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### **GOBERNAR EL SIGLO XXI – GOVERN THE 21ST CENTURY**

#### **Multilevel constitutionalism and Global Democracy**

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# GOBERNAR EL SIGLO XXI – GOVERN THE 21<sup>ST</sup> CENTURY

## Multilevel constitutionalism and Global Democracy

Ingolf Pernice, Berlin\*

President,

Distinguished Ladies and Gentlemen

This Congreso del Futuro is an extraordinary venture in science and its social impacts. It enjoys a great audience here in the Salón de honor, ExCongreso Nacional, and people can follow its proceedings worldwide – and rightly so, since the subjects at issue are of a global dimension and concern.

It is the internet that makes it possible for thousands of people to follow the video-stream, worldwide, in real time.

I am most honored and grateful for being invited to make a modest contribution, though my thoughts are a challenge. And the title of this session is not modest: I was asked to explain some ideas related to the question: Gobernar el Sieclo XXI – Govern the 21st century. As I am not a prophet what could I tell you?

As a scholar of constitutional law, of European and international law, having gathered also some knowledge of the working of the internet, I am happy to use this opportunity to present some perhaps somewhat revolutionary thoughts about governing in the future. As Edwy Plenel already dealt at the Congress with the subject: “Revolución digital, revolución democrática” – I am happy to refer to his stimulating speech and to add a third aspect, closely linked to the digital and the democratic revolution: It is the revolution of the world order and of the role the individual can take.

Yes, the individual is the real sovereign in a multilevel system of democratically organized levels of political action, including the global level. And this is possible, as I will explain, thanks to the internet or, more specifically, though e-democracy.

My proposition is based upon the recognition of human dignity, that means both, self-determination of everybody, and the mutual respect of the other, his or her otherness, diversity of the value of our society. And as we live in a society, we can organize our life and self-determine our conditions of life so to make best of it, in our families, local communities, regions, states and, if you like, supranational or even at a global level. Take the perspective of the mature, civilized individual, that associates, as appropriate for achieving the objectives, and defines herself as:

- a citizen of his local community, take your case: citizen of Santiago
- a citizen of his region or subnational district, perhaps la región Metropolitana
- a citizen of his nation-state: This is Chile in your case, Germany in my case

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- perhaps also, as is the case for me: a citizen of a supranational union: I am a EU citizen, - and

here is my question: What are the reasons and conditions for us, people from all around the world, not to perceive us also as citizens of the world – or as “global citizens”?

This is the question of the 21st century. Yet, already Immanuel Kant spoke about world citizens. And it is worthwhile to read his “perpetual peace”. It is the question of the 21st century, nevertheless - at least if we wish that the 21st century become a century of peace, of solidarity, of prosperity for all. I do wish so, definitely, for the sake of humanity.

In fact, we already have several political identities, related to the diverse levels of political communities to which we belong: Each level serves certain tasks, for certain purposes of common public interest. As the case may be, each level has its own constitutional setting: institutions, responsibilities and powers, decision-making procedures, with some definition also of the rights and obligations of the individuals being citizens of the respective community. Governance, already today, thus, has a multilevel structure. And to understand this in terms of constitutional law, I have proposed to talk about “multilevel constitutionalism”. With this concept I try to explain the European Union; and this is what I propose to extend to the global level.

What is new about multilevel constitutionalism? It is the perspective of the individual – that is, in terms of democracy, the only source and origin of legitimate or sovereign powers exercised by public authorities, at whatever level it may be.

In academic writing, you can find a brought debate on “global constitutionalism”, the main trend is to argue for a binding character of some international law upon states, with a view to protect human rights and to preserve peace: taming the prince! The prince, here, is the state. Binding international law would represent a sort of external constitution for each country. But this is not the reality. As we know, states – sometimes just their governments – feel sovereign, and there is little hope that this will change, except for very convincing reasons.

