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Working Paper

Werner Gephart

Constitution as Culture

Constitutional Universalism and Pluralism of Legal Culture

Inauguration of the Year's Theme

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Before engaging in a discussion of the limits of the law, the frontiers between the spheres overlapping areas, hybrid zones, and new terrains of research, I would like to begin with some words on the second phase of the center, as it will now begin its scientific program. In the second part of my lecture, I will then reflect on the interfaces of politics and the law as represented by constitutional cultures.

The second funding phase (2016-2022) envisions the Käte Hamburger Center for Advanced Study in the Humanities “Law as Culture” using this ‘re-measurement’ of law as a basis for examining the interactions between the juridical sphere and other spheres of society in a biannual rhythm. Attention will be initially focused on the relationship between law and politics – for example, by studying how this relationship is solidified in constitutions. The second step will involve examining the relationships between law and economy – for example, by analyzing the legal culture required for economic activity as well as the economic foundations of different legal cultures. The third and final step foresees that the Center consider the relationship between law and community – for example, by exploring different family cultures and corresponding family law cultures as well as by pursuing questions regarding the boundaries of legal community and the relationship with the rights of others.

Additionally, three cross-cutting issues will guide the aforementioned research activities throughout the second phase. The first guiding issue involves the innovative concept of differentiation cultures as well as the Center’s comparative approach towards legal cultures as a whole. Here, it must be noted that this will serve as the basis for which different interactions between law and other societal regulations are embedded in a comparative social-theory framework that makes it possible to transcend the limitations of a purely Western perspective. The second cross-cutting issue concerns the human rights discourse as well as issues of individual and field-specific autonomy. Lastly, the third cross-cutting issue focuses on the emotive foundations of the law and the elementary question of adherence to the law.

I. Some General Remarks on the Intersection of the Legal and the Political Spheres

Political cultures cannot be reduced to a decision-making mechanism, the selection of their leaders, or particular institutional settings. It is necessary to analyze their symbolic forms and rituals. As such, the thematic field of Law and Politics views legal and constitutional cultures as interacting with a political sphere that cannot be observed purely from the perspective of system rationality. However, if law and politics are both viewed comparatively using tools of cultural analysis, then there are a number of highly specific ways to determine how they relate to one another. If political cultures clearly differ in the first place with regard to the issues they wish to politically resolve— with models of parliamentary sovereignty (such as in the United Kingdom and, for a long time, in France) competing in sensitive constitutional matters with models of the absolute primacy of a constitutional court (as in Germany) – it would then appear that it is not always possible to assign issues precisely to the different spheres. Even constitutional bodies, such as the Federal Constitutional Court in Germany and the U.S. Supreme Court, rarely limit themselves to simply applying the law, but rather use their jurisdiction to create new law. When it comes to distinguishing between the legal and the political, another central issue is whether the constitution can adapt to changing societal conditions by way of interpretation or whether explicit changes need to be made to the constitution itself in specific cases.

At the same time, comparative study can be undertaken to determine the extent to which the ‘dressing up’ of political demands in legal language is a universal trend. Martti Koskenniemi, for example, has expressed unease regarding the inflation of human rights and fundamental rights language, a practice that seeks to assign ultimate justification to frequently disputed normative positions in order to remove them from political discourse. Conversely, the law can also (intentionally) come to apply political pressure, as seen in Europe’s multi-level system of governance. In this case, private international and procedural law are harmonized in an alleged attempt to agree to neutral procedural arrangements and instructions, which in turn put member states under political pressure to act so that that their legal systems can remain competitive at international level (regulatory competition).

However, the idea of the constitution as a normative modernization project is also finding its way onto the agenda of societies that have been caught up in the modernist mindset. These constitutional projects and the processes for implementing them vary enormously – from the

imposed constitutions of victorious powers to the constitutions of liberated former colonies to constitutions mandating a commitment to constitutional fundamentalism. Finally, constitutional projects played an extraordinary role in the wake of the Arab Spring. The question arises as to how, given the clearly pluralist legal culture of the constitutional ideas, models, and practices, the UN Charter can be conceived as a global constitution for a global society – that is, in accordance within the scope of constitutionalism under conditions of globalization and localization of social settings and communities. The collision between supranational and global constitutional models along with national and local claims to sovereignty and constitutional traditions is certainly expressed in the protection of human rights and in the fleshing out of fundamental rights.

In a regional context, a vigorous discussion has arisen concerning the hollowing out of democratic decision-making processes and the ability of nations to determine their own political destiny by dynamically interpreting human rights treaties to provide themselves with political options. This discussion is restricting the scope for frank political discourse and democratic decisions, at times even appearing to remove it entirely. In those states particularly defined by democratic, legitimizing decision-making processes, the unforeseen and even unforeseeable development of new human rights standards is often regarded as a restriction of political freedom of choice or as an incursion into historically-rooted legal cultures.

In a general sense, the issue of legitimation indicates the binding force of constitutions, which, in the end, also draw on politically inspired and induced symbols, narratives, and rituals. At the same time, emotionally charged political campaigns can also call into question the validity of the law. Even if constitutions are intended to operate independently of values and prerequisites, they require even greater symbolic efforts in order to affect their validity. Constitutions require a common constitutional belief or awareness in order to be effective, though the affective relationship between communities and their constitutions varies greatly in a national context. In the United States, for example, one finds the religious-style constitutional cult; in Germany, the constitutional patriotism, which is in some cases academically invoked; and in France, the “avalanche of constitutions” that came about following the Revolution and for a long time had neither a constitutionalizing effect on the political process nor an effective impact. The French case is representative of the emotional linkage of collective ideas of the nation that often negated the legitimate legal claims of the nation’s population and, as was the case during colonial rule, the “rights of others” (Seyla Benhabib).

One additional dimension of the political form of organization of the law remains to be examined under the aspect of the law's binding force. Ever since political rule transformed social norms into law with the transition from segmented to stratified societies, the state has been considered a central organizational unit in the creation of laws, the finding of justice, and the enforcement of legislation. Consequently, it has also been considered a constitutive requirement of modern law. (However, it must be noted that the Bonn-based Center has chosen to adopt a multidimensional concept of the law which offers a social science viewpoint that enables one to focus on the organizational diversity of the law as well as historical and comparative cultural perspectives.) A comparative cultural sociology of the state promises to yield insights into the specific regional weighting of law and politics as well as the issue of the validity and binding force of the law. This grows increasingly true as the state has now come under pressure from many different angles for being the organizational form of political activity based on the pattern of European nation states – that is, for being the sovereign foundation of the legal system *and* for being a creator of legal legitimation. While the list of failing states and concentric legal spheres constitutes a new facet in the relationship between politics, law, and culture, the boundaries of the traditional nation state are also seen in the process of economic globalization and the emergence of supranational and transnational political spheres that create law in the absence of state-building. At all these levels, the following question arises: What organizational forms offering legitimacy and legally binding force may arise as a functional equivalent to the state in order to guarantee a binding social framework for the law?

II. Constitutional Universalism in the Legal Project of Modernity

Sociology has not yielded a thorough constitutional theory.¹ In the “Methodenstreit” of political science, sociology remained on the outside, even though it did inspire political and constitutional studies. The Jellinekian concept of the state does admittedly differentiate between a sociological and legal view of the state but leaves the sociological aspect of the state in pure abstraction. The radical dualism by Kelsen did not convey a sociological theory of the state², especially as his notion of a science of reality was too narrow despite his

¹ For conceptual history see: Dieter Grimm/Heinz Mohnhaupt: *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart*, Berlin 1999.

² For comparison see: Stanley L. Paulson/Michael Stolleis (eds.): *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts*, Tübingen 2005.

awareness of Weber's work. When Rudolf Smend finally grounds the key term of political theory *integration* in a sociological concept, the constitutional project of integration remains sociologically underdetermined when faced with upheavals found in the Weimar society that could not be solved by its Constitution.

It is therefore not astonishing when new works on constitutional theory once again turn to the classic standard works of sociology, not astonishing when Hasso Hofmann, for example, thinks of state sociology as constitutional sociology, or when Oliver Lepsius should harness Weber's theory of rule for state and constitutional theory.

