

LESSONS FROM THE PAST?  
RULE OF LAW, INSTITUTIONAL ARRANGEMENTS,  
CONSTITUTIONAL REVIEW

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**Summary:** 1. Lessons from the past? – 2. The dreadful 20<sup>th</sup> century. – 3. Constitutional state. – 4. Return to a 'constitutional state'. – 5. Europeanization. – 6. Globalisation

*1. Lessons from the past?*

Lessons from the past - this is a common expectation on Historians. Please tell us the lesson we can learn from the past! As experts for the past Historians like to comply with this request because they gain the aura to have the right of deciding not only about the past but also about the future.

To start with a paradox: Historians have the same knowledge about the future as everybody else. They are neither Haruspices nor priests of Clio nor oracles. Historians describe the past as closely as possible based on a presumed truth. They interpret texts and pictures of the past. But there is no way of determining normative directives for the future based on this descriptive hermeneutic work. The future is the most unknown. It contains more surprises than we can imagine. In short: it is not possible to define the future out of the past.

At the same time we know, especially from the education of children, that the only way of learning is based on (your own/or other) experiences. Humans are able to handle discursively their gained experiences regarding the organisation of decisive and protective legal and institutional structures. There is no way back, but a way forward, into the future, is only possible with the aid of experiences gained in the past<sup>1</sup>.

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<sup>1</sup> Stolleis, 2016a.

Therefore let's reduce the demand to teach lessons of the past of some Historians (Philosophers, Theologians) to a realistic and moderate level. As jurists, how can we learn from historical experiences of the 20<sup>th</sup> century?

## 2. *The dreadful 20<sup>th</sup> century*

Especially in Europe, the 20<sup>th</sup> century was a century of horror. In Western Europe, the belief in liberal self-monitoring collapsed after the experiences of the social question and the industrial capitalism<sup>2</sup>. Authoritarian, half and full-fascistic regimes came to be omnipresent everywhere (Italy, Spain, Portugal, Greece, Austria, Hungary, Slovakia, Poland and of course in Germany after 1933). Almost without transition the Tsarist Russian Empire turned into the socialistic force of Lenin and Stalin<sup>3</sup>. The small states, which were hardly able to liberally organise themselves, were annexed by the Soviet Union (Estonia, Latvia, Lithuania, Poland, Hungary, Romania, Bulgaria) and again oppressed. In the Balkans there was the Tito-Regime and the primal communistic state of Albania<sup>4</sup>.

In the second half of the 20<sup>th</sup> century most of the states turned back to democratic-parliamentary regimes, such as Italy and Germany, Austria, Greece, with a short period of Colonels' regime, Spain and Portugal, and at the end the states which gained their freedom after the collapse of the Soviet Union.

Altogether it was a permanent shift in terms of oppression and freedom as well as absence and presence of rights. I have to remind you of this and choose intentionally the German example. After the setting of the star of liberalism and practising the presidential dictatorship between 1930 and 1932, Hitler, the most radical opponent of liberalism, parliamentarianism and constitutional state came to power. Immediately regime opponents were arrested and deported, citizenships were denationalised, properties confiscated, civil service laws deprived; followed by public arsons, abasements, ostracism in any way, until the "extermination of European Jews" – the "holocaust" or the "shoa" started under the veil of war. Millions of victims were rounded up, stored in a stock car and killed. These tortures

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<sup>2</sup> Stolleis, 2014a.

<sup>3</sup> Hildermeier, 1998; with perspective on cultural history Schlögel, 2017.

<sup>4</sup> Calic, 2016.

are well-known throughout the world today. Memorials, Holocaust museums, countless books and films are spread over the world. The brilliant illustrator and Pulitzer Prize winner Art Spiegelmann drew affectingly a comic about this topic (*Maus: A Survivor's Tale*, 1980-1991).

