IMPOSED BY FOREIGN POWERS AFTER THE SECOND WORLD WAR

Summary

Modern-day states adopt constitutions in accordance with free political will of their citizens and their representatives, and within their more or less autonomous constitutional-adopting capacities. However, several actual constitutions do not fit into the pattern. Two of them are truly comparatively notable – the constitutions of Germany and Japan –and the other three represent a peace-seeking reflection of foreign powers' political interests included in the fundamental legal basis of post-conflict states. They contain somewhat unique, though not that replicable and reusable institutional frameworks. This is the case with constitutions of Bosnia and Herzegovina, Afghanistan, and Iraq. All of the five analyzed constitutions share one historically original similarity: they were not freely drafted by relevant domestic political representatives. Rather, they were inspired, conceived, or, in fact, written by foreign political or military forces – some legal scholars would say: occupying powers. The paper aims at discovering the truly foreign (imposed) nature of the analyzed constitutions, and intends to search whether these acts were conceived to serve as long-term normative projects, or merely as a temporary basis for enabling more stable, permanent state-building legal documents. Although there are numerous proofs that these states' sovereignty is made to appear limited, some of the components of the analyzed countries' constitutions indicate that those countries, at least nominally, are sovereign, which opens up space for assessing the 'honesty' of the constitution-drafters. Whether the examined constitutions do leave place for national sovereignty to be expressed in practice remains the central point of interest of the paper.

Key words: Constitution, Sovereignty, Occupation, Limitations of Sovereignty, Internationalization of Constitutional Law.

1. INTRODUCTION

Although an overwhelming majority of national constitutions represent manifestation of free and sovereign will of the population, there still remain some constitutions whose historical conception and content reflect the direct influence of external political factors. Truth be said, a closer comparative scrutiny would reveal that frequent ‘borrowing’ of functional constitutional models and the extent of the internationalization of the constitutional law have severely curbed the freedom that a constitution-drafter has enjoyed in not that distant historical times. However, there is a number of constitutions whose writing style and certain political inclinations point to the somewhat obvious conclusion that they were drafted for countries which do not enjoy a fully independent status when it comes to constitutional law. Strongly distancing himself from any distant suggestion that those countries are not fully independent in the sense of international law, author of this paper will try to establish certain historical and normative connections between constitutions of the countries that, in accordance with his assessment, represent the outcome of direct *foreign* constitution-making drafting processes.

Subject of the research analysis are the constitutions of several countries whose population, to a lesser or greater extent, effectively did not participate in the elaboration of their own constitutions. These constitutions were drawn by foreign (or occupying) powers and have been implemented by external administrative authorities and (or) military forces. Namely, these countries are: Japan (Constitution of 1947), Bosnia and Herzegovina (Constitution of 1995), Afghanistan (Constitution of 2004), and Iraq (Constitution of 2005). The paper also relies on the content of one of the most notable documents in contemporary comparative constitutional law, the Basic Law for the Federal Republic of Germany (1949). Even though the Basic Law was adopted by German political representatives (at the *Herrenchiemsee Convention*, assembled in August 1948), its application depended upon the authority of the western Allies of the Second World War, because they were the ones authorized to *approve* it a year later.

In all of the five observed countries, the main political influence standing behind the constitution-making was that of the United States of America (the US). This obviously had an enormous effect in putting one of the fundamental components of the US Constitution of 1787 – the federal structure of the state – into three of the five analyzed constitutions (Germany, Bosnia and Herzegovina, and Iraq). Ethnic homogeneity is present in two of the observed countries (Germany, Japan), but states with plural ethnic composition constitute majority in the analysis. However, the most important feature of the external (American or, broadly put, *international*) constitution-making *assistance* to the constitution-making process in the analyzed countries is the clear limitation of national sovereignty. This characteristic is detectable in the field of a given nation’s foreign and security policy, internal composition of the elements within its political and legal system, and – first and foremost – its constitution’s drafting process.