By way of such legal-sociological finesses, it is quite easy to forget which role the notion of constitutions plays in the modern era, which Habermas certainly views correctly as determined through his "Projektcharakter". In this respect, one should first recall the *Grundzüge des okzidentalen Konstitutionalismus*, which feeds upon the traditions of French nation-building, Germany's late constitutional culture, and the constitutional project of freedom in the Anglo-Saxon world. Just as the significance of constitutions is prominent in the formation of Western modernity, the notion of constitutions as a normative project of modernization also comes into play in the communities that are caught up in the maelstrom of modern thought.

III. Constitutional Cultures of the Modern Era

a.) The Pathos of the Constitution or the Sacralization of the Constitution in France

The French Revolution began with a constitutional pledge to not separate from each other – before the Third Estate itself would have issued a constitution for its sovereign of the nation in the National Assembly. The Constitution from 1789 specifies in Article 16 what a society would lack if it did not surrender to such a process; it would have the flaw of not possessing a constitution: "Toute société, dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution."



Image 1: Barbier's Declaration of Human Rights, Museum Carnavalet. Retrieved on May 5th, 2013.

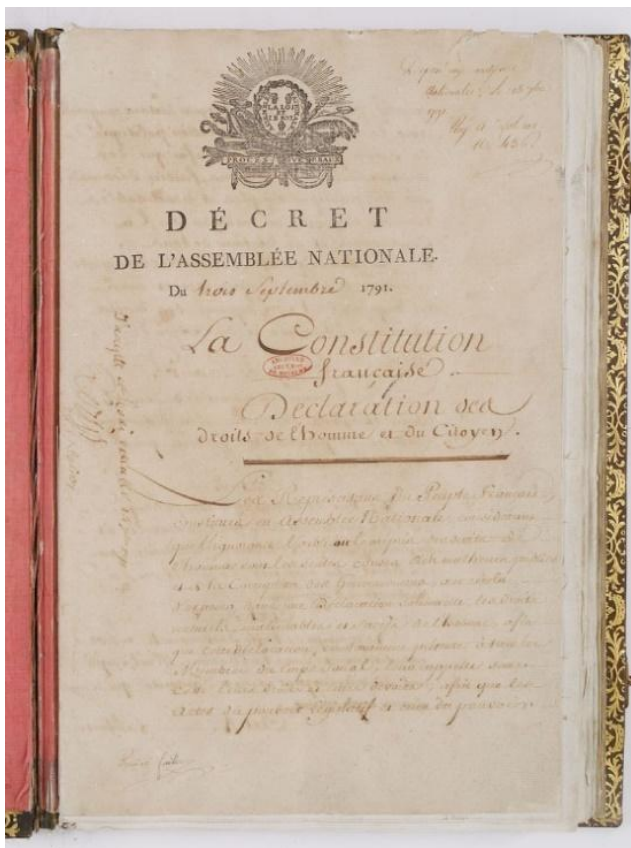


Image 2: Constitution 1791. Page 1 – Archives Nationales

This raising of the constitutional term to a sacral category which symbolizes everything holy in a secular community triggers the spread of a “constitutional fever” from “ocean shorelines to Jura, from Lille to the Pyrenees.”³ In such a manner, the constitution became the central location for the nation-building of a Grande Nation that was not founded on linguistic or ethnic ties, but rather viewed as a project of a nation state that subscribed to the idea of sovereign, humane self-determination. In Saint Just’s terms: “La constitution est l’image sacrée de la liberté.”

Knowing this, one may be able to better understand why Chirac placed so much importance on adopting the European constitution and how devastating the French voters’ rejection in 2005 could be estimated. But one should be careful in interpreting: the rejection of a European reality is not meant, but simply the higher dignity of a normative order that the nation state would have an edge over the vouching constitution of the French.

Thus, in France, the point is not whether there is a “constitutional god” (as di Fabio claimed for Germany)⁴, but if the Constitution itself contains a divine glamour as can be seen in numerous formulations and symbolical representations of French constitutionalism – from the declaration of the human rights as a bible-like Decalogue (as part of the cult of the “être suprême”) to Louis David’s “Le serment du jeu du paume” (1790) to the adoration of Napoleon (1805-1807) or the death of Marat. Thus, contradicting tendencies of pure sacralities of textual and visual narratives – full of revolutionary pathos – collide.

The horrible events of November 2015 brought the contradictions of an unfulfilled integration under the constitutional promise of republican egalitarianism and existing spheres of exclusion to an explosive visibility.

b.) The Constitution of Freedom: The Anglo-Saxon Creed

The paradoxical claim of a normative order that is also binding for the sovereign first takes shape in the American Revolution. Thereafter, the constitution is the highest law and the single source of legitimate sovereign power. It was issued in an act of exceptional legislation through the “pouvoir constituant” and then materialized in a constitutional charter as a “secular expression of Protestant belief in ‘script’”⁵, as stated by Preuß. Similarly, in his study

³ Quoted from Hofmann, Hasso: Von der Staatssoziologie zu einer Soziologie der Verfassung, in: JZ 1999, pp. 1065-1074, here p. 1069.

⁴ During a presentation at the University of Bonn.

⁵ Preuß, Ulrich K.: Verfassung, in: Historisches Wörterbuch der Philosophie, Vol. 11, Darmstadt 2001, pp. 635-643, here 638.

on the emergence of human rights, George Jellinek had anticipated Weber's work on the connection between protestant ethics and the spirit of modernity.⁶ The revolutionary breakthrough to English parliamentary absolutism⁷ here is not that ruler is replaced, but that the basis for ruling is converted to a consensus of those subjected to rule. In doing so, their freedom is ensured both internally and externally. At the same time, society's functional areas are left in their autonomy – notably stated by Grimm⁸ –; and when one wants to interpret this by the means of systems theory, the principle of functional differentiation becomes institutionalized.



Image 3: Constitution of the United States, Page 1, Internet 2016

⁶ For comparison see: Gephart, Werner: Gesellschaftstheorie und Recht. Das Recht im soziologischen Diskurs der Moderne, Frankfurt am Main 1993.

⁷ For comparison, refer to the methodologically and practically still fundamental Bagehot, Walter: The English Constitution, London 1867.

⁸ Grimm, Dieter: Braucht Europa eine Verfassung? Vortrag, gehalten in der Carl-Friedrich-von-Siemens-Stiftung am 19. Januar 1994, München 1995, pp. 20ff.

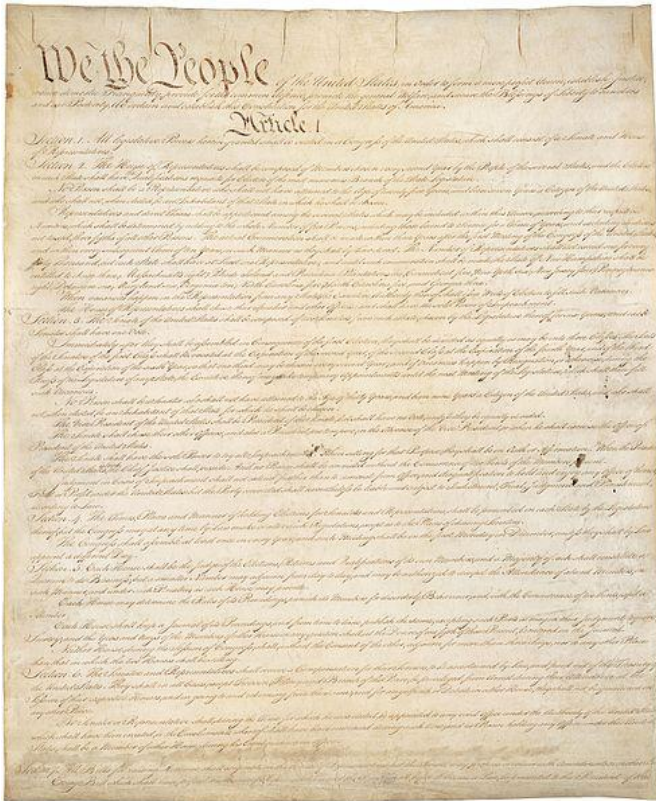


Image 4: Constitution of the United States, National Archives and Record Administration (Washington).