Today, we can have a look at the 20<sup>th</sup> century with different eyes, more unbiased than in 1945, and therefore also consider its communistic aspect. It caused millions of victims as well, even if we don't believe Stéphane Courtois, who assumed a number of 100 million victims caused by communist regimes in his book "The Black Book of Communism: Crimes, Terror, Repression" in 1997. Today, nobody contradicts that there were a myriad of victims.

The idea is not the double-entry bookkeeping of terror – fascistic and communistic. This attempt would be pointless and leads to never-ending debates about ideologies and guilt. The difference between the death of starvation in Stalinism and the quasi-industrial-killings of the Holocaust cannot be divided into categories like 'inevitable' on the one hand, and 'absurd' on the other. Hecatombs of victims are always 'absurd'. For the purpose of this lecture it is enough to assert that the 20<sup>th</sup> century was the most murderous one in the whole human history. In absolute terms the number of the dead exceeds every hitherto existing memories. But also relating to the relative number of a growing world population the death rate seems to be extremely high, presumably because it was the first time of mass and "mechanical" killing. Death became an industrial product. Adding the infinite suffering of relatives, refugees, dispossessed, disenfranchised and expropriated, the defamed and camp-vegetating people, every person disintitiled of his remedy to the death – all this exceeds our conception.

### *3. Constitutional state*

Let's focus now on the counter concept of civilization, the constitutional state. It emerged from the ideals of the American and the French Revolution in the 18<sup>th</sup> century. Its typical structures, which were developed in the 19<sup>th</sup> century, are as follows: Monopoly on the use of force of the state and functional balance of power, commitment of the state to the precise requirements of democratic law, legal control by independent law courts, penetration of the whole legal system by the postulates of constitutions, especially basic rights.

This is set as the permanent European model, however it still includes rich variety. In Germany the term 'Rechtsstaat' first emerged in 1800<sup>5</sup>. Other European languages adopted it (état de droit, stato di diritto, estado de derecho, estado de direito). The American doctrine of 'government of law' (and not men) became the maxim of every European state. First of all, it was positioned against the despotism of the monarch, against the dogma of his sovereignty. But in the course of the 19<sup>th</sup> century the European conservatives (mostly even the monarchists) started to accept and support the program. The constitutional state was at the same time connoted with the forward-looking progress of trade and industry because it ensured the calculability of risks and security of the remedy. Thus the ideals of personal and economic freedom were connected with the desire for internal and external state protection.

We are all aware that the European way to a constitutional state, for binding the state on its law and constitution, took overall approximately 200 years. The road was full of setbacks and, of course, full of human sacrifices. We should be remembering the length of this road while criticizing the lack of respect of human rights in post-dictatorship regimes, in the Islamic world or in the formerly Soviet-occupied states. As observing historians we have to call on to be patient. Of course that will not help the victims of the current conflicts.

#### *4. Return to a 'constitutional state'*

If we want to understand why there were significant differences in the return to a constitutional state, an independent legal system and the enforcement of basic laws, we have to take a look back in the past and ask: Why was it so simple to break the juridical, ethical, cultural or civil stoppages? Why were many autocratic or dictatorial regimes able to defy the rights?

For appreciation, we have to identify the similarities and differences in a more specific way:

(a) Similarities of the different fascist regimes in Western Europe and the socialistic regimes of the Soviet Union were revolutionary establishments and ideological bases. They wanted to form, educate and lead a new society

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<sup>5</sup> Stolleis, 1990; Id., 2014b.

based on a new spirit by all available means, even if it includes violence or killing against their real or assumed opponents. The civic idea of the constitutional state did not fit into their anti-bourgeois and anti-liberal approaches. Mistrust against the state meant also mistrusting the leading party. A legally guaranteed remedy against the state and its leading party was a way of resistance to the party and their leaders. They did not want a 'legal' opposition. But to be consisting, almost every kind of a constitutional state was disposed – at first the constitutional court. Later on also the administrative courts were marginalized. Independent courts were replaced by politicized courts who had the purpose to destroy the inner opposition. Those tribunals were named significantly 'Volksgerichte' or 'Volksgerichtshöfe' (People's courts). This should imply that the populace judge over their opponents without any extensive formalities.