2. THE 'FOREIGNNESS' OF THE IMPOSED CONSTITUTIONS

How can one claim that the *structural origin* of the constitutions of Germany, Japan, Bosnia and Herzegovina [B&H], Afghanistan, and Iraq is foreign in nature? Examining the arguments that stand behind the claim that these constitutions were written under the authority or direct supervision of foreign or occupying powers is the central component of this part of the paper. In this regard, the formality of these acts being, in some cases, adopted or approved by local political assemblies, cannot exclude the fact that they are not the product of the work of inherently local, national constitution-making powers. This conclusion is supported by the analysis of the historical process of drafting of the five observed constitutions and their adoption.

Authors of the *Constitution of Japan* were the officials who worked under the authority and supervision of the occupiers of Japan (mainly from the US) after the Second World War ended. In accordance with its Article 73, the Constitution was formally adopted by the Japanese legislature. Text of the most renowned component of the Constitution (Article 9, or the "No-War" provision) was "based on both Japanese (…) and American (…) influences", but it was drafted in early 1946 by an American Colonel (Charles Kades), Deputy Chief of the Government Section in the Allied Occupation apparatus (Beer, 1998, 820, fn. 16; similar conclusions are brought upon by: Chinen, 2005, 90, Gluck, 2019, 49, and Ishizuka, 2019, 8). In fact, "the Constitution [of Japan] in general and Article 9 in particular" were "imposed [*sic*!] by foreign occupation" (Chinen, 2005, 92-93). Bearing in mind that the American drafters of the Constitution "were actually conscious that they were engaged in an unusual and likely dubious enterprise of writing another country's constitution" (Gluck, 2019. 52), one may easily conclude that the Constitution represented "a wholly alien instrument of national governance" for the country (Ishizuka, 2019, 6).

None of the American representatives involved in drafting the Constitution were experts in constitutional law (Ishizuka, 2019, 8), which represents a particularly informal method of curtailing the Japanese role in the constitution-making process. Another modality of bringing the local political influences down was the speed by which the American constitution-makers were driven in presenting the constitutional framework to the Japanese government, and by "the coercive manner in which [the Constitution] was adopted" (Ishizuka, 2019, 9). Although the occupation authorities "feared that public knowledge of foreign imposition would destroy the legitimacy of the new constitution among the Japanese" (Patrick Boyd, 2014, 49), the Japanese negotiators "had virtually no means to reject the reforms imposed", and "were instead compelled to present the document to the public as a Japanese-originated and –endorsed instrument"; they were in no position "to alter the fundamental foundations of the new political and social order [the Constitution had] established" (Ishizuka, 2019, 11). The process led to adopting a truly "reactive constitution" (Gluck, 2019, 49). It is, thus, well-founded to claim that the Japanese Constitution is "a largely "un-Japanese" document", when one reads that the instructions of

General Douglas MacArthur (the Supreme Commander of Allied forces in Japan), who personally approved the text of the Constitution, to its drafters were clear: “keep the emperor, renounce war, remove all vestiges of feudalism” (Gluck, 2019, 53-54).

No prior local authorization was required before setting the framework for adopting the West Germany’s *Basic Law* either. The local (national) body which formally adopted the Basic Law (the Parliamentary Council) was established on the grounds of a six-power conference of the US, Great Britain (GB), France, and the three Benelux countries, which took place in London in the spring of 1948. Basically, the Conference represented “the starting point” (*Ausgangspunkt*) for the foundation of the quasi-legislative body that drafted the Basic Law. It was decided in London that the Western military governors in Germany should authorize the executive branches of government of the West German federal units to convene a Constituent Assembly with the task of preparing the foundation of “a free and democratic form of government” (Görtemaker, 2007). The “Frankfurt Documents” followed suit, by the authority of which the military governors of three Allied powers (US, GB, and France) ordered West German nascent authorities to convene the required constitutional convention (Görtemaker, 2007). The Basic Law, therefore, hardly represented the manifestation of a sovereign constitution-making will of the German people, even the one residing in the territories occupied by the Western Allies.

Although formally the constitution-making power resided with the German people, it never directly expressed itself about the document, which rendered “the constitutional process somewhat internationalized” (Simović, 2020, 177). Consequently, it was the decision of the Western Allies that the (West) German people were to be given “full government responsibility” (“die volle Regierungsverantwortung”) only gradually. This responsibility (limited sovereignty) was coupled with two restrictions: the Allies would retain international control of the Ruhr area, and were authorized to intervene militarily in case of instabilities in West Germany (Görtemaker, 2007). The amended Basic Law after unification in 1990 “required approval by the four Allied powers” (Gluck, 2019, 61).

