



The legality of the Imposed constitutions and the will of people and their consent

Prof. Dr. Sherzad Ahmed Ameen Al-Najjar

Abdulrahman Hamdi Abdulmajeed

Abstract

This paper focuses on studying the new concept of imposed constitutions as this new term has been lately discussed among constitutional scholars. This type of constitution is related on certain situations when a state goes through a harsh international and internal situation that affect its absolute sovereignty in a negative way. Such situations pave the way for international actors to intervene in multiple ways in the process of making a new constitution by implementing different manners. Such constitutions are labelled as imposed constitutions, in which the degree of the imposition varies from one case to another. These degrees of imposition are measured by different measures, most prominently in regards with will of the people and their degree of consent when it comes to the three main phases of the constitution making process which are the drafting, ratifying and implementing it.

Keywords: imposed constitutions, will of people, consent of people, international actors.

شرعية الدساتير المفروضة وإرادة الشعب وموافقته

أ.د. شيرزاد احمد امين النجار

عبدالرحمن حمدي عبد المجيد

الملخص

تركز هذه الورقة على دراسة المفهوم الجديد للدساتير المفروضة حيث تمت مناقشة هذا المصطلح الجديد مؤخرًا بين علماء الدستور. يرتبط هذا النوع من الدستور في مواقف معينة عندما تمر الدولة بموقف دولي وداخلي قاس يؤثر على سيادتها المطلقة بشكل سلبي. تمهد مثل هذه المواقف الطريق أمام الفاعلين الدوليين للتدخل بطرق متعددة في عملية وضع دستور جديد من خلال تطبيق أساليب مختلفة. توصف هذه الدساتير بأنها دساتير مفروضة، حيث تختلف درجة الفرض من حالة إلى أخرى. تُقاس درجات الفرض هذه بمقاييس مختلفة، أبرزها فيما يتعلق بإرادة الشعب ودرجة موافقته عندما يتعلق الأمر بالمرحلة الثالثة الرئيسية لعملية صياغة الدستور وهي صياغة الدستور والتصديق عليه وتنفيذه. **الكلمات المفتاحية:** دساتير مفروضة، إرادة الشعب، موافقة الشعب، الفاعلون الدوليون

Introduction:

The constitutional legitimacy problem shows how to prove that anyone should submit to the orders of a constitutionally valid law. The law-making system is considered legitimate if there is a prime duty to obey the rules it makes. Neither “consent of the governed” nor “benefits received” justifies obedience. Citizens tend to observe a constitutional law if there is an actual unanimous consent by the people to the jurisdiction of the lawmakers or, in the case of the lack of



support, shreds of evidence are made by procedures that assure people there are no unjust in these laws. Without majority agreement, a written constitution should be considered a component of the law-making regime. However, suppose any form established a law-making procedure that ultimately guarantees the justice of laws. In that case, it becomes legitimate even if the people's consent has not been linked to that constitution. This type of constitutional legitimacy does not assume any particular theory of justice but instead stands between the concepts of justice and legal validity.

The term the sovereignty of people is essential to most classical constitutional theories. However, modern examples, such as in the case of imposed constitutions, undermine this primary principle. This phenomenon creates a paradox between the traditional theory, which makes the people the leading actor in the involvement of the constitution-making processes¹. The participation of the international community in constitution-making processes has recently taken multiple forms over time. To maintain international peace and security, military interventions were considered a justification for intervention, particularly after the foundation of the United Nations (UN) system, which has made peace-building operations a prime task of the international peace and security institutions. The end of the Cold War and the need to tackle with failed governmental systems of many nations formerly belonging to the socialist bloc necessitated the establishment of new sets of actions to maintain peace and security across the globe. On the other hand, by bringing about unseen interactions among nations, globalization turned some internal matters, traditionally considered purely domestic affairs, into international ones, which involves the implication for other countries².