The destruction of the constitutional state in the Soviet Union after 1917 proceeded rapidly and without much difficulty<sup>6</sup>. There were no pre-existing structures formed by a bourgeois revolution or struggles for constitution. Traditions of fundamental rights or an independent legal system didn't exist. The legal form, which had been implemented by Alexander II since 1864, was buried with military and intelligence repression by his followers Alexander III and Nicolaus II. Neither the Russian Revolution in 1905-1907 nor the October Revolution in 1917 led, as everybody knows, into a constitutional state. Quite the contrary: Under Lenin and especially under the somehow paranoid-mistrusting Stalin the penal camps had been stoked up again. There is a direct path from Dostoyevsky's 'The House of the Dead' (1860) to Solzhenitsyn's 'The Gulag Archipelago' (1973) – the camps for contra-revolutionaries and class enemies.

In other words: in Western understanding, Russia never developed a constitutional state. The state and the Russian Orthodox Church acted in traditional and incorporated-authoritarian ways. Though the Russian legal education of the 19<sup>th</sup> century had many interfaces with the West, for instance in Dorpat/Tartu, at the 'Kaiserliche Rechtsschule' (Imperial Law School) in Saint Petersburg or in Kharkiv, Ukraine<sup>7</sup>, the group of lawyers trained within this framework wasn't huge enough to stand up against the

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<sup>6</sup> Baberowski, 2017.

<sup>7</sup> Silnizki, 1997.

authoritarian regime – before and after 1917. The approaches of a self-contained Marxian-Soviet legal-theory (Stuck, Paschukanis), were liquidised by Stalin. In the end Andrey Vyshinsky (1883-1954) is at the same level with the German Roland Freisler, of whom Hitler once said he would be a Bolshevik ‘in his whole ability’.

Some comments – in this ‘socialistic’ context – on the German Democratic Republic in Eastern Germany: The German Democratic Republic was, at least until 1961, a vassal state of the Soviet Union and undoubtedly not a constitutional state. It seems appropriate to differentiate three stages in the history of the German Democratic Republic: Firstly, the years of occupation under the ‘guardianship’ of the Soviet Military Administration, secondly, the Stalinist-epoch under Ulbricht and thirdly, the Honecker-era. A time of brutal injustice and national uprising until 1953 was followed by a consolidated sovereignty of the SED – characterised by a steady growth of omnipresent spying and prohibition of fundamental rights of freedom. Nothing changed in this concept, apart from certain liberalisation after 1961 and 1985. Concept and praxis of the state were diametrically opposed to a constitutional state. Both: concerning the appointment of the legal system in general and the missing administration law in special<sup>8</sup>. The injustice was bureaucratized: through omnipresent ‘Staatssicherheit’ (state security) and arbitrariness in the offices. The repression became ideologically funded in terms of ‘education’: An education which should lead to the new socialist human being. Finally the regime collapsed for economic and foreign policy reasons, but in general, because of the loss of legitimacy. Those evident lacks of the constitutional state played an important role.

(b) The situation in the Western countries was quite different. The first half of the 20th century was dominated by fascistic or national-socialistic regimes. They already had a century-long tradition of indigenous and Roman law and a large number of lawyers who were trained in those frameworks at classical universities. The features of a stable constitutional state tradition in every country, Germany, Austria, Italy, Spain, Portugal, were similar, just a little differently nuanced. Here, the farewell from the bourgeois constitutional state took different, partially bizarre, shapes.

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<sup>8</sup> Hoeck, 2003; Stolleis, 2009.