However, by using the idea of a ruler’s consensus-dependency, a problem concerning the continuation of this charismatic consensus arises; and this occurs through juridification. Unlike many other nations, the UK does not have a single constitutional document. This is sometimes expressed in an oversimplified manner by stating that it has an uncodified or “unwritten” constitution. Much of the British Constitution is embodied in written documents, such as within statutes, court judgments, works of authority, and treaties. The constitution has other unwritten sources, including parliamentary constitutional conventions. The cornerstone of the legislative British Constitution since the Glorious Revolution of 1688 has been described by various experts as the doctrine of parliamentary sovereignty: that is, the statutes, legal acts, passed by Parliament are the UK’s supreme and final source of law, not any other kind of normative power. From there, it follows that Parliament can change the Constitution in the formal sense by simply passing new acts of Parliament. There was some debate about whether the principle of parliamentary sovereignty remained valid in light of the UK’s former membership of the European Union; this issue was naturally one used by the supporters of leaving the Union in the 2016 referendum vote known as “Brexit”. Brexit now appears to be leading the United Kingdom out of the legal jungle of Brussels.



Image 5: Werner Gephart, Babylonian Production of Normativity in Europe (with the help of Pieter Breughel), 2016



Image 6: Werner Gephart, Brexit with Spectators, as Seen from the Legal Jungle of Brussels, 2016

The paradoxical situation of the English case is clearly expressed by Hans Vorländer: “Wo die Verfassung als das System von als selbstverständlich angesehenen Ordnungsregeln in eine gewachsene und tradierte politische Kultur eingelassen ist, da bedarf es keines expliziten, schriftlichen Verfassungsdokuments.”⁹

However, where it exists, particularly in American constitutional culture, it becomes a part of a widespread “production” process, as explained by Daniel Schulz: “Sie sind in der Rotunda für die Charters of Freedom im Gebäude der National Archives in Washington D.C. als sakrale Gründungstexte des amerikanischen Gemeinwesens ausgestellt und dort in ein umfangreiches Bildprogramm eingebaut.”¹⁰

c.) The Constitution as a Normative Order of State Institutions: the Late Constitutionalism in Germany

On the contrary, German constitutionalism is neither the result of a tie between nation-building and constitutional statism nor of the will to shackle the too powerful ruler to the constitution and protect individual rights. The “Zeitgeist” – subsequent to the French Revolution – also drifts above the German lands, but the absence of a political constitution in Prussia is compensated by reforming the governing constitution. The late nation- and constitution-building, born in 1871 requiring both a war and the agreement of the rulers, remains apprehended by this doubling of popular and monarchal sovereignty. As the German nation viewed itself as a type of ethnic community or as a cultural identity in the “cultural nation”, it was not dependent upon the concept and reality of a constitution. In contrast, the French nation established their collective identity directly through the constitution.¹¹ Thus, Wilhelm Grimm writes the following to his brother-in-law, Hassenpflug: “Mir gefallen die Constitutionenmacher so wenig wie Dir, aber wie sollen sie ausbleiben bei dem Zuschnitte, welchen die Welt nun einmal hat...”¹²

⁹ See Vorländer, Hans: Integration durch Verfassung? Die symbolische Bedeutung der Verfassung im politischen Integrationsprozess, in: id. (ed): Integration durch Verfassung, Wiesbaden 2002, pp. 9-40, here p. 34.

¹⁰ See Schulz, Daniel: Verfassungsbilder. Die visuelle Inszenierung konstitutioneller Rechtsordnung, in: Llanque, Marcus/Schulz, Daniel (eds.): Verfassungsidee und Verfassungsbilder, Berlin/München 2015, pp. 191-200, here 194.

¹¹ For comparison, also in sociological terms, see: Gephart, Werner: La construction des identités nationales, in: id.: Voyages sociologiques. France-Allemagne, Paris 2005, pp. 143-160.

¹² Wilhelm Grimm an Hassenpflug, quoted bei Grothe, Ewald: Für und wider „die modernen Constitutionenmacher“ – Die Verfassungsdiskussion zwischen den Brüdern Grimm und Ludwig Hassenpflug, in: Peter Brandt/Arthur Schlegelmilch/Reinhard Wendt (eds.): Symbolische Macht und inszenierte Staatlichkeit. „Verfassungskultur“ als Element der Verfassungsgeschichte, Bonn 2005, pp. 283-297, here p. 290, whereas Hassenpflug is told to declare the finally reached constitution of 1831 “in politischer Beziehung ein Werk der Revolution und in religiöser ein Werk des Teufels” (ibid., p. 294).

When beginning the history of constitutions by first glancing at the constitution of the Weimar Republic, it can also be understood why the Nazi regime's revolutionary act that targeted the law does not concern inconvenient questions of the constitution (as the unity of the Nazi community already always preceded the law). By looking at the denial of constitutional projects of modern times, it may be possible to explain why the Federal Republic's society grants constitutional order such authority; why the "grounding" of the "Grundgesetz" cannot be hollowed out; and why, in constitutionality, the borderline draws on the legitimate order. With the newly created "pathos" of the constitution, which presented a fundamental consensus regarding congress' disagreements and therefore posed an extraordinary challenge and confirmation of basic order, the Federal Republic's society has fully arrived in Western modernity! The idea of constitutional patriotism¹³ expresses this – from Dolf Sternberger to Jürgen Habermas – as a minimal program of an effective commitment to public spirit that is neither subject to permanent change nor bound to a substrate of the people, the party, or an abstract society. Rather, constitutional patriotism is directed towards a text, the *charisma of a text*, in which – as Isensee has put it rather ironically – the constitution becomes the lost location of the fatherland.

Horst Bredekamp was able to show that the signing act of the German Constitution was, however, far away from false pathos and charismatic presentation: "Kunstvoll arrangiert, fällt der einzige unverstellte Blick auf den kargen Hocker, auf dem die Unterzeichner Platz zu nehmen hatten. Er ist das zentrale Symbol. Die Zeremonie suchte nicht repräsentativ aufzutumpfen, sondern den Moment aus dem Geist der Zurückhaltung mit einer höheren Dignität zu versehen, als es die äußeren Zeichen der repräsentativen Öffentlichkeit hätten leisten können."¹⁴ The anti-pathos is relativized by the fact that the fountain pens for signing could be filled by an ink pot, a statute that contained the Chinese signs "Ju-I", meaning "long life". The provisional status of the fundamental law was thus counteracted by a message for eternity! It would be fascinating to learn how the experts in German constitutional law read such an interpretation of the founding act of the Federal Republic of Germany – an act which does not does not prorogate the idea of a foundational myth. However, the ascetic style of the Bonner Republic, combined with some Rhenish Catholicism, was a rather successful model of implementing a fundamental law into a morally and physically devastated landscape.

¹³ For comparison refer to the nice study by Kronenberg, Volker: *Patriotismus in Deutschland. Perspektiven für eine weltoffene Nation*, Wiesbaden 2005.

¹⁴ Bredekamp, Horst: *Politische Ikonologie des Grundgesetzes*, in: Michael Stolleis (ed.): *Herzkammern der Republik. Die Deutschen und das Bundesverfassungsgericht*, München 2011, pp. 9-35, here p. 12.

Image 7



2 Erna Wagner-Hehmke, Carlo Schmid beim Unterzeichnen des Grundgesetzes, 23. Mai 1949, Photographie, Bonn, Haus der Geschichte

Image 8



4 Anonym, Konrad Adenauer beim Akt der Unterzeichnung, Photographie (ullstein bild/ap)

An analysis of the marmorated cover of the document concludes that, typographically and by way of the parchment material (by the Papierfabrik in Zerkall), a distance to former styles had been sought. However, at the same time, a semantic affinity to Rhenish Catholicism became visible as other publications from the Catholic Borromäusverein appeared. Whether all of this may be resumed in a veritable political iconology, as stated by Bredenkamp¹⁵, remains an open question for discussion.