Defining the will of the people:

The emergence of the 'will of the people as a term in political science was a significant development, and it was experienced as such by the people themselves. In the outcome of the major revolutions of the late eighteenth century, to assure the intended, logical, and collective will of the people as the source of political legitimacy and the principal reasoning behind the political actions that rejected the alternative methods of political thinking that were based on the exclusion of the society will and it was considered a politic determination by natural, historical or economic need. It was on the opposite on the other then

¹ Blerton Sinani, 'A CRITICAL-LEGAL OVERVIEW OF THE CONCEPT OF CONSTITUTION AS THE HIGHEST LEGAL-POLITICAL ACT OF THE STATE IN THE LIGHT OF CONSTITUTIONAL-JURIDICAL DOCTRINE' (2013) 29 Pravni Vjesnik 51.

¹John Graham and Elder C Marques, 'Understanding Constitutions: A Roadmap for Communities' [2000] Institute on Governance., P.5

²James Bryce Bryce, *Studies in History and Jurisprudence*, vol 2 (Oxford University Press, American Branch 1901). P.125



prevailed concepts of will such as the will of God³, of God's representative on earth, or his semi-secular equivalent: the will of an elite entitled to govern on account of their accumulated privileges and qualifications.⁴

Thus, the simple definition of "will of people" term could be described as the 'deliberate and inclusive process of collective self-determination. Like any kind of will, its exercise is voluntary, emancipatory, and autonomous, a matter of practical freedom; like any form of collective action, it involves assembly and organization".⁵ "Rousseau differentiates between what he describes as the 'will of all and the 'general will." The will of all expresses people's thoughts while looking at political issues from their viewpoint. There may be as many wills forming the will of all as individuals. The general will, in contrast, is shaped while citizens seek to determine what is in it for their interests. The concept may be illustrated through an instance that Rousseau himself uses."⁶

"The general will is the intention to promote the common good. The community expresses the general will insofar as it intends to promote the common good, and likewise with its members."⁷ "If everyone agreed on these common decisions, there would be no problem." This is what Rousseau wanted to imagine occurring in a peasant society ruled by the general will while laws to be proposed: "The first man to propose them merely says what all have already felt." This was a very romantic opinion when Rousseau wrote it down; it is a romantic imagination by today's standards. People have contradicting statements and different interests, which need to be reconciled in some ways if public policies are to be considered. Not everyone in society is able just to go his own separate way. However, when people have different thoughts, they risk reaching an end route unless they can reach an agreement on a common ground to tackle their disagreements. They need a way to agree on a formal policy decision, accepting that there are different and incompatible opinions about what should be done."⁸

Characters of the will of people:

According to its different identifications, the will of the people with the constitution writing must have the following characters:

³ For more on Freewill and God, James Fieser, 'Great Issues in Philosophy' [2009] Retrieve from www.utm.edu/staff/jfieser/120.

⁴ Peter Hallward, 'THE WILL OF THE PEOPLE' [2011] Theory After Theory' 90.

⁵ Hallward (n 4). P90.

⁶ Albert Weale, *The Will of the People: A Modern Myth* (John Wiley & Sons 2019). P30.

⁷ Gopal Sreenivasan, 'What Is the General Will?' (2000) 109 The Philosophical Review P545.

⁸ Weale (n 6). P32.



Voluntarily:

Not as the involuntary or reaction answers, people's will should initiate actions by free, rational intention. As Rousseau explains, the primary "principle of any action lies in the will of a free being; there is no higher or deeper source. Without a will, there is no freedom, no self-determination, no moral causality".⁹

Collectively action and participation:

By this, we mean the involvement of the collective action and direct participation. The democratic political will relies on the strength and practice of inclusive participation and the ability to hold a legal obligation.¹⁰ The assertion of what Rousseau calls a 'general will' is a matter of collective choice at every stage of its progress. The inaugural 'affiliation' is the maximum voluntary act within side the world,' and to stay a lively player of the affiliation 'is to w il what's with inside the not unusual place or popular interest.' Insofar (and best insofar) as they pursue this interest, every character 'places his character and all his electricity in not unusual place below the best management of the popular will. Defined in this way, 'the overall the will is constantly at the aspect maximum beneficial to the general public interest, this is to say, the maximum equitable, so that it's far vital simply to be confident of following the overall will.'¹¹ A will of people exists mainly when the need to pursue it is far better than the distraction of single interests. To say that a people's will is 'strong' does now imply any longer that it is to diminish opposition or imposes certain forms. It indicates that process of negotiations within the variations of different wills would result in the result that the common interests will finally prevail.¹²