The new dictatorial powers stepped carefully forward to ascertain whether the civil jurists-elite is willing to follow the new line. Mussolini built his fascistic institution besides the monarchy as a Dual state. Likewise Franco pursued an authoritarian-conservative line in Spain, based on the military and the 'nacional-catolicismo', after a first phase of bloody payoff with the 'Movimiento Nacional'<sup>9</sup>. There was no constitution, just a few 'fundamental rights' and finally the return to Monarchy. The short-lived austro-fascism (1934-1938) was also no renunciation from the previous way with its disposition of authoritarian, federal structures, but rather an exchange of some leading heads while the legal system continued to work<sup>10</sup>. In Hitler-Germany at first, there was the open break of law, but later on, after the killing of some people<sup>11</sup>, an announcement of Hitler that the revolution is over and a return to regular and established rules possible. They pretended to be civilised, the middle classes breathed a sigh of relief and additionally they also benefited from the deportation of the Jews. The bourgeois lawyers, in the vast majority with a German-nationalistic way of thinking, no fanatic, but rather moderate national-socialists, did not want the destruction of the legal forms, no disorder. Just after 1938/39 a new period of unlawfulness was onset and led into the extermination of the European Jewry, accompanied by the killings of other minorities. Until the end of the regime a parallelism of normality and terror existed. This belonged to the signum of National Socialism<sup>12</sup>.

(c) The end of World War II indicated the European signal of a return to a constitutional state. The resistance circles already demanded: immediate return to a constitutional state. The same also applies to Italy after Mussolini and France after the Régime de Vichy. Switzerland and Great Britain just had to cancel a few restrictions which had been established during the war<sup>13</sup>.

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<sup>9</sup> For an detailed conception on this see Fernández-Crehuet López –Hespanha (edd.), 2008.

<sup>10</sup> Tálos, 2013; Tálos – Neugebauer (edd.), 2014.

<sup>11</sup> Bloch, 1970.

<sup>12</sup> See Stolleis, 2010; Id., 2016b.

<sup>13</sup> Kley, 2015, §§ 15,16.

The authoritarian regimes in Spain and Portugal remained in power. Eastern Europe was drowned in Stalinism.

The collective extension of European institutions played an important role in the process of a return to a constitutional state in Western Europe. It was a return to the constitutional fundamentals of Europe, to democratic decision-making, to the principles of separation of powers, the recognition of human rights as well as juridical control of the state<sup>14</sup>. The trauma of war brought the nations together, an exchange of youth was established and Historians started to research on the causes of the catastrophe and were employed over decades.

In the past 30 years we can observe a return to constitutional states all over Europe, a return to superior juridical control, which attend to constitutional conformism of the institutions. It is, indeed, a highly politicized control but was proved as an important corrective of the political everyday life. The constitutional jurisdiction appears to be a fundamental constructional element of a liberal and democratic order, acting in a free society, manned with independent magistrates, exposed to the control of science. Especially in Britain and France the fact that also acts of the legislative are controlled, led to practical and theoretical problems. But in federal structured Germany it is accepted because of the always-been lower-ranked parliament in contrast to the British one or the French National Assembly.

##### *5. Europeanization*

The previously shown model of a democratic constitutional state, as it developed from the struggles of the 19<sup>th</sup>, the two world wars of the 20<sup>th</sup> century and Europe's burden of dictatorship does not mean "the end of history" at all. Not only Europe, which emancipated from fascistic and communistic repression, mostly during the last generations, is thrown into a new context of world-politics. But also the old states of Asia, the postcolonial states of Africa which live in particularly harsh conditions and the democracies and dictatorships of South America – everybody needs reorientation in a rapidly changing world.

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<sup>14</sup> For France see Gaillet, 2012.



(a) But let's start with Europe: We have been facing a new era of institutional consolidation with the Maastricht Treaty, which was enacted in 1992 and became effective in 1993. At that time, there was a geographical expansion (Austria, Sweden, Finland), the internal frontiers were eliminated, and the Euro became the new European currency in 1999. Since 2002 it is the official currency of twelve countries. On this symbolic and psychological active innovation are many tries regarding a real European constitution, including a charter of fundamental rights – despite the fact that there was and is neither a European nation nor real European parties nor a homogeneous public opinion nor a common language. The process of Constitutionalization of Europe developed constantly, despite many objections, even if it temporary happened against the majority, in the case of France, the Netherlands or Ireland<sup>15</sup>.