Taming the prince, means questioning states’ sovereignty. Take the example of the European Union. Its institutions exercise sovereign rights they are entrusted with for special purposes. The result is, as the European Court of Justice says, that member states gave up parts of their sovereignty for the benefit of a functioning European Union.

But who has conferred these sovereign rights to the European institutions, who could really do so, and for what purposes?

The common answer is: The member states. My answer is: the citizens of the member states. By contracting through their national institutions the establishment – or better: the “constitution” – of the EU have defined themselves as the citizens of the Union.

The primary purpose was: Preserve peace, after centuries of horrible wars among the peoples of Europe. Other purposes were: secure prosperity and welfare for all, and freedom and the protection of human rights, through “an ever closer Union among the peoples of Europe”, as the Preamble of the EU-Treaty states.

And here is my answer to the question of the 21st century, put a few minutes ago:

The condition for us, people from all countries of this world, to perceive us as global citizens would be a global constitution by which we create the institutions, powers and procedures for achieving objectives of our common interest, to act in matters that are beyond the reach of national or even supra-national authorities.

Be sure, this does not mean a global state. Other organizations can have a constitution too, at least in a post-national, functional sense.

But there are at least three important questions I will try to answer step by step:

1. Why should we endeavor to adopt the identity of global citizens through a constitutional process with the aim to set up institutions vested with the power to act?
2. How could a constitutional setting look like for democratically and effectively implementing the responsibilities of such institutions, and what is their relationship to our states?
3. What is the specific role of the internet and e-democracy in this constitutional process, and for the later operation of institutions set up for the purposes that may justify them?

The first question regards the democratic deficits of our present system of sovereign nation-states.

The second is related to the concept of multilevel constitutionalism as a possible way-out of the existing sovereignty-trap we are still in.

The third is critical insofar as we have no experience with e-democracy connected to global constitutionalism, so we approach new territory.

Let me shortly sketch out, and later discuss with you, the main ideas at the basis of the answers to these questions. My conclusion is simple: If democracy means self-government, or self-determination of the individual, than provisions for legally binding regulation at the global level are not only an option, but a necessity. And the internet is not only a subject for such regulation, but primarily the instrument that makes it possible: global democracy through the internet.

#### I. THE FIRST QUESTION, THUS, WAS WHY SHOULD WE DO THIS?

Why should there be a global constitutional setting for regulation beyond the state, why global citizenship?

Some people feel as global citizens already today; they travel around the global village without even noting the different countries and cultures, speak many languages and make business across borders: cosmopolitans. But this is part of what global citizenship is about.

More important is that relationships among people around the world are becoming denser, people travel, meet, communicate, associate, and this not only for the good; but they may also organize crime or terrorism, so abusing the freedoms, facilities and the internet for bad purposes: Need for regulation.

As David Held observed already in the nineties, the global interconnectedness increases the external effects of national politics, I quote:

“National communities by no means exclusively make and determine decisions and policies for themselves, and governments by no means determine what is appropriate exclusively for their own citizens.”

Let me just name a few examples:

- Climate change: That the low-lying islands, countries in the Pacific will perish in the sea, is not a consequence of their domestic policies.
- Why are nuclear plants in the northern hemisphere, where the wind from west is the rule, generally located at the eastern border of each country?
- The global financial crisis was the result of certain policies in the U.S. The consequences hit the economies of other countries worldwide.
- Can we accept that powerful banks determine the destiny of our countries through global financial transactions made within seconds through the internet?

True, we should not blame the banks for using the freedoms given to them. What we should do is: setting limits, a global legal framework for their action, as necessary for preserving democratic self-determination of our countries. And this framework needs to be democratically established, as an expression of self-determination of the citizens of our countries, acting together through global institutions.

To tackle climate-change or regulating the global financial markets are only to fight against organized crime and international terrorism or to protect human rights effectively in cases of totalitarian regimes or failed states, but also to ensure the openness and security of the Internet, privacy and data protection – how could one state acting individually deal with these issues?