Empowerment of the will:

Will instructs the initiation of action, not representation. Exercising the will involves holding power, not receiving it, assuming that the people usually own the right to take it back as a matter of reason or natural right.¹³

The realization of the will:

The will is distinguished from being only a wish or fantasy via its ability to initiate a process of genuine realization¹⁴. The intention is – in such understanding – is more likely related to the sort of actions that are applicable

⁹ Hallward (n 4). P95.

¹⁰ Hallward (n 4). P96.

¹¹ Hallward (n 4).P96.

¹² Hallward (n 4). P97.

¹³ Hallward (n 4). P98.

¹⁴ Hallward (n 4). P99.



and can be done via the tools and means of exercising people's will. Although, as mentioned above, the intention is linked to the initiation of actions, then the choice must be distinguished from the ideas still in the negotiation stage and considered by public opinion.

Imposed constitution and consent:

The possibility of the idea that a constitution can be imposed with the acceptance of the people on which it is set is under debate. Considering that The general understanding of the term 'imposed' basically means that a constitution is being forced on certain people after wars dismiss this possibility. The prominent character of an 'imposed constitution' rejects the idea that a nation could deprive itself of its natural right of self-determination following democratic principles of constitution-making.¹⁵

A constitution can be imposed with consent if a nation calls on another government or an international actor to act on behalf regarding amending its constitution. Depending on another country creates a heteronomous relationship between them. In this example, the called-upon Nation will exercise a decision-making level of authority over the internal political players to formalize their constitution changes. This relationship certainly differs from the defeat notion that defines the relationship between countries in the context of winning or losing wars.¹⁶

Another form of imposing a constitution with consent is where a country invites another country or external player to adjudicate disputes resulting from its constitution. This case occurs when the interpretation of a domestic constitution is believed to be in the power of another sovereign law-making entity, bounded by limits drawn by local political actors according to their norms and preferences.

The last type of a constitution imposed with consent is when the interpretation of a constitution functionally falls under the control of domestic actors but is formally restricted by external law sources. Usually, domestic players interpret their local constitution per the domestic law sources. But in this case, the interpretation of the provincial constitution is bound by external rules. An example of this model is the Swiss Constitution, where all instances of constitutional amendment or replacement must respect "mandatory provisions of international law."¹⁷

¹⁵ Richard Albert, 'Constitutions Imposed with Consent?' (2017),(1)

¹⁶ Albert (n 15).

¹⁷ Albert (n 15) 22.



Whose consent:

One of the difficulties that face the study of defining the 'consent' term here is determining whose consent is needed in drafting, adopting, and implementing a constitution. In this matter, groups of people and institutions should be regarded and considered to examine the acceptance of the newly imposed constitution. In this regard, there are some levels and groups, as follows:

The state consent:

By state, we mean the official institutions representing a country's sovereignty, including the government and its branches. But, to argue that merely states need to have consent goes against the classic understanding of the constitutional term and their political theories. Taking into consideration the liberal perspective, which focuses on the autonomy of individuals, not the state, it will turn it the too weak argument that imposition only counts when it occurs to entities known as states. Conversely, it doesn't count when it happens to actual people. This becomes more difficult when we consider that the people are the main factor in the process of constitution-making and that the power to create a constitution belongs only to the people, not to the state, which is itself created by the will of the people.¹⁸ For these normative reasons, it will be clear why scholars have labelled constitutions declared by monarchs as the imposed constitution in some ways¹⁹.