The *Constitution of B&H* is technically the Fourth Annex of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), which served to end the war that went on in that country from 1992 to 1995. The Agreement (i.e. the Constitution) was signed by official representatives of the US, Germany, GB, France, the European Union, Russia, former Federal Republic of Yugoslavia (FRY), as well as the former Republic of Bosnia and Herzegovina (which was conclusively abolished by the adoption of the Dayton Agreement). The Constitution also represents the product of negotiations held in Dayton (Ohio, the US), in November 1995, between the President of the-then Republic of Bosnia and presidents of the Croatia and FRY, under the auspices of the enumerated foreign entities. One can justifiably argue that foreign (international) subjects, and, in particular, “the American diplomacy”, represented “the real Constitution-makers” in B&H, whose Constitution “was negotiated as part of the international peace

treaty", constituting, thus, an example of the "international negotiation of a constitution" (Šarčević, 2010, 38)

Although the dismemberment of the *Islamic Republic of Afghanistan* in 2021 effectively put out of action the pre-Taliban legal system, the country's Constitution adopted in 2004 formally still remains unabolished. The Constitution represented the product of the engagement of national transitional administrations which came to power as the consequence of the US-led invasion in 2001 (authorized by the United Nations Security Council [the UNSC] Resolution No. 1386). The competent constitutional commission was given the proper authority by the Bonn Agreement, adopted under the auspices of the United Nations (UN)-led *international conference* held in 2001.

Similarly to the Afghani experience, the *Constitution of Iraq* was adopted by the Transitional National Assembly of Iraq, replacing the Law of Administration for the State of Iraq for the Transitional Period (signed in 2004). The adoption of both of these fundamental legal documents of Iraq was enabled by the aggression the US operated against Iraq in 2003. The occupying administration and military forces effectively held control on Iraqi politics, including the drafting of the current Constitution. The Iraqi Transitional Administrative Law (the TAL), which "was written and imposed without the proper involvement of Iraqis", was drafted by the US nationals "assisted by two expatriate Iraqis holding US and British nationalities, and who had not lived in Iraq since they were young children", and, therefore, in 2005, "Iraqis went to vote on a permanent constitution they had not seen, read, studied, debated, or drafted" (Jawad, 2013, 7, 13 & 25). Not much different from the German, Japanese, or Bosnian constitutional experience, the TAL, thus, "was essentially drafted by US officials and a number of Iraqis, most of whom had just returned from decades-long exile and none of the principle actors had been elected at that point." (Zaid & Yussef, 2020, 29).

3. TEMPORARY NATURE *VERSUS* THE STABILITY OF THE IMPOSED CONSTITUTIONS

Are the five constitutions imposed by foreign powers *temporal* in nature? Were they written in order to govern the country for a shorter, transitional period of time, or was their primary purpose to continuously serve to stabilize war-ridden political and institutional systems? There, of course, exists no unique and simple answer, but the history of the Basic Law may serve as an indicative example.

Authors of the German constitutional document named it *Basic Law* (*Grundgesetz*) – the expression suggested by Max Bauer, the mayor of Hamburg, and a representative at the *de facto* constitutional convention (Görtemaker, 2007) – contrary to the previous historical practice,[1] precisely because they wished to outline the *temporary* nature of the

[1] With the exception of the "German Federal Acts" (*Deutsche Bundesakte*) of 1815 (the first German constitution), all basic legal documents in German history have had the word "Constitution"

document. The more dignified term “constitution” (*Verfassung*) would be reserved for a document “applicable to the nation as a whole and designed to last in perpetuity” (Kommers, 534). The same was the reason for naming the Constitutional Convention of 1948 the “Parliamentary Council”, instead of using a more appropriate, yet politically challenging, title of “National Assembly” (“Nationalversammlung”) (Görtemaker, 2007). The provisional character of the Basic Law, it was planned, would be surpassed once the two parts of occupied Germany were reunited, in accordance with the open-ended clause claiming that the Basic Law would “cease to apply on the day on which a constitution freely adopted by the German people takes effect” (Basic Law, Art. 146). However, when reunification came four decades later the original title of the constitution remained preserved, and the cited provision was erased from the Constitution. One of the reasons for the post-Cold-War “survival” of the Basic Law may be that it “has become the part of united Germany’s national identity, thus outliving its own original mission” (Simović, 2020, 185). Similar conclusion may be drawn in Japan from the fact that the highest legal act of that country is referred to as the “Peace Constitution” by its own population (Beer, 1998, 815).

