ABSTRACTS

From the "Community" to the "Union of South American Nations"

By *Waldemar Hummer*, Innsbruck

Conceptually built on its predecessor, the „*Community of South American Nations*“ (CSN), founded in 2004 on the basis of a brazilian initiative, the „*Union of South American Nations*“ (UNASUR) was formally inaugurated in May 2008 by twelf Latin American countries. A detailed description of the aims, purposes, objects, powers and institutional setting reveals that UNASUR is formally equipped with international personality, but does not dispose of the necessary competences in order to discharge its duties. Therefore, the statute of UNASUR seems to be only of a programmatic nature. Although UNASUR is referred to as a model of economic integration and cooperation as well, UNASUR in reality represents neither a regional preferential zone in the sense of article XXIV GATT nor a special „Union of Nations“ as regards public international law. UNASUR is nothing but a mechanism to harmonize special policy areas to be coordinated or integrated afterwards in a formal manner by its member states. As one of its most concrete aims UNASUR strives for the convergence of the two leading regional preferential zones in the Southern Cone of Latin America (Cono Sur) - that is the „*Common Market of the South*“ (MERCOSUR) and the „*Andean Community*“ (AC) - into one single free trade area, but unfortunately without indicating how and when this objective should be reached adequately.

The Statute of Bayonne (1808) and Spanish America

By *Andreas Timmermann*, Berlin

200 years ago a spanish assembly approved the first constitutional document. Significance and legitimacy were disputed amongst Spaniards and Americans. The Statute of Bayonne makes nevertheless a start with the constitutional history in Spain; and indirectly in Spanish America as well, because the Statute of Bayonne is essential part of french intervention in the internal affairs of the spanish kingdom that resulted in the emancipation of overseas territories. The author elaborates on this process and explains the repercussions in Spanish America.

The special role of reserved Māori Seats in New Zealand's system of mixed-member proportional representation (MMP) – successful minority privilege or out-dated relict of colonial power?

By *Constantin Frank-Fahle*, Hamilton

The German electoral system, also referred to as the Mixed-Member-Proportional System (MMP), has been the preferred electoral system in a number of international electoral reforms since the early 1990s, including New Zealand in 1993. Since 1867, New Zealand has provided special electorates for its indigenous people, the New Zealand Māori. The Māori Seats were originally established because during the colonial period, Māori were often not able to meet the property qualification required as part of the New Zealand Constitution Act of 1852. Furthermore, the previous electoral system of First-Past-the-Post (FPP) favored majority representation and could not secure the interests of minorities. Since that time, the potential abolition of the Māori constituencies has been a significant and significant political issue, particularly because the shift to proportional representation in 1993 provided justification for removal. The Royal Commission on the Electoral System reported in 1986 that with the potential adoption of MMP, the Māori Seats would lose their raison d'être as minority representation would be guaranteed by MMP. Interestingly, the Royal Commission recommended that an exemption clause to the 5% threshold should be established for those parties that specifically represented Māori. This threshold waiver was based on the German provision of securing representation for national minorities on the federal level (Bundeswahlgesetz) and partly on the state level (Landeswahlgesetze). In particular, in Schleswig-Holstein, this exemption clause guaranteed representation to the South Schleswig Voters League, representing a small Danish-speaking minority.

This article scrutinizes the establishment and development of the Māori Seats under special consideration of the electoral reform, demonstrating that the Māori Seats have lost their raison d'être under proportional representation. Since the New Zealand electoral system is based on German style MMP, the author provides a discussion of the special provisions for national minorities and their method of securing representation. However, it is stressed that the process of retaining the Māori constituencies is linked to the recognition of Māori as an indigenous people set forth by the Treaty of Waitangi. In this example, the balance between indigenous representation and the cultural/political reality are illustrative of the complexity and sensitivity of electoral law reform.

Bolivia: "Indian" State? Reflections on the plurinational state in the constitutional debate in Bolivia

By *María del Pilar Valencia / Iván Egido*, La Paz

Boaventura de Sousa Santos introduced the idea of the Experimental State in the international debate and put Bolivia as an example in order to develop the concept. There,

the characteristics of the plurinational state, the constitutional guarantee of Collective Rights and the recognition of indigenous territorial autonomies have become subjects of great controversy and political debate since the first moment they were brought up. The authors attempt to unravel these concepts in the context of the Constitutional Assembly (2006-2008) by describing the processes in which the concepts were developed from the perspective of the indigenous people and by analysing them from a legal and constitutional point of view.

Brazilian nationality law between ius soli and ius sanguinis

By *Jürgen Samtleben*, Hamburg

Laws regulating citizenship reflect the values and policies that a country advances in relation to the outside world. During the times of strong Brazilian immigration, only the principle of *ius soli* offered adequate solutions by providing that Brazilian citizenship was acquired by birth in Brazil. Children of Brazilian parents born abroad had to come to Brazil to become Brazilian nationals. The situation has changed in recent decades. A significant part of the Brazilian population has left the country for economic reasons. This favoured the principle of *ius sanguinis* according to which a Brazilian father or mother can obtain Brazilian citizenship for their new born by registering it in a Brazilian consulate. The article discusses the evolution of these opposed tendencies in Brazilian constitutional law and the final outcome in the Constitutional Amendment no. 54 of 2007.

Universalist Constitutionalism in the Philippines: Restricting Executive Particularism in the Form of Executive Privilege

By *Diane A. Desierto*, Manila / Yale

In *Romulo Neri v. Senate of the Republic of the Philippines* (March 25, 2008), the Philippine Supreme Court upheld a Cabinet member's claim of executive privilege in a legislative inquiry involving controversial high-level corruption in government transactions, after the narrow *Neri* majority transplanted a test of 'presidential communications privilege' from American jurisprudence. The *Neri* majority's abrupt importation of American jurisprudential doctrine caused the untoward expansion of the doctrine of executive privilege, with unsettling implications for universalist constitutional politics. This was an unprecedented departure from the settled pattern of Philippine constitutional jurisprudence, which, before *Neri*'s promulgation and in strict adherence to the universalist normative structure of the 1987 postcolonial and post-dictatorship Philippine Constitution, had generally favored a greatly-delimited sphere of unreviewable Presidential discretion.

This Article applies a universalist reading of the postcolonial and post-dictatorship 1987 Philippine Constitution to a specific form of executive particularism – the doctrine of

executive privilege. Executive privilege is not found anywhere in constitutional text, but existing through judicial recognition. Given this doctrinal singularity, the Philippine Supreme Court's methodology and use of foreign sources in recognizing executive privilege should be seen as an open area for contestation and critique. Posing a universalist dialectic to the problem of executive privilege, I argue that while Presidential control of information regarding public transactions is typically fraught with the particularist justifications of "sovereign prerogative" and "national interest", executive privilege can be scrutinized from the lens of the 1987 Constitution's universalist ideology. In this case, universalist ideology is ascertainable from expressly-constitutionalized universalist rights to information and access to government data, as well as international legal standards on the right to information that are likewise present in the Philippine constitutional system due to the Incorporation Clause. Judicial sensitivity to universalist constitutionalism in the 1987 Constitution should therefore favor a return to restricted executive particularism, and ultimately, a more limited scope of executive privilege.