Image 9: Front page of the German Grundgesetz
(Copyright: Deutscher Bundestag/Georg Munker)

¹⁵ "In all seinen Buchelementen bietet das Grundgesetz eine so starke Kongruenz von Inhalt und Gestalt, dass erneut von einer veritablen politischen Ikonologie zu sprechen ist." (ibid., p. 20)

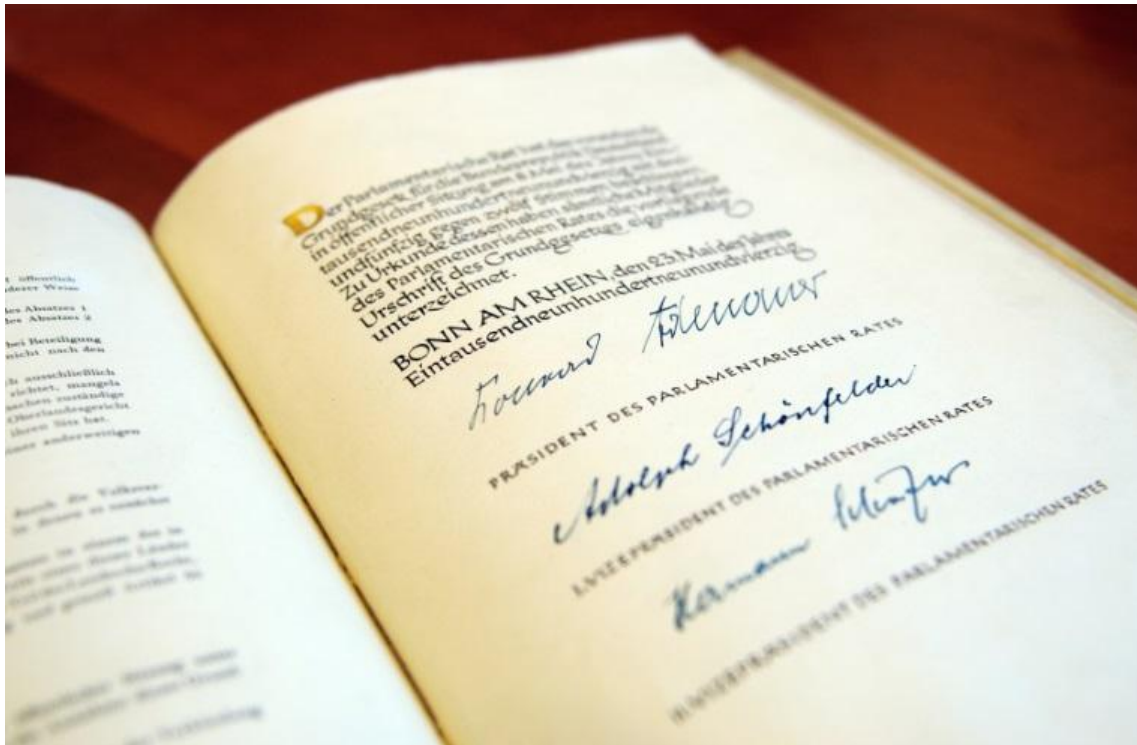


Image 10: Certification of the Grundgesetz (Copyright: Deutscher Bundestag/Silvia Bohn)

d.) The Constitutional as an Evolutionary Universal

Considering that there had previously been *lois fondamentales*, *constitutiones*, but not a single text that measured the validity of the legal system or the organs of political action as constitutional or unconstitutional, can the invention of constitutions in the 18th Century truly be considered an evolutionary achievement? This question is only logical if one considers it to be in line with the evolution theory found in the description and explanation of societies. But, in sociology, this is thoroughly not illegitimate: In his fundamental essay on “Evolutionary Universals”¹⁶, Talcott Parson demonstrated how particular institutions, cultural legitimation, market and monetary systems, social stratification, bureaucratic organization as well as universalistic legal systems and democratic authority belong to prerequisites without which a further development of societies in the sense of higher adaptability would be unthinkable.¹⁷ Here, Parsons does not mention the “constitutional complex”, as called in his theoretical lingo. However, on the contrary, Luhmann analyzed the constitution exactly along those lines.

¹⁶ Parsons, Talcott: Evolutionary Universals in Society, in: American Sociological Review 29 (1964), pp. 339-357.

¹⁷ For comparison see Gephart, Werner: Gesellschaftstheorie und Recht, pp. 210ff.

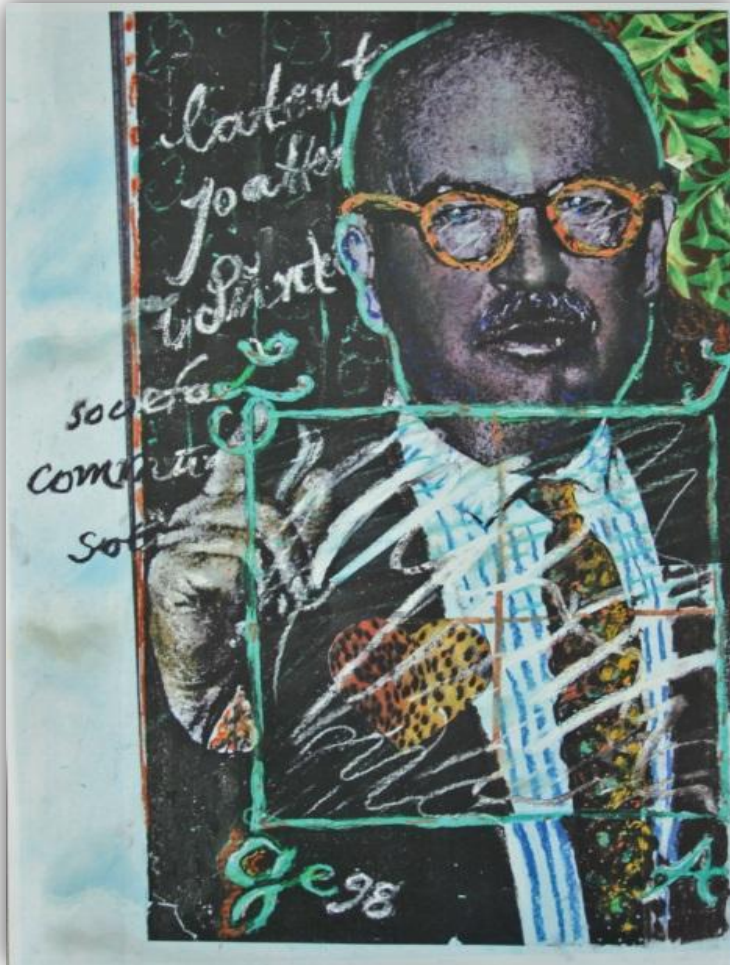


Image 11:
Werner Gephart,
Talcott Parsons as a pop artist, 1998

In Talcott Parsons' theory, constitutions can be interpreted as the code that regulates the ordinance of the symbolically-generated communication method of "power" and steers the processes of increasing and decreasing levels of power.¹⁸ In doing so, he locates constitutions in society's political system. Luhmann, too, expresses this affinity for the political system, but his core point differs: constitutions are not only related to the political system of modern societies, but also to the legal system, as they reflect and enable the differentiation between politics and law while also congruently facilitating their structural linkage. The emergence of the constitutional idea hereby reacts to processes of functional differentiation which, as described by Emile Durkheim in his study on the division of labor, replaces societal structure with segmented differentiation in Western modernity.

Luhmann asserts very vividly that the law, through its modernity (meaning its positivity), was "surprised". Even when "positivity" means that "arbitrary law" becomes positively valid, a

¹⁸ For general information see: Parsons, Talcott: On the Concept of Political Power, in: id.: Politics and Social Structure, New York 1969, pp. 352-404.

self-restraint of this autonomy, which should not be arbitrary, is necessary. However, this means “daß alle Unvereinbarkeit, Verletzlichkeit, Höchstwertigkeit etc. im Rechtssystem selbst konstruiert werden muß”.¹⁹ For this reason, the legal system refers only to itself, rather than to a logical norm, as Kelsen implies, by neglecting to refer to something aside from itself, natural law, or reason. Instead, it does so by declaring itself superior to simplistic law; depriving itself of the arbitrary modifiability through complicating provisions of constitutional amendments; incorporating controls on constitutionality; and binding the institutions, created by the constitution, again to nothing other than the constitution *as the law*.²⁰ As a result, a typical problem of self-referential systems, which break through the cycle of self-reference through re-entry, is identified.