Although the Basic Law has been exposed to extensive partial revisions (more than 60 amendments), it still contains some extremely anachronistic provisions, such as the one claiming the primacy of the federal law over the law of the federal units “insofar as it applies uniformly within one or more occupation zones (*Besatzungszonen*)” (Basic Law, Art. 125, Para. 1). At the same time, Art. 1 (Human dignity and Human rights) and Art. 20 (Constitutional principles and Right to resistance) are protected by the so-called eternity clause (*Ewigkeitsklausel*), contained at the Art. 79 Sect. 3, which prohibits any change or removal of, *inter alia*, the principles laid down in those two articles.

Japan’s Constitution is comparatively distinctive in one regard: it is the longest living constitution in the world that has never been amended. From the global comparative perspective, the procedure of its revision is not very demanding. It suffices that, upon the initiative of the two thirds of members of the parliament, the citizens approve the revision at the referendum, with no more than affirmative majority of all votes cast required (*i.e.* relative, or simple majority) (Constitution of Japan, Art. 96 Sect. 1). The subsequent promulgation of the amendment by the Emperor, as prescribed by Sect. 2, represents a mere formality, given the symbolic constitutional status attributed by the Constitution to the monarch. This conclusion does not suggest that the history of contemporary Japan

(*Verfassung*) included in their title: Constitution of the German Empire (*Verfassung des Deutschen Reiches*) of 1849, North German Constitution (*Verfassung des Norddeutschen Bundes*) of 1867, Constitution of the German Confederation (*Verfassung des Deutschen Bundes*) of January 1871, Constitution of the German Empire (*Verfassung des Deutschen Reiches*) of April 1871, and – probably the most prominent among previous German constitutions – Constitution of the German Reich (*Verfassung des Deutschen Reichs*), or the Weimar Constitution (*Weimarer Verfassung*) of 1919.

does not include certain pages depicting moves in the direction of the constitutional revision, for there existed several of them, including the ones initiated in the parliament (Chinen, 2005, 56). The Constitution "survived unscathed serious revision attempts in the 1950s and 1960s" (Patrick Boyd, 2014, 55), although "the clamor for revision began almost immediately, on the grounds that the constitution was indeed imposed by the occupation", because "its alien provenance was hard to miss and just as hard to bear" (Gluck, 2019, 55). Most recently, in a speech in May 2019 (exactly on Constitution Day), the then Prime Minister (Shinzo Abe) "repeated his pledge to have a new constitution in effect by 2022" (Gluck, 2019, 61), which was obviously a misplaced promise. The general public has most fervently resisted amendments to the notable Art. 9 (Chinen, 2005, 82), a subject which will be more thoroughly examined in the next part of this paper (Chapter 4). It is quite possible that the absence of the constitutional revision is owed to "a deep distrust of conservative intentions, rooted in historical memory", held in the minds of the opponents of the revision (Ishizuka, 2019, 21). Yet, important components of the constitutional system (the electoral system and the judiciary), have effectively been amended since the Constitution's adoption, by means of legislative (sub-constitutional) techniques (Gluck, 2019, 59).

Similarly, the Constitution of B&H has never been amended. This might appear surprising, because of the even less-demanding procedure for the revision. The Constitution requires the approval of two-thirds of those members of the parliament who are *present* and *voting* (Constitution of Bosnia and Herzegovina, Art. X Sect. 1). Neither a tighter qualified majority, nor the referendum approval is needed. Although from the comparative perspective this document represents one of the most flexible constitutions in the world, it has never been amended most probably because the sensitive nature of the post-war consociational plurinational democracy in the country prevents the constitutional revisions to emerge. Also, it is in the nature of every *agreement* to sort out a solution to a precise problem, while a *constitution* has for purpose the projection of a vision for a society it is invited to govern (Šarčević, 2010, 47). Paradoxically, it has never been changed even though "it should not be disputed that Annex 4 is valid as a temporary regulatory document which maintains a provisory of the state of the constitution in an unfinished social-political phenomenon (Šarčević, 2010, 49).