The century-lasting process of European integration almost deregulated the traditional borders of the national state, finally with the 'Schengen-Agreement'. Not just the tollgates and custom facilities disappeared even the goods traffic circulates without restrictions as well as the exchange of services and information. In the light of transnational freedom of movement questions of residence and workplace seem to be secondarily. People also vote for a European Parliament, still less interesting than the national elections, but the constantly growing competences of the European Parliament will change its role based on long-term considerations. Additionally people get informed by mass media about the importance and the influence of the European Court of Justice in Luxembourg as well as the European Court of Human Rights in Strasbourg. In other words: The people, in any case those of the older member states, know more or less that they are inevitably part of Europe and that they have to participate in the European development process in their own interest. A European public, a European identity slowly comes into being.

Right in the middle of the integration process the Eastern Bloc collapsed. Withstanding this, many new challenges arose for Europe. The Cold War ended officially with the Helsinki Accords in Paris in November 1990. The Baltic states were set up to the Balkan new governments, they searched for access to the European market and many of them adopted the European

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<sup>15</sup> Schorkopf, 2015. For the consequences on Germany see Mangold, 2011.

currency. While using the debility of post Soviet Union to change position – from Warsaw Pact to NATO – the states of Eastern Europe build the fundament for a new juridical and constitutional order. These revolutions themselves, from the Baltic States to South East Europe, would have been big political challenges. But the collapse of Yugoslavia in 1991 led into war and mass murders and concurrently into a NATO operation, especially in Kosovo in 1999, not to forget the tragedy around Sarajevo.

These European and geopolitical actions are well known, especially the break of 9/11. Since then this “nine/eleven” symbolizes the manifold tensions in the Middle East (Afghanistan, Iran, Iraq, Syria, Yemen) between the Western and the Islamic World. Since 2010, there were popular uprisings in Tunisia, Libya, Egypt and Syria, but also in Morocco, Algeria and Jordan. The bisectonal constitution of global order which provided the coordination system for policy since World War II no longer exists. China has risen up, USA is geared to the Pacific and now restricted to national egoism, the Russian Empire is diminished, today it is only Russia and a chaplet of small states around it, which followed the path of independence, sometimes with many difficulties, and it is still a far cry from democratic structures. Belarus is just one example, although a tough one.

This is the framework for constitutionalisation in context of globalisation. Those facts are immediately relevant for Europe. What happens in North Africa and the Middle East doesn't affect the European Union, but the political and military decisions of Teheran, Damascus, Cairo or Jerusalem do.

(b) But let's first take a look on the inner difficulties of Europe. From the perspective of the citizens the institutions in Brussels, Strasbourg and Luxembourg are far away and alien. What happens there is indeed appreciable – prices, production, competition, employment market, announcements and so on – but seems to be abscond from the democratic instruments like votes or self-organization of people. The financial crisis and the turbulences around the currency Euro were experienced as particularly dramatic and risky. To some it appeared as the total loss of national sovereignty, as expropriation and prohibition. Others bristle at funding national shortfalls while thinking that they could have been avoided by having a consequent policy. In the past, those states had the option to fund their shortfalls by currency devaluation. While being a part of the European Union this is not possible anymore. The Details could be set aside here; but

everybody knows that anti-European Nationalists and Populists rise up. The process of European integration which has always been in a “stop and go” circle attained at ‘stop’ at the moment. Every kind of integration, for example the initiative for creating a central budget controlling, is controversial, especially in time of Brexit-deliberations. Let us not prevail in any illusions: The situation is very difficult. It is the first time after 1957 that we are talking seriously about the end of the ‘European Project’ – an end, which is by realistic political means not ‘allowed’.