Image 12:
Werner Gephart
The Magician of Sobriety (Sachlichkeit)
(Niklas Luhmann), 1997

¹⁹ Luhmann, Niklas: Verfassung als evolutionäre Errungenschaft, in: Rechtshistorisches Journal 9 (1990), pp. 176-220, here p. 186.

²⁰ For comparison see *ibid.*, p. 187.

A similar problem, however, is also characterized by the differentiation of the political system. Just as the legal system constructs its unity, the political system seeks to establish its system-specific unity in the form of sovereignty, not just against the empire and the church, but also against a corporate social order. As soon as legislation undertakes this “unifying function” and the division of powers, system-theoretically speaking, serve as a paradoxical form of creating unity, the law as constitution enters into a so-called “sovereignty gap”. Hence, constitutions are at a crossroads between this twofold problem of autonomy and the structural linkage between law and politics: “Die Neuheit des Verfassungskonzepts des 18. Jahrhunderts liegt darin, daß die Verfassung eine *rechtliche* Lösung des Selbstreferenzproblems des *politischen* Systems und zugleich eine *politische* Lösung des Selbstreferenzproblems des Rechtssystems ermöglicht.”²¹

Theoretically less stressed or stressful, it can also be said that constitutions find themselves within the legal system as supreme, no longer surpassable institutions in which an unconstitutional constitutional law is fundamentally excluded and the law can be either constitutional or unconstitutional, a process through which it gains its own legitimacy and identity. In contrast, the political system, within its prescribed procedures, implements binding decisions for society as a whole under the legitimacy of a sovereign entity whose hands are bound by the law.

One does not need to be a clever system theorist to draw a conclusion from this analysis, namely to determine constitutions’ meaning for the emergence of states and civil societies in occidental, oriental, and Asian societies.

1. Here, not only general problems of cultural transfer need to be considered when observing the ‘exporting’ and ‘importing’ of constitutions as institutions. This could potentially interfere with a European bias and the reception of European-Western legal culture.
2. Rather, there could be structural reasons for the limited export opportunities²², as the prerequisites needed for constitutions to fulfill their function as a hinge between the legal and political systems are therefore simply not provided. This could rest upon the

²¹ Ibid.

²² Cf. *ibid.*, pp. 212 ff.

fact that, for example, elementary requirements of functional differentiation are missing or another type of differentiation culture has been established.

3. In doing so, one would certainly land in the familiar ‘development trap’, in which the structures that it first promises to create itself are a precondition for the institutional transfer to be implemented.

First Preliminary Result: Constitutions as Multidimensional Structures

For a sociological view of constitutions, which is to lead a cultural-oriented comparison of constitutions, it becomes possible, beginning in the context of the ‘Law as Culture’ Program²³, to differentiate between various aspects²⁴.

1. Constitutions reveal a *symbolic* level which aims directly at the order of collective symbolism; grounds the collective identity of a nation; and expresses itself through visible signs, often a flag and a figure (i.e. an emperor, a president, etc.) that symbolizes the unity of the political system. How competing symbolisms are treated, both inclusive and exclusive, signifies an important dimension of intercultural constitutional varieties. Constitutional charters can be read as the materialization of such inclusive strategies. The location where they are stored marks the differences of their socio-cultural significance. To Bellah, the U.S. Constitution, viewed as a manuscript, is a component of civil religion in America: “The Declaration of Independence and the Constitution were the **sacred scriptures** and Washington the divinely appointed Moses who led his people out of the hands of tyranny.”²⁵ Constitutional images are capable of condensing the overflow of meaning regarding their idea of order and thus contribute to the “validity” of constitutional order.²⁶

²³ See Gephart, Werner: Rezeptionsanalyse als Rechtskulturforschung, in: Schermaier, Martin/Gephart, Werner (eds.): *Rezeption und Rechtskulturwandel. Europäische Rechtstraditionen in Ostasien und Russland*, Frankfurt am Main 2016, pp. 257-268.

²⁴ These distinctions apply the sociological concept of law, which is oriented towards Durkheim’s theory of social life, to constitutional questions; cf. Gephart, Werner: *Recht als Kultur. Zur kultursociologischen Analyse des Rechts*, Frankfurt am Main 2006, pp. 289ff.

²⁵ Bellah, Robert N.: *Civil Religion in America*, in: *Daedalus. Journal of the American Academy of Arts and Sciences*, 96 (1967), pp. 1–21, here p. 9.

²⁶ In comparison see: Schulz, Daniel: *Verfassungsbilder*.



Image 13: Mirabeau expels the royal master of ceremony from the conference hall of the National Assembly, June 23 1789. Painting by Joseph Desire Court

2. At the same time, constitutions are the **normative superior order** of society – the “norm of the norms” resting at the peak of the Leges hierarchy, protected from arbitrary change by processes preventing changeability in the future. This is made possible as their normative order is oriented on the unalterable past of a narratively-spread founding myth. (This corresponds to the normative constitutional term.) This hierarchical idea repeatedly raises the question of the guardian of constitutions who is also an interpreter and, with his/her “power of interpretation”²⁷, grows beyond the role of the interpreter of legal norms and often becomes a political actor.

²⁷ In comparison see: Vorländer, Hans (ed.): Die Deutungsmacht der Verfassungsgerichtsbarkeit, Wiesbaden 2006.

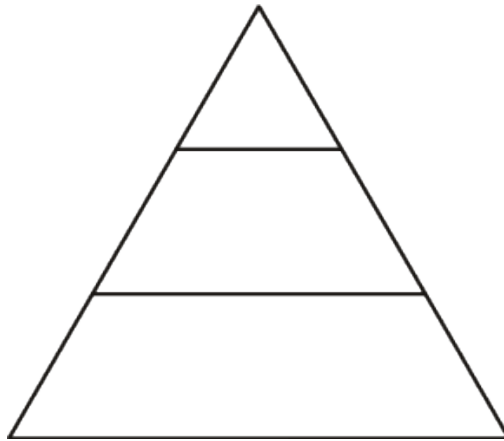


Image 14: Pyramidalhierarchie, Internet 2016

3. Constitutions are furthermore an organizationally-formed order of the political-institutional system, as the division of competencies of certain state institutions (“Staatsanstalt”), which simultaneously institutionalize the superiority constitutions, is propped up by constitutional courts and other judicial inventions such as that of constitutional interpretation.²⁸



Image 15: European legislation, Bundeszentrale für politische Bildung, (Copyright: by-nc-nd/3.0/de/)

²⁸ Cf. the texts of Christoph Möllers, e.g. Staat als Argument, Tübingen 2000.

4. Lastly, constitutions are the code of the legitimate use of power as a symbolically generalized medium of communication that regulates the creation of power in processes of generating and applying of legitimate rule.²⁹ (Constitution as *process/ritual*). This level appears in transitional phases of special meaning, for example, when old orders dissolve and new plans for the creation of meaning of society take on a normative-constitutional form.



Image 16: A protestant church, Internet 2016

5. Constitutions are the place where the structural decisions of a society become visible. These decisions embrace the societal system and its subdivisions according to their specific culture of structural and functional differentiation, determining as well the hierarchical and heterarchical social architecture (societal concept of constitution)

²⁹ In the Parsonian sense of power as a generalized medium of communication.

6. Finally, the epistemical doubt that repeatedly bothered us during the first phase of the projects may not be left unmentioned: if we simply put occidental speech into completely different living conditions and constitutional circumstances, don't we need to contextualize the emergence and validity of the notion of the constitution much more from a cultural-sociological perspective?