Democracy means also the capacity to act effectively in matters of concern. Only common action and binding regulation at the level where the problem appears is a solution. If the state has not the power, the necessary institutions have to be established beyond the state. Jürgen Habermas says – I quote from his book on “The Crisis of the European Union. A Response” (2012):

“In view of a politically unregulated growth in the complexity of world society which is placing increasingly narrow systemic restrictions on the scope for addition of nation states, the requirement to extend political decision-making capabilities beyond national borders follows from the normative meaning of democracy itself”.

## II. LET ME NOW COME TO THE SECOND QUESTION:

How can a constitutional setting look like for democratically and effectively implementing beyond the state, what is the relationship to our national constitutions? This is where multilevel constitutionalism comes in:

We would not strive to creating a world state, with a world parliament and a world government. Copy and paste of the state model is not an option, for many reasons.

Immanuel Kant already said that it would lead to tyranny. The idea of a world parliament as a legislative body in the traditional sense, faces the problem of size. It would either be too big to function properly, or it would not be representative for the diversity of cultures and political preferences.

My vision for a global constitutional framework for regulation in some key areas is more modest. It is build upon functioning democratic states and supranational organizations, additional and complementary, and necessarily less rigid, and above all: based upon the rule of law, action through law – with no physical coercion, no police, no army.

From the perspective of the individual, it seems preferable to follow the model presented by James Madison in the Federalist No. 46:

“The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.

What we need, thus, and what seems to be possible today thanks to the internet and e-democracy, is the establishment of a global layer of political discourse, of will-formation and – as I would call it: of validation of – normative processes resulting in common principles, standards and, as felt appropriate, binding regulation for limited, well determined policy fields.

The architecture of the system would be governed by the principle of subsidiarity: Only where states or supranational organizations are unable to effectively achieve the desired results, can global institutions be competent. We have some experience in Europe for how this principle works for the attribution of responsibilities and powers, as well as for their exercise.

Though David Cameron is not happy with it, it works pretty well. The system could be improved, yet also for global ruling.

Against the backdrop of the experience with internet governance, and drawing from the principles applied in the Rio-process at large, I believe that at least five elements of a regulative system for global issues should be considered:

The establishment, by the UN, of a Global Governance Forum (GGF). It would follow the example of the very successful Internet Governance Forum (IGF). It would not take decisions, but offer the space for an open, organized, inclusive and structured multi-stakeholder discourse on the relevant questions to be tackled. Its function is rather a brain-storming and mind-setting function; people who participate on the spot or on-line would learn from each-other, develop ideas and better understand diverse interests, perspectives and preferences.

Insights and ideas from the GGF are the basis for the elaboration of principles and standards by a body to be established following the model of NETmundial. Let us call it: Principle-setting body (PSB). The principles and standards would be adopted by consensus, without being legally binding. But processes of monitoring, best practices and peer review could be applied for encouraging the respect of the principles by states and organizations.

The classical form of validation and legal concretization of the principles would be international conventions. Yet, as we experience, it is not only difficult to negotiate

meaningful legal obligations – the Paris Agreement on climate change is a recent example –, but it is often not sure that they are implemented properly. More importantly, citizens and the civil society have little to say. The more international treaties tend to lay down self-executing law in each state – some talk about “Weltinnenrecht” (domestic global law), the more effective democratic participation of the citizen is in need. – My proposal, thus, is to give the General Assembly of the UN the power to decide upon the validation and concretization of the principles and standards with qualified majority. But, to become binding law, the consent by the global citizens is required. This is to be achieved through a system of e-voting at the global scale, possibly organized by the UN Secretariat General.

If legal provisions that are directly applicable to the citizens are adopted at the global level, the system must be based upon both, an effective protection of the fundamental rights and a Global Court of Justice (GCJ) in charge of the judicial review. The competence of this Court could be extended to decide upon questions of implementation of the global law so to make sure that it is equally applied in all countries.

Both, the regulation and the case-law, should be subject to review-processes. An open global discourse on the effects and necessary improvement could lead to new initiatives within the GGF and the PSB and ensure a dynamic development of global law at large.