(c) Thereby the process of constitutionalisation ceases even on a European level. To revive him, we have to simplify the multitude of ‘levels’. Inherently the national states themselves have a complex structure, especially the federal-structured ones. Nowadays we have the European institutions positioned above. We can speak of a European multi-level-normativity. It is pretty uncertain, if there will be a proceeding constitutionalisation in direction to the ‘United States of Europe’, a long-lasting stagnancy or even a deflection of competences back to national states. The history of the European agreement shows that, in any case, we can’t speak about a ‘natural-like’ development leading into a European federal state. However, supposedly geopolitical conditions will push us in those directions, if Europe wants to preserve the position of high economic-standard and wants to keep political influence alive. Somewhere in between of regulatory overkill and delegitimation we have to find a way. It will be a generational duty to approximate the complex reality with the normative idealism of European constitutionalism – only in the states of Western Europe.

If we take a look, not only at Brussels, Luxembourg and Strasbourg, but at the new member states in Eastern Europe as well, then the gap between normativity and reality becomes apparent. Rumania and Bulgaria are states with a weak economy, highly levelled unemployment and corruption; also the western standards of a constitutional and social state are not achieved. The universities work under difficult conditions. Profiled national juridical culture is not visibly existing. European Law does not count – or just with attenuation. Law enforcement is still suboptimal. This retroacts to the European Law and needs to be included as exceptional rules or transitional periods in the Western states of Europe; because we have to deal with the outsourcing of employment to those regions. In other words: The

enlargement of the European Union to the East and South East was geopolitical necessary and correct, but the accomplishment of the thereby accrued economic and juridical problems is a decade-lasting challenge.

#### 6. *Globalisation*

(a) The process of globalisation comes along with the internal and external problems of constitutionalisation of Europe. What is meant by 'globalisation' remains vague and it is also questionable whether everything is as new as it appears.

The 'first globalisation' was the Spanish-Portuguese discovery of the new world and the first circumnavigation in the 15<sup>th</sup> and 16<sup>th</sup> century. Equally important was the Copernican Revolution. Since then the earth was a globular planet which circulates around the sun.

The 'second globalisation' began with the industrial revolution in the 18<sup>th</sup> and 19<sup>th</sup> century. Now we speak about 'world-literature' (Goethe), 'world-trade', 'world-expositions' (1851). The term, 'world war' was actually first mentioned in 1845. The competition for inventions and industrial production started. That was the time of 'progress' and 'comparison' itself. Karl Marx wrote in 1867: "The industrial developed nation just shows the future to the less developed nations". The nations were measured on world-scale. Even the new subject of Comparative Law was intentionally a 'world-subject'. International Law and Comparative Law, while becoming essential, attended the globalisation process. Since the 20<sup>th</sup> century, the dynamics of globalisation determined all elaborated and nascent industrial states. Factual borders only existed where technical infrastructure is underdeveloped or dictatorships build up their regimes on exclusion.

With the revolutionary technical development of aerospace, new 'spaces' and constraints for Law emerged. We observe a process of erosion of national boundaries and a tendency to placelessness (Atopia)<sup>16</sup>. Everything can be observed, photographed or saved. News, stock exchange prices, capital, services of all kinds are exchanged. Spaces seem to become much smaller or lose its relevance. The time to override space is shrinking constantly. It is impossible to predict the effects on the normative orders of historically grown societies. The institutional arrangement, namely state and administration, will change dramatically. Erosion of boundaries makes sure

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<sup>16</sup> Willke, 2001; Teubner, 1997.

that the territorial base of state loses its relevance. Even war becomes placelessness; there are covered strikes and unmanned weapon systems. Less bellicose examples are the non-governmental basic rules of world trade, electronic communication, stock exchange and monetary transaction, mass spectacles of sports (soccer, tennis, alpine skiing, motor racing), including the Olympic Games.

In addition, there are norms produced by many nongovernmental or arbitral courts. Those corpora of regulation consist of 'Law' – provided that the term 'Law' is here differentiated from the attribute 'State'. They are allowed to impose sanctions. They are emerging, in a way, on the basis of private autonomy and are pushed by the practical constraints of global exchange. Legislators are those who have strong institutional and economic resources and a vital interest in binding themselves and apprentices to their corpus of regulation – not least because of reducing overheads.

