

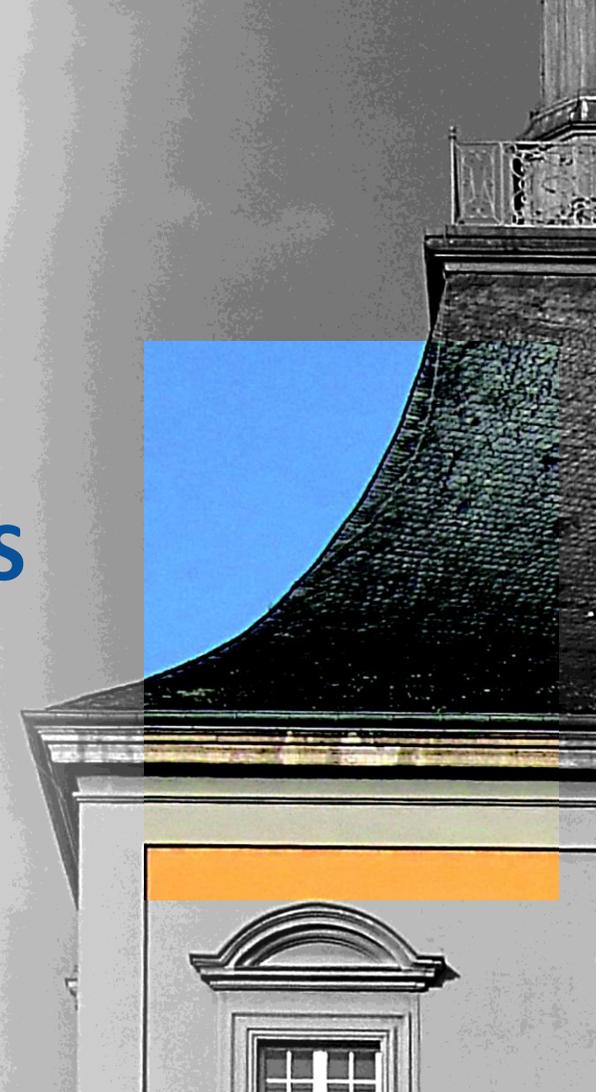


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PARLIAMENTARY CONTROL OF AND WITHDRAWAL FROM TREATIES

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THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON
CONSTITUTIONAL DEMOCRACY IN AFRICA
– WORKSHOP IN WINDHOEK, 6-8 MARCH 2019



I. PARLIAMENT AND THE RATIFICATION OF TREATIES UNDER THE GERMAN BASIC LAW

1. Ratification of treaties in general (Art. 59 (2) GG)

- “Political” treaties
- Treaties affecting domestic law

2. Treaties transferring sovereign powers to supranational organisations (Arts. 23, 24 (1) GG)

II. SUBSEQUENT EVOLUTION OF TREATIES BY CONSENSUS

The case of the “New Strategic concept” of NATO. Federal Constitutional Court: violation of Parliament’s rights only if the consensual evolution affects the structure of the treaty (BVerfGE 104, 51 para.154)

III. WITHDRAWAL FROM INTERNATIONAL TREATIES

- Traditional approach under the German Basic Law

- reference example: European Convention on Human Rights European Union Law

- New Tendencies:

Powers as to withdrawal mirror powers as to approval of treaties (actus contrarius).

Joint authority over withdrawal from treaties

United Kingdom: Supreme Court on “Brexit”, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

“80. One of the most fundamental functions of the constitution of any state is to identify the sources of its law. And, as explained in paras 61 to 66 above, the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning. This proposition is indeed inherent in the Secretary of State’s metaphor of the 1972 Act as a conduit pipe by which EU law is brought into the domestic UK law. Upon the United Kingdom’s withdrawal from the European Union, EU law will cease to be a source of domestic law for the future (even if the Great Repeal Bill provides that some legal rules derived from it should remain in force or continue to apply to accrued rights and liabilities), decisions of the Court of Justice will (again depending on the precise terms of the Great Repeal Bill) be of no more than persuasive authority, and there will be no further references to that court from UK courts. Even those legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.”

“81. Accordingly, the main difficulty with the Secretary of State’s argument is that it does not answer the objection based on the constitutional implications of withdrawal from the EU. As we have said, withdrawal is fundamentally different from variations in the content of EU law arising from further EU Treaties or legislation. A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, if Notice is given, this change will occur irrespective of whether Parliament repeals Page 28 the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.”



- South Africa: Withdrawal from the Rome Statute
- Switzerland (legal and political controversy) (see Schweizerische Eidgenossenschaft, 16.456 Parlamentarische Initiative Kündigung und Änderung von Staatsverträgen. Verteilung der Zuständigkeiten Vorentwurf und erläuternder Bericht der Staatspolitischen Kommission des Ständerates vom 16. November 2017)
- United States of America: condominium of President and Congress?
- A new balance between legislative and executive power under the German Basic Laws
- “Political treaties”
- Treaties affecting domestic law and individual rights

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