Constitutions of Afghanistan and of Iraq have also never been subject to the constitutional revision process, although the former was *de facto* abolished in 2021 with the Taliban forces effectively ending the Islamic Republic of Afghanistan.

4. EXPRESSIONS OF LIMITED CONSTITUTIONAL SOVEREIGNTY

A limited sovereignty and a national constitution-making process seem to stand in a mutually contradictory relation. Nonetheless, there is an ample amount of the provisions contained in the analyzed constitutions which were drafted with a specific role to restraint

the sovereignty, external as well as domestic, of the states on which the constitutions were imposed.

These provisions regulate the *tropes* of the states' aspiring to universal peace, the special role given to the political and military administrations of the foreign (occupying) powers, and the stipulated primacy of the international law. Plural specific similarities are expressed in the five constitutions, which can be attributed to the fact that an occupying power (or powers) represented more than just an intervenor in the observed constitutional-making processes.

Several analyzed constitutions contain provisions reflecting given states' pronounced aspiration to participate peacefully in international relations. Due to its deep transgressions against international law, the Constitution of Japan has been marked with a quite unique normative feature – the No-War Clause (Beer, 1998, 817). In it, it is stipulated, that "aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes" (Constitution of Japan, 1947, Art. 9, Sect. 1). In addition, "in order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained", while "the right of belligerency of the state will not be recognized" (Sect. 2). These provisions have "stirred controversy since the Constitution went into effect", because "like the rest of the 1947 Constitution, Article 9 is a product of the Occupation" (Chinen, 2005, 56-57). It is of no small importance that Article 9 is the *sole* article contained in Chapter II, the title of which is "Renunciation of War".

Limitations of sovereignty have, in a bigger or lesser extent, curtailed the nations' ability to play an institutionally significant role in international arena. Thus, the No-War Clause still stands "as an impediment to Japan's ability to play a greater role" in the system organized within the UN. Thus, "for years, Japan has wanted a permanent seat on the [UNSC], believing its economic power and participation in world affairs merits such a recognition", but the Article 9 continues to halt this ambition. Namely, "its ambiguous language makes it unclear whether Japan would be able to meet its responsibilities as a permanent member" of the UNSC (Chinen, 65), and the pacifist constitution "has constrained Japan's ability to chart an independent path on foreign policy" (Ishizuka, 2019, 7). There is a degree of probability that the very composition of the Article 9 came from the highest military officials of the US in Japan, including General MacArthur (Gluck, 2019, 51). It is also very informative that the Constitution includes no provision relating to the procedure for declaring war or concluding a peace agreement.

In a comparable fashion, West Germany had also for a long time "lived in a state of 'semi-sovereignty' by virtue of its Nazi past and its division into two states", right up until it reached a position to have its own foreign ministry in 1951 and defense ministry four years later (Mény, Knapp, 1998, 386&371). Both Germany and Japan, being "responsible for mass crimes during the Second World War, explicitly express their devotion to peace" in the

texts of their preambles (Simović, 2020, 185-186). In the Basic Law it is announced that the German Federation "shall establish Armed Forces for purposes of defense", while employing of the Armed Forces is restricted "only to the extent expressly permitted by this Basic Law" (Art. 87a, Para. 1-2). A significant revisionist political movement in Japan during the 1990s called for the abolition of the Article 9, recognizing "war as a sovereign right of the nation" (Beer, 1998, 820).

The Article 27E of the Constitution of Iraq contains a much-disputed provision on the non-proliferation and non-use of forbidden weapons (nuclear, chemical, or biological) (Istrabadi, 2005, 293). Consequently, the final composition of the provision "contained a strong rejection of the proliferation of weapons of mass destruction, but couched that renunciation in terms of the limited duration of the transitional period" (Istrabadi, 2005, 293). Similarly, Afghanistan is obligated to "prevent all kinds of terrorist activities, cultivation and smuggling of narcotics, and production and use of intoxicants" (Constitution of Afghanistan, Art. 7) – a highly unique provision in a constitution of any sovereign country.