The people's consent:

Suppose there is to be consent that confers legitimacy on a constitution. In that case, it is difficult to avoid the conclusion that the consent in question must ultimately be directly or indirectly the consent of actual people. But even to say that a constitution needs the permission of 'the people, this argument will surely bring another argument into the discussion about who should be considered as 'the people. Are they those who must abide by the constitution under discussion, or just a portion of the citizens? Perhaps minority of political elites or certain vocal and influential constituencies²⁰. Or a larger but still politically privileged subset of the population—call it the political community, the citizenry, or the

¹⁸ Tamara El khoury, 'Pouvoir Constituant' Oxford Constitutional Law (december 2017) <<http://oxcon.oupplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e709>>. Tamara El khoury, *Pouvoir Constituant*, Oxford Constitutional Law (december 2017) (sep. 15, 2020), available at <http://oxcon.oupplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e709>. 22/08/2022 22:36:00

¹⁹ Ramesh Chandra Thakur, Michael Ignatieff and Simon Chesterman, *Making States Work: State Failure and the Crisis of Governance* (United Nations University Press New York 2005). P59-62.

²⁰ Mark W Janis, 'Human Rights and Imposed Constitutions' (2004) 37 Conn. L. Rev. 955.



"polity"? If the distinction is between citizens and non-citizens, why do some people get to be "citizens" and thus have a say in government matters while others do not? To those who are disenfranchised, do we have anything more convincing or satisfying to say than the mere tautology that "your views do not count because those of us whose views have decided that your views do not count"?

How much consent is needed?

How much support is needed before it could be said that a constitution is accepted rather than imposed? First, of course, the majority support usually refers to widespread approval. The obvious reason for saying that is apparent. In any community of even small sizes or diversity, unanimity is a practical impossibility; some lower threshold is a practical necessity if political decision-making is to occur. Super-majority rule is common for decisions necessary for nature or difficult to reverse, such as constitutional revision. A majority is needed, particularly in the field of Constitutional Law. Thus the whole idea of a constitution is to be linked to a majoritarian excess, and the protection of minorities, some higher threshold, or something approaching consensus, might be necessary²¹.

But why could anything less than majority acceptance count as an imposition from the perspective of those on the losing side? Whatever the level of support is, it is still unclear whether the majority of constitutions would be capable of meeting this requirement, such as mechanisms for registering public sentiment are common. Still, statistically, only one-third of the states' constitutions require direct public participation in the form of a popular referendum requirement. Instead, citizens are usually expected to register their views indirectly by electing representatives to a constitution drafting assembly or a legislature body. But using such a mechanism may not accurately prove strong and original support for that proposed constitution. The side that imposes a constitution can be predicted to form at least a thin cover of procedures to gather popular support. For example, a military junta that does not tolerate even the existence of opposition may never go to the degree of holding a popular referendum when the time comes to adopt a constitution that undermines their rules²².

²¹ Mark W Janis, Richard S Kay and Anthony Wilfred Bradley, *European Human Rights Law: Text and Materials* (Oxford University Press, USA 2008).

²² Yaniv Roznai, 'Internally Imposed Constitutions' [2018] *The Law and Legitimacy of Imposed Constitutions* (Richard Albert, Xenophon Contiades, and Alkmene Fotiadou eds., Routledge, 2018 Forthcoming). (pp. 58-81).



Conclusion:

The imposed constitution might be seen negatively by many political science and legal scholars, as its name suggests the lack of will of the people during its making process or the lack of public consent. But in reality, all constitutions have degrees of imposition elements and in modern days the intervention of international actors. Thus, it is highly necessary to study and highlight these three mentioned aspects when imposition constitutions are detected in somewhere in the globe.

The degree of how much will of the people was affected or respected during the constitution writing process does affect the way the citizen reacts with their new constitution, which ultimately affects its legality. But, taking in consideration the cases of imposed constitutions in Japan and Germany, it shows to us even with lack of the will and sovereignty, the consent of and the way of the people towards their new imposed constitution have not affected the legality side in a negative way, on the contrary, these two constitutions remained mostly intact and proven successful.

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