(b) Putting all together, the question occurs whether there is a possibility of transformation from the classical international law to a new 'constitutional' world order. This issue affects especially the lawyers of national constitutional law. In some ways they could use the conceptions of Kelsen, especially the idea of universality of legal norms and the idea of the possibility of a discourse about universal ethics. The demands are clear: The different legal cultures should come to an agreement! The European-American side should 'open up' to the factual differences and compromise, while the non-European, especially the Islamic, side should on their part approximate the universal ethics. The ideological and practical problems are clear, too: In philosophy, there is the Habermas-orientated Recognition Theory which tries to evolve a model of 'transnational justice and democracy' and which discusses universal ethics. Conflict- and Peace-studies, Philosophy of Law and Social-Theory are working in many ways on the fields of International Law, defy it, and sometimes their idealism seems to be too extensive. For example in demanding public participation in international conflicts or privatisation of security policy. 'Global justice', so they say, should be established, not by military interventions or economic sanctions, but by arrangements of actors – so at least by self-produced Law<sup>17</sup>.

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<sup>17</sup> See the summary in Stolleis, 2017.

(c) The idealistic or rationalistic idea of constitutionalised global politics is opposed by the observation of a factual fragmentation of International Law. There are actually some indications for this purpose. The world, brought together by communication, becomes even more complex instead of being simple. Subsystems have to be developed constantly to limit the risk of conflicts. New normative orders are formed in every subsystem. But they have to be compatible with the functional differentiation. The conflicts of those normative orders have to be absorbed by new conflict rules again. Regardless whether it is described in terms of system theory or culture-critical as a symptom of decline of classical international law, or somehow as a kind of 'primeval soup' of a (web-based) deliberation, from where new normative orders or new hegemonies are emerging, but one fact is incontestable: international law takes new shapes in context of globalisation. If the thesis of the drifting-apart of culture areas (Western, Far-East, Islamic Spheres) comes true, it would result in the regionalisation of International Law – with even more incalculable effects on the implementation of universal human right standards. Unfortunately the voices, which are talking about the universal claim of Western International Law as a new sophisticated kind of colonialism, increase. On the other hand they warn of abandoning the universal claim and accepting the differentiation in culture areas because such a development would directly rip into the heart of International Law, edified with a universal claim since antiquity.

A conservation of the universal claim of International Law is not hopeless, if we try to use all elements which could be useful for the creation of a peaceful and liberal order. For example: the cooperation of national governments for implementation of aid programs or external support of free elections. Where state structures have been destroyed in civil war, international law requests could be at a pinch advanced with aid of NGO's or economy.

Times of closed nation states and 'classical' International Law, which was practiced up to World War I., are over. The number of actors had increased; religious and cultural coined regions became apparent. Alike the differences of state-structured public law, international law and private law are diffusing. In face of the deficient international security, caused by the increase of terrorism as well as further dispersion of nuclear weapons, a

modified transformation of the constitutional principles seems to be a realistic challenge. It already happened that the principles of the American and the French Revolution jumped over the frames of national constitutions; they already became a part of international law. Principles of a constitutional state (right to due process, publicity, neither arbitrary nor doubled penalty), division of powers, strict obligation to statute and law are part of international law, even though in a modified form. All those had already been proved on national level. Although these elements are rooted in the European-American constitutional debate of the 18<sup>th</sup> century, they are also universally applicable in the context of globalisation.

(d) However, this modest premise of dissolving bindings raises a problem – because the theoretical fundament of the mentioned principles is unclear. We cannot rely any longer on the classical Natural law, which was cultivated from antiquity to 18<sup>th</sup> century. Apart from the catholic social theory there is no publicity left. At best we can speak of a ‘crypto natural justice’ circulating in those debates. By the way, a more and more positivistic international law took its place, in terms of international conventions and even partly in codifications, especially in humanitarian areas. At the same time almost every state became a part of the ‘international community’. All emerging states were included into globalised International Law. Secessions make sure that the number constantly grows. The United Nations Organisation stands symbolically for this development.