An array of certainties regarding old constitutionalism are also no longer valid in the occidental world. The debate concerning the European Constitution and the corresponding constitutional texts have shown that the constitutional idea is no longer bound to the substrate of the political system that we call "state". The denationalization of politics, however, entails that the entities, which are denied the uniform quality of the state, nevertheless seek the ornament of the constitution and, on the other hand, separate themselves from the state as a substrate of the formation of social reality by means of a constitution. This will be discussed in more detail at the end of this lecture.

Even when "constitutions" should operate detached from values and presuppositions, they requires an even higher symbolic effort to bring their validity into effect. Constitutions' "force de droit" (Pierre Bourdieu) needs common belief in constitutions or a constitutional consciousness insofar that the religious motivation in believing the text disappears. The law as well as the constitutions themselves must offer civil religion in order to steer affective needs of collective creation of meaning and identity building towards constitutions. Thus, at the same time, the European Constitution is enormously overburdened, as the stress of integrating³⁰ transnational community formation, which exists neither as a community of values nor communication but at most as a legal community, is imposed on it.³¹

With this in mind, can sociologically substantiated statements or, at the very least, questions be developed that contribute to an understanding of constitutions in multiple modernities?

³⁰ Since Rudolf Smend, this constitutional function is a constitutive part of the discourse about constitutions, while its meaning remains far from being clear (cf. Vorländer, Hans: *Integration durch Verfassung?*, pp. 14ff.

³¹ For comparison see: Gephart, Werner: *Zur sozialen Konstruktion europäischer Identität. Symbolische Defizite und europäische Realitäten*, in: Gephart, Werner/Sauerwein, Karl-Heinz (eds.): *Gebrochene Identitäten. Zur Kontroverse um kollektive Identitäten in Deutschland, Israel, Südafrika, Europa und im Identitätskampf der Kulturen*, Wiesbaden 1999, pp. 143-168.

	Constitutional symbolism	Constitutional normativity	Ritual dynamics of constitutions	Constitutional organization
France				
USA				
Germany				
Japan				
India				
Islamic countries				

IV. Constitutional Orders Outside of the Occidental

We had expressed the assumption that two reasons would make the reception of the constitutional idea of a European-occidental constitutionalism more difficult: firstly, the legal-cultural characteristics of Western legal cultures and their respective counterparts and, secondly, the concurrent structural difference of their conditions of validity. The example of Japan is especially revealing, but its “modernity” is out of question.



Image 17: Werner Gephart, Legal transplants (with the American Constitution), 2016

a.) Japan: The Recovery of Lost Modernity?

The preamble of the Japanese Constitution from November 3rd, 1946, is characterized by a universalism which can be explained by the defeat of the Japanese Empire: It is a confession of the right of all people to live in peace, free from fear and terror, and recognizes that no nation exists solely for itself “but that laws of political morality are universal.” It is no longer the universalism of human rights, but rather the political virtue of institutions, which is obligatory for all nations.

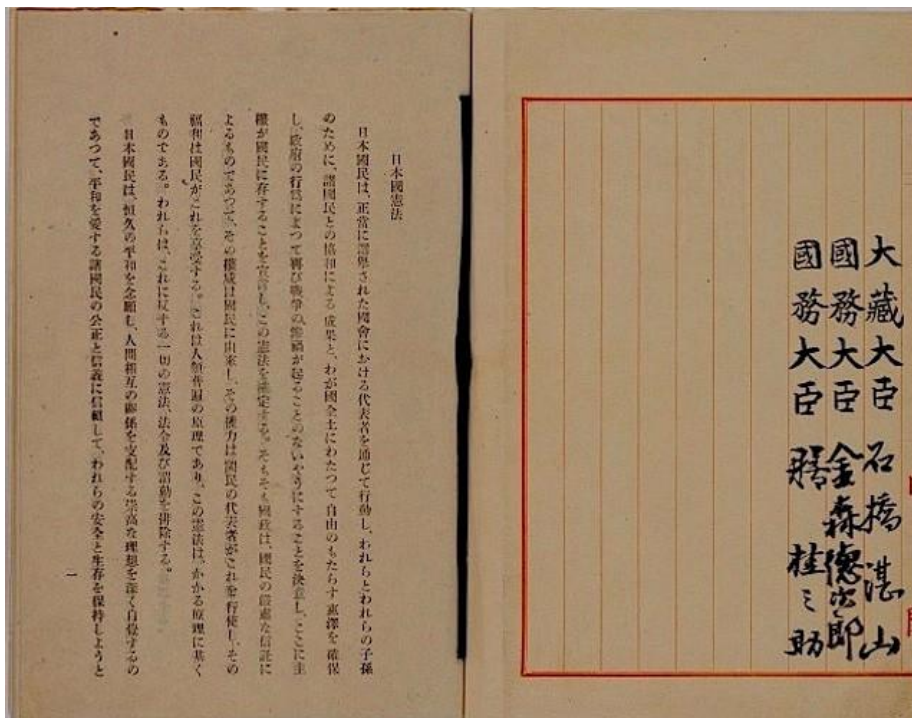


Image 18: Constitution of Japan 1946,
(Copyright: 2015 National Archives of JAPAN All rights reserved)

The fact that the Constitution emphasizes the role of the Tenno in its first Article and, at the same time, reduces the office to a symbol, which, according to the constitutional text, is supposed to represent the unity of the state thereby leaves open the highly-debated question in the teaching of constitutional law of whether this office is entitled to the function of head of state beyond its (the role's) ceremonial functions. This is basic knowledge about Japan. The fact that the Constitution has not changed in its wording once – if am seeing this correctly – may be because of the firm resistance to change found in Article 96, which not only calls for a two-thirds majority in parliament, but also requires a referendum for constitutional

amendments. At the same time, the precedence of constitutional law is defined in Article 98, while human rights can be traced back to their historical dignity in Article 97. At the same time, the precedence of constitutional law is defined in Article 98, while human rights can be traced back to their historical dignity in Article 97. Simultaneously, there is a duty to reject war in a constitutionally-unique clause that is connected to the disenchantment and desacralization of the Imperial House, namely: “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right to the nation and the threat or use of force as means of settling international disputes.” (Article 9, first sentence) Formulations of this kind attempt to link the paradox of a state stripped of its full sovereignty to the idea of popular sovereignty by constructing the will of the Japanese people as fiction.

But what is still “Japanese” in this Japanese Constitution? Thus, one could ironically ask this especially when presenting the Japanese Constitution as an imposition by Douglas McArthur. However, a line of continuity to the Meiji Constitution reveals itself but is not pursued further in the context of this paper.

The conditions for the emergence of this constitutional work, which at least leave open the question of whether or not the pacifist clause could perhaps go back to Japanese influence, is tied together with a more reserved debate on fundamental rights, whose individualistic orientation has led to a constitutional discourse that, according to Reinhard Neumann, “eine starke Gegenreaktion in dem Sinne ausgelöst habe, daß eine Rückbesinnung auf traditionelle Werte gefordert wurde, auf Tugenden wie Gehorsam, Bescheidenheit, Achtung der Älteren, Fleiß und ähnliches, welche in die Verfassung eingefügt werden sollten.”³²

Even if the Constitutional Charter in Japan appears to be met with a special reverence – that is, a kind of civil religion of the Constitution appears to be established – the separation of church and state (Article 89), especially regarding state-Shintoism, represents a clear break with an imperial past.