### III. THIS BRINGS US TO THE THIRD QUESTION:

What is the specific role of the internet and e-democracy in this constitutional process, and for the later operation of the institutions finally set up for the purposes that may justify them?

Part of the answer was already given. But let me shortly explain why only in the age of the internet the vision of democratic regulation at the global level can be seen as a realistic option.

Or, with other words: that governing the 21st century may mean: self-government of the citizen in a multilevel system including a global level of regulation.

I do not need to rehearse, at this spot, the benefits of the internet related to the access to information, communication, social networking and deliberation in real time, with no borders and the potential to include everybody everywhere.

Nor do I need to remind problems that exist with regard to the digital divide, that is a democratic divide, net neutrality, mass surveillance, data security and protection, privacy and all abuses of the internet. To deal with these problems effectively is a first priority, it is the basis of the trust people can have in the internet, and therefore, it is the condition for the application of the internet in governing the 21st century.

In some respect, indeed, there is a vicious circle. Trust is the condition for the full application of the internet, while the internet is a condition for establishing a system for the regulation necessary for re-establishing this trust.

The solution will be a pragmatic step by step constitutional process, that is lead hand in hand with arrangements among the stakeholders making sure that citizens support the process for their own benefit.

There are four important aspects to be mentioned, where the internet has a decisive relevance:

- Unlimited and real-time access to information, education, culture for all citizens interested in participating in the political discourse at all levels.
- With the internet, for the first time, it is possible to envisage a global public sphere to emerge. Deliberation is possible, across borders, in social networks, discussion forums. This includes, as already mentioned, the on-line participation in the IGF and NETmudial, or the future institutions established following these models.
- Encouraging experiences made with direct participation of citizens in constitution-making processes. One is the “futurum” website opened in 2001 by the Constitutional Convention that elaborated a draft Treaty on a Constitution for Europe. A second example is the attempt in Island of what was called the “first crowd-sourced constitution”. Lessons to be learned from the two examples could help to develop an internet-based participative process also for the establishment of a global constitutional setting.
- E-voting and e-referendums, as a mode of direct democracy at the global level. It is true that experience so far with e-democracy is rather limited and academic writing tells us that it does not change the democratic system fundamentally.

This, however, could be different if a new setting is organized following the lines proposed by Majid Behrouzi, 2005: His “theory of direct-deliberative e-democracy”, developed for reforming the US constitution with a view to empower the citizen, gives us a number of insights that are helpful for designing a system of e-voting for the global citizen called to directly participate in global decision-making processes.

I shall not bore you in summarizing his theory. What is essential, however, are three points he makes that are particularly important:

1. The citizen is the real sovereign: Behrouzi understands Rousseau in an individualistic way:  
“the sovereignty of the people turns out to be the sum total of the individual sovereignties of the individual citizens who comprise the demos”;
2. E-voting of the citizens is based upon a process of learning, deliberation and education related to the subject at issue.
3. There are elected experts and trustees who as “guardians of the citizens” set up the agenda for the voting exercise, and who in some way participate, as a special assembly, in the final decision.

The weight of the citizens e-vote in the decision-making process, finally, depends on the voter turnout. This would encourage participation, but also leave the power in the hands of the institutions, if people are not interested.



## CONCLUSION:

Even if we understand that there not only is a need for global regulation on global issues, but that this is even a requirement of democracy, a constitution for it will not be done from one day to the other. There is a long way to go for achieving it. Yet, the internet and e-democracy, in particular, may make it possible.

The process will include establishing democracy in many countries where it is not existent yet, let alone in failed states that even do not have a government at all. It will include coming to what Hasso Hofmann called a mutual promise of human dignity among people, as a basis for solidarity also at the global level, and to the recognition of human rights worldwide. Also the technical requirements for free and equal access to the internet are yet to be set up. All of this, however, may be a question of time. More important is:

If we learn to take ourselves seriously as the owners of our political system, it is the internet that allows us to establish global democracy and so to govern, ourselves, the 21th century.