At the same time we observe an individualisation of international law; for example in the fight against slavery and human trafficking, minority rights and others. Mainly the universal phrasing of human rights provides the rhetorical character of a world constitution of international law. Although international law was still an ‘inter’ – national law, new actors appeared, NGO’s, arbitral courts, the European Union, the World Trade Union – everybody is shaping norms.

(e) In this way the borders of the state become diffuse but permeable. Private autonomy constitutes normative global networks. In one way we could interpret this as an increase of democratic participation. But the counter question: “how much freedom and remedy is going to be destroyed at the same time” is still open. If there is no authoritative normativity, the poor people will lose the game. Global networks have more influence than the individuals or the unorganized people and they will use it to assert

themselves. So at the end strong procedural structures don't exist, as well as democratic identification. The 'global players' are as egoistic as anti-democratic regimes. Both refuse participation.

(f) The decline of the significance of the national state will have serious consequences. It retains its oldest task – to take care of security – but it has to handle it differently. For example: There are no classical wars left. Nowadays, war is concealed, sophisticated and asymmetric. The conflicts are regional, fragmented: collective strategic foreign missions, unmanned weaponry and cyber-war are on the agenda. An international law, responding on these developments, arises. Warring politicians underlie international criminal law. And above this it has to challenge the task of 'civilizing' the new forms of war. As a consequence individualisation of international law will go on.

In parallel with this the role of the state is shifting with regard to the inner concerns, too. The national state becomes the communal or regional 'state' which is responsible for accomplishments and deficits. Education and welfare policy will remain as 'core business', even though nongovernmental and transnational law is spreading and society will regulate itself more strongly again.

As a matter of fact the constitutional state has to absorb the risks arising in the context of globalisation, namely if the citizens are confronted with private legal persons and not with 'the' state. Today we talk of regulated self-regulation. The variable mixture of self-regulation and surveillance seems to connect the particular benefits, which arises from the actions of private individuals on the one hand and with the state one's on the other. The state gives incentives for the deployment of liberties. But this deployment has to be kept in the frame of the 'ordre public'.

It is even more important to relocate the state functions to the outside. The static idea of people is replaced by a 'drifting' population including immigrants, political and economic refugees, alongside the national state other institutions come into responsibility – the institutions of the European Union, those, who are constituted by international law, nongovernmental organisations, global enterprises and especially networks like Google. Those do not threat the leading position of the national state aggressively. But subtle changes can be observed. They depend on social practices: the collection of images ('street view'), of documents and dynamic data (real-



time tracking of mobile phones) or by publication of secret documents ('Wikileaks'). There is no exclusive right of the national state to handle the matters of concern in his territory.

We have to think about the future and the constitutional state in our world society. Constitutional Law, the complex of Law, has to face the challenge of globalisation. For more than two decades we register the changes and it is common to speak of an 'open state'. This ensures that the state is still the reference figure even in times of manifold cooperation and complexity. It will be important to find a balance between the local, regional, national and transnational sphere. This balance, which is per se tenuous, is the object of all juridical disciplines, from private to international law. But the legitimation of the modern state is not only dependent on its competency to take care of the individual rights. It has to civilize the institutions which try to replace it by the process of globalisation. That is why we have to establish more transparency and controls to the global-acting enterprises. Besides, we should transfer democratic practices from the national to the supranational level.

The past teaches us that such a conversion lasts many generations. Institutions and mentalities just change very slowly. There will be a lot of passages and, of course, some experiments will fail. With a science-critical intention we have to be doubtful about those concepts of a 'virtual state', an 'electronic democracy', a 'global civilisation', or a 'cosmopolitan democracy'. But it is interesting to take a look on them as symptoms of the social change itself. There are two ways to gain knowledge. On one side we can use the classics for interpreting the unknowingly present. On the other side we can try to produce empirical material to understand who we are. But: We are always signed by our past – naturally. Today globalisation, and what is associated with it, gives us the strongest impulses for intellectual fantasies. But in a global society every person has to realize – voluntarily or not – that he or she is part of it, too.

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