In the tension between popular sovereignty and Tenno-legitimacy, Japan is preserving its own path into a constitutionalized modernity, as shown by Kyoko Inoue in a linguistic analysis of

³² Neumann, Reinhard: *Das Japanische in der Japanischen Verfassung*, in: Menkhaus, Heinrich (ed.): *Das Japanische im japanischen Recht*, München 1994, pp. 425-434.

constitutional negotiations: “By arguing that the Emperor was a *kokumin*, they were able to claim the sovereignty resided both in the Emperor and the people.”³³

Thus, the Japanese Constitution constructs an order of collective symbolism that fluctuates between universalism and Japanese particularism, creating a durable moral-normative superior order as a constitutional text and regulating the separation of powers and use of political power. At the same time, it leaves its founding myth in the ambivalence of an imposed Constitution, forced values of the individualistic West, and the knowledge of the Japanese’s peculiarity.

b.) India’s Project of Multi-Communitarianism: The Constitution in the Struggle against Imperialism and Colonialism

As the Constitution of India came into force on January 26th, 1950, after two-and-a-half years of negotiation in the constitutional assembly, the legend of its president was founded – a mythical legislator of the Constitution that, as Dalit, had led the commission: Bhimrao Ramji Ambedkar. Even when Constitution contains elements of different constitutional traditions that are modeled after British parliamentarism or a catalog of fundamental rights that resembles the United States and foresees a high court that emulates the Supreme Court, the Constitution also looks to other constitutional traditions. For example, in its ideals, it understands itself in the French tradition of “*égalité*”, “*liberté*” und “*fraternité*”. Regulations regarding emergency rule were borrowed from the Weimar Constitution (Articles 352-359).

³³ Kyoko Inoue, quoted by Eisenstadt, Shemu’el Noah: Japanese Civilization, Chicago 1996, p. 96.



Dr Ambedkar, Humnabad (Bidar), Karnataka, India - Sunil Deepak, 2013

Image, 19/20: Dr. Bhimrao Ramji Ambedkar, Internet 2016

The Constitution establishes a “sovereign, democratic republic” named India or Bharat as a “union of states”. Only in the context of a model of decentralized policy and strong local administrative structure (*panchayat*) does a parliamentary and federal system, which has a strong central decision-making body, emerge.

To this extent, it is the Constitution of the state institution and the division of powers of political units of action – that is, a purposeful instrument of the exercise of rule – that regulates the framework for the genesis of power as well as its circulation and application. The Constitution of India is, however, much more: it is the symbolic expression of a social project intended to reverse a system of collective inequalities by means of a constitution. Article 17 eliminates the social category of the “untouchables”: “‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.” This provision precedes a ban on discrimination that prohibits the state from discriminating against its citizens: “No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

- a) access to shops, public restaurants, hotels and places of public entertainment, or
 - b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.”
- (Article 15)

Similarly, titles – the more or less “subtle differences” – that have lasted the longest even in revolutionary France are being removed. And, finally, a foundation of the Indian caste system, namely the particularistic barriers to a profession, is eliminated in the formulation of the constitutional text by entitling all to the pursuit of every type of profession, employment, trade, and commerce. This guarantee of freedom of occupation (Article 19(1)(g)) is part of a conversion from a system of religiously-legitimized and traditionally-solidified inequalities into *inclusion semantics*, which represents a characteristic of the Indian Constitution.

In particular, how should a society that admittedly prohibits discrimination on the basis of religion, race, and castes but also guarantees religious freedom (Article 28) withstand all the tension between the factuality of a still-existing caste system, religious-pluralist groupings, and a difference between genders that just recently abolished the burning of widows (*Sari*)? After all, the Constitution explicitly guarantees the plurality of collective identities as stated in Article 29: “Any section of the citizens residing in the territory of India or any part thereof

having a distinct language, script or culture of its own shall have the right to conserve the same.” (Article 29, Paragraph 1) In doing so, the Indian society masterfully unifies over 3,000 castes and sub-castes, 300 languages and dialects, and a virtually unbelievable abundance of religious forms from Hinduism to Zoroastrianism, from Christianity to Islam and Sikhism under one roof. But: on which pillars does this roof rest? Does the Constitution of India fulfill that mythical function of constitutions to not only achieve system integration of the political system but also span the social integration of its plural orders? How did the subsequent related faith in constitutionalism (Verfassungsglaube) arise?

The Constitution has been a product of the struggle for liberation, in which the dispute for a legal power, namely the right to produce salt, became the starting point for the peaceful transformation of the Indian society. The lawyer Ghandi had prophesied this revolutionary effect that he experienced by way of the charisma of non-violence.³⁴ How does the Constitution of collective symbolism, in which the divorce between the “pure” and the “non-pure” is abolished, behave in relationship to the building of slums in the metropolis? Does the inclusive nature of the Indian Constitution rest upon the fact that a large portion of society is excluded in an ongoing manner?

The symbolic message is also expressed in its outward form: The original Constitution of India is handwritten with beautiful calligraphy, each page beautified and decorated by artists from Shantiniketan including Beohar Rammanohar Sinha and Nandalal Bose. The illustrations on the cover and pages represent styles from the different civilizations of the subcontinent, ranging from the prehistoric Mohenjodaro civilization in the Indus Valley to present-day societies. The calligraphy in the book was done by Prem Behari Narain Raizda. It was published in Dehra Dun, and photolithographed at the offices of Survey of India. The entire process of producing the original took nearly five years.

³⁴ For an evaluation of Ghandi from the perspective of the theory of charisma cf. Gandhi, Mahatma/Rothermund, Dietmar: Charisma als Erfahrung und Eigenschaft, in: Nippel, Wilfried (ed.): *Virtuosen der Macht*, München 2000, pp. 192-206.

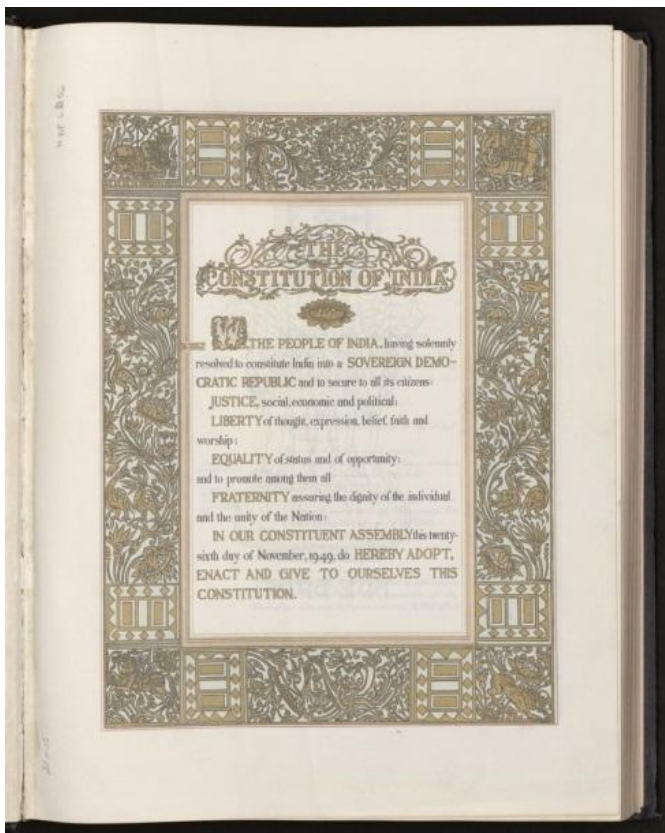
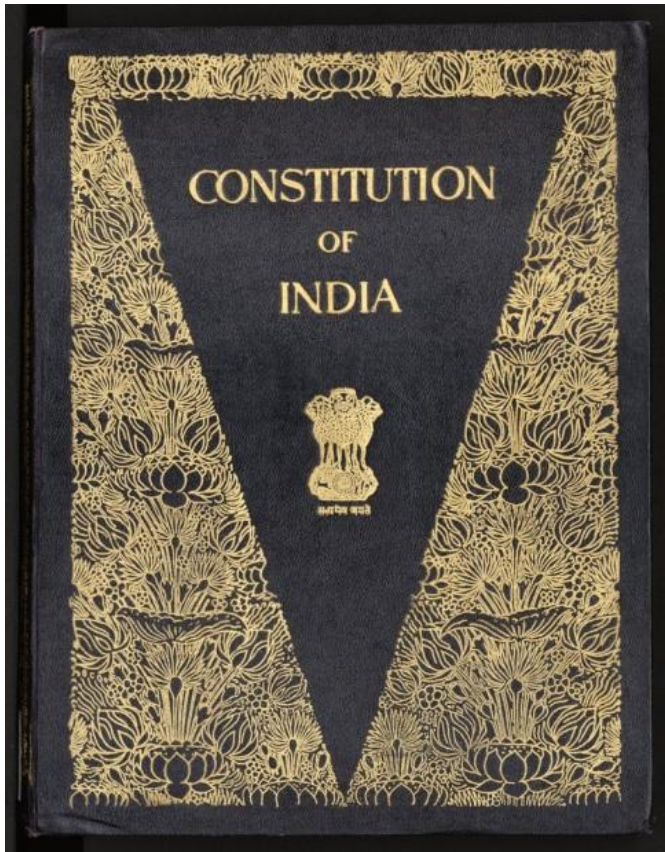