In B&H, foreign constitution-makers established, *via* Annex II of the Dayton Agreement ("Transitional Arrangements"), a *Joint Interim Commission* "with a mandate to discuss practical questions" connected to the implementation of the Constitution, the General Framework Agreement, and its Annexes (Constitution of Bosnia and Herzegovina, 1995, Art. 1 Para. "a"). Although the Commission is composed of 8 local (B&H) representatives (Para. "b"), its meetings are chaired "by the High Representative [HR] or his or designee" (Para. "c"). This is the unique spot in which HR is mentioned in the Constitution. At the same time, the signatory parties have designed, in Annex 10 Art. 1 Sect. 2, "a High Representative, to be appointed consistent with relevant [UNSC] resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a [UNSC] resolution (…)". In addition to his other powers and responsibilities, in Art. 10 of the Annex it is stated that "the [HR] is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement". It is hardly surprising that "there is a widely spread attitude that the [HR] is obligated to implement the decisions of the Constitutional Court or to intervene in the legal system of the country" (Šarčević, 2023, 20). Although this intervention of his cannot be arbitrary, but must be based on the decisions of the Constitutional Court and the European Court for Human Rights (Šarčević, 2023, 20), it still resembles an institute of steady foreign intervention in the local and national (as well as ethnic) political composition of the newly-born country. Hence, the Agreement "derives from [a position that B&H] is outwardly sovereign", but it still "suspends sovereignty of [the country's] organs in favor of the authority of the [HR]", which led to the "outwardly proclaimed sovereignty [being] neutralized by the deprivation of the internal sovereignty" (Šarčević, 2010, 66).

In some of the observed constitutions international law takes precedence over the national (sovereign) law. Such is the express message delivered by the Basic Law (Art. 25), while in B&H the basic rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe and its Protocols have a *direct application* and stand above “all other law” (Art. II Sect. 2). At the same time, “all competent authorities” in B&H need to “cooperate with and provide unrestricted access” to international human rights monitoring mechanisms and the supervisory bodies established by any of the international agreements listed in Annex I, including the International Tribunal for the Former Yugoslavia, as well as “any other organization authorized by the [UNSC] with a mandate concerning human rights or humanitarian law” (Art. II, Sect. 8). The Section’s title is, perhaps somewhat cynically, entitled “Cooperation”. The Japanese Constitution states that “laws of political morality are universal”, as well as that “that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations” (Preamble, Sect. 3).

The analyzed constitutions also aim at diminishing the powers of the head of state. Thus, the command over the Armed Forces is not vested in the Federal President, as usually is the case, but in the Federal Minister of Defense (Basic Law, Art. 65a, Sect. 1). The parliament is “the highest organ of state power” (Constitution of Japan, 1947, Art. 41), and it “shall manifest the will of its people as well as represent the entire nation” (Constitution of the Islamic Republic of Afghanistan, 2004, Art. 81 Sect. 1). The composition of the Constitutional Court of B&H reflects a vastly limited power of the judicial self-organization of the country, because out of 9 of its members, 3 are to be selected by the President of the European Court of Human Rights after consultation with the Presidency”, and those members cannot be citizens of B&H or of any of its neighboring states (Art. VI Sect. 1-2)**,** ***i.e.*** Croatia, Serbia, or Montenegro.

Foreign constitution-makers, did, however, have enough political wisdom to nominally proclaim the sovereignty of states whose legal system they aspired to regulate from the top. Some constitutional provisions proclaimed *formal* national independence within *factual* limited constitutional sovereignty. In accordance to this method, the adoption of the constitution in question was unmistakably declared as the action of the local population, the people, by the means of exercising “their constituent power” (*seiner verfassungsgebenden Gewalt*) (Basic Law, Preamble, Sect. 2). Similarly, Iraqi Constitution was enacted by “the people of Iraq” (Preamble, Sect. 7). Additionally, the constitutions contain the claim that the political authority in the state resides in the people. Thus, “all state authority derives from the people” (Basic Law, Art. 20; similar statement is made in the Constitution of Japan, 1947, Preamble, Sect. 1, and Art. 1 Sect. 1). Similar to that, “national sovereignty (…) shall belong to the nation (…)” (Constitution of the Islamic Republic of Afghanistan, 2004, Art. 4). Nominal sovereignty of the *state* is also proclaimed

(Constitution of Bosnia and Herzegovina, Preamble, Sect. 6; Constitution of the Republic of Iraq, 2005, Art. 1, 50&109).

5. CONCLUDING REMARKS

In modern circumstances, constitutions should not be imposed by any foreign power. This anomaly would contradict to one of the classical functions of any constitution, which aims at adequately assessing a given population's political and basic rights demands and needs, as well as to transferring a functional normative document in a democratic and pluralistic society.

Within the confines of the constitutions observed in this paper, the sovereignty of the five nations appears to be *limited*, in the field of *international* politics, as well as in the domain of management of *internal* affairs. In particular, the constitutions of Japan, Germany, and B&H are truly *foreign* in their very core, having been drafted and adopted under the auspices of the outside powers which bore responsibility for security of those countries at the time of writing of their constitutions. Domestic political influences were effectively downsized, even though in certain constitutional provisions it is somewhat cynically underlined that the constitutions do represent normative reflection of the proverbial popular will.

With the exception of Germany, none of the analyzed constitutions has ever been amended, although it is doubtless that, by the arguments that rely on common sense, local and international circumstances, a space has been carved out for necessary constitutional revisions. All of the constitutions awkwardly seemed at the same time to serve only as provisional documents, aiming at stabilizing the war-ridden territories until more suitable constitutional arrangements were ready to be put into effect.

Limited constitutional sovereignty is manifested in a particularly highlighted tendency for the states whose political and legal system was established by a foreign power to claim their fervent respect for peace in international relations. In this regard, particular comparative authenticity must be ascribed to the No-War Clause of the Constitution of Japan, as well as to the role of the HR in the Constitution of B&H. Although all of the five analyzed constitutions contain provisions which specifically proclaim sovereignty of the state or people in question, it is clear that impressions derived from the analysis of the content of the majority of numerous other provisions point to the opposite conclusion. An official normative announcement that a country is sovereign and that it freely adopts its own constitution does not mean much if the historical circumstances and the institutional framework bear witness to the contrary claim.

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Др Владимир МИКИЋ*

УСТАВНА ОГРАНИЧЕЊА СУВЕРЕНОСТИ НАМЕТНУТА ОД СТРАНЕ ИНОСТРАНИХ СИЛА НАКОН ДРУГОГ СВЕТСКОГ РАТА

Апстракт

Устави савремених држава усвојени су у складу са слободном политичком вољом грађана и њихових представника и у оквиру мање-више аутономних уставних државних капацитета. Ипак, у овај образац не убрајају се неки међу важећим уставима. Упоредно посматрано, два таква устава су веома важна – реч је о уставима Немачке и Јапана. Истовремено, друга три представљају одраз политичких интереса иностраних сила које првенствено теже за миром у пост-конфликтним државама. У њима су садржане донекле јединствена, мада не толико генерално упоредноправно употребљива решења. Ово је случај са уставима Босне и Херцеговине, Авганистана и Ирака. Историјски куриозитет који спаја анализиране уставе огледа се у томе што их нису слободно израдили релевантни политички представници посматраних држава. Ове су уставе надахнули, осмислили или, чак, написали представници иностраних (може се рећи и: окупационих) политичких ауторитета и војних снага. Истраживање које стоји иза овог чланка тежи откривању у којој је мери природа анализираних устава уистину иностранa (наметнута), као и да ли су ти правни акти имали за сврху да буду трајног или привременог карактера. Премда је јасно да је анализираним уставима суверенитет држава ограничен, некима од уставних одредаба указује се на то да су неке од тих држава, макар формално, суверене, што отвара простор за посматрачку процену искрености уставописаца. Средишња тачка истраживања састоји се у утврђивању да ли је анализираним уставима уистину остављен простор за испољавање државне суверености.

Кључне речи: Окупационе власти, сувереност, устав, ограничења суверености, интернационализација уставног права.

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