Image 21/22: The Constitution of India. (Calligraphed by Prem Behari Narain Raizada (Saxena), Illuminated by Shri Nandalal Bose and other artists), <https://www.wdl.org/en/item/2672/>

How can such a sacred text be preserved? The original 1950 Constitution of India is preserved in helium cases in the Parliament House in New Delhi. There are two original versions of this – one in Hindi, the other in English. The importance of the constitution is pronounced in a self-description by Justice Khanna:

“If the Indian Constitution is our heritage bequeathed to us by our founding fathers, no less are we, the people of India, the trustees and custodians of the values which pulsate within its provisions! A Constitution is not a parchment of paper, it is a way of life and has to be lived up to. Eternal vigilance is the price of liberty and in the final analysis, its only keepers are the people.”³⁵

Here, questions regarding the “lived” constitution converge with the change of structural inequalities that are caught in a model that R.A. Momin labeled and analyzed as multi-communitarianism in a fragmented world.³⁶ A formalistic belief in the legitimizing force of documents is counteracted by the pathos of “lived law”.

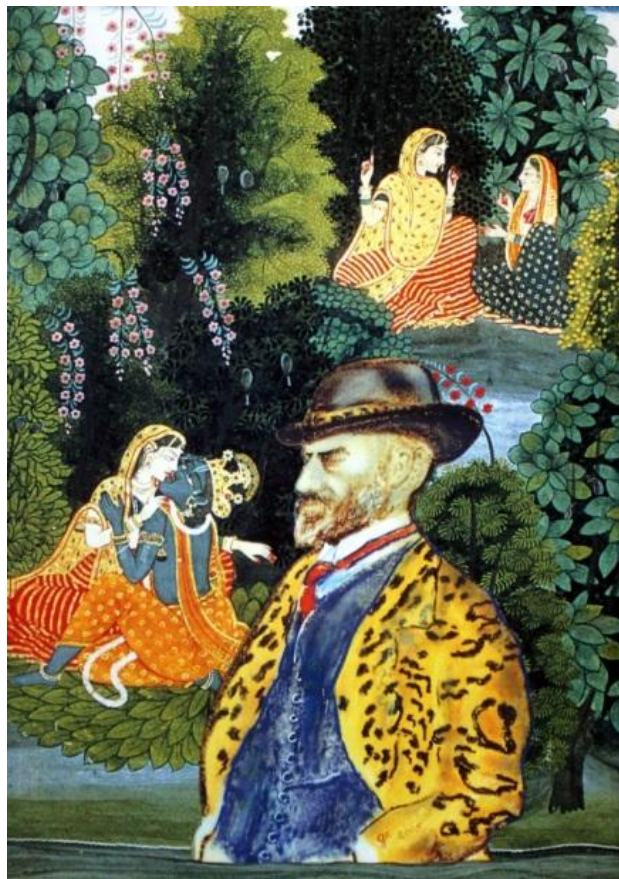


Image 23: Werner Gephart, In the enchanted garden, Max Weber in India, 2005

³⁵ Khanna, H.R.: Making of India's Constitution, Lucknow 2008, p. 164.

³⁶ Momin, A.R.: Multicommunitarianism in a Fragmented World, in: Asia Europe Journal 2 (2004), pp. 445-459.

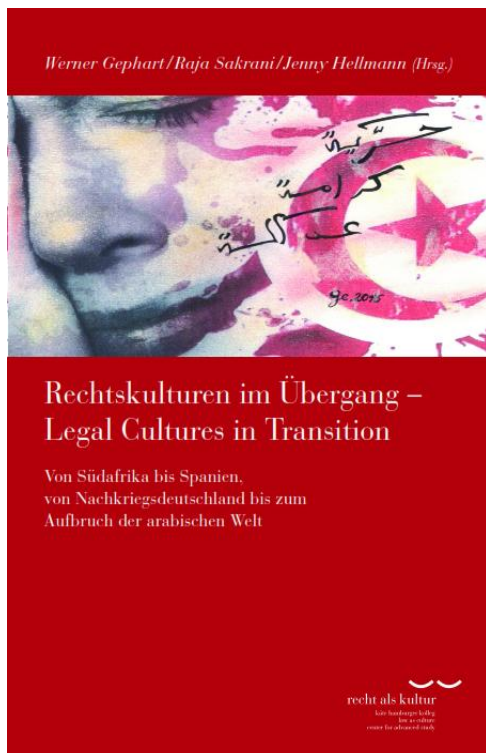


Image 24: Alexander Polzin, Homage à Dr. Ambedkar, 2011

c.) Islamic Constitutionalism? From the Constitution of Medina to “Constitutional Islam”

Lastly, one must take an example from outside of occidental world, as this distinction is still to be made. The Iranian Revolution’s reference to Islam is built in the revolutionary documents of constituting a state according to an Islamic normativity, although it remains unclear what exactly this means. Some call this question “Islamic constitutionalism”.

On two separate occasions, the Center has dealt with those questions – once in Bonn in 2012 as well as in Beit al Hakma (Tunis) in 2014.



How can one obtain access to a concept of “Sharia” without committing the constructivist error, as some do, of acting as if neither “Sharia” nor Islamic law “existed”. How can one grasp “Sharia” in between transcendent reason and a super-meta norm? Further, is there a theoretical gain when calling it a “validity culture” and embracing all normative rules in one uncanny realm of normativity? Against such a possible reductionist view, Asma Afsaruddin pleads for the pluralism of “Sharia” conceptions and a variety of women’s rights to be seen under the umbrella of “Sharia”. Apart from this feminist reading of the Quran, one can also listen to the voice of a young and courageous blogger, Lina Ben Mhenni. Her point is to emphasize her Muslim origin, but at the same time demonstrate that it is also a product of chance. Had she been born in Germany, she remarks, she may have been Protestant; in France, Catholic; and in Cambodia, Buddhist. The equally contingent affiliations to different schools and branches within the Islamic world would be no less extreme. The reference to “Sharia” is frightening to Ben Mhenni because her fight for freedom, justice, and dignity does not need any kind of religious foundation! The great intellectual Sadik J. Al-Azm is more explicit about a secular perspective towards “Sharia”. As a historical observation of Islamic societies, he argues that it would be wrong to claim them to be under the rule of “Sharia”. Countries such as Egypt, Iraq, Syria, Algeria, and Turkey would not stay under Islamic precepts. Therefore, the complaints of Islamists are justified: The totality of social life is not regulated by reference to “Sharia”. Hence, any kind of restricting religious experience and practice to one differentiated sphere of social life – as the Western model of a compatibility of

the sacred and the profane in modernity would recommend – is not acceptable for a radical view of “Sharia” as the form for the totality of social life. In Western tradition, one is trained to look for the centers of “*Deutungsmacht*”, i. e. the bearers of definite interpretation of the holy text. Al-Azhar in Cairo – which nearly regained such power through the project of the Egyptian constitution in Art. 4 – and the famous Zaituna in Tunis are viewed critically by this secular protagonist of a civil society in the Arab world. They contributed, according to his experience, literally nothing to an innovative reading of “Sharia” and the Quran. This observation makes it plausible that innovation comes, whether from the right or from the left, from other places in the world other than the locations of authoritative interpretation in Cairo and Tunis. Sadik Al-Azm reminds us of the hanging of Mahmoud Muhammed Taha for his interpretation of the Quran in Sudan in 1985. He also recalls Nasr Hamid Abuzeid and his wife, Ebtihal Younes, who were forced to emigrate to the Netherlands. But perhaps one main point of critique of the secular is Al-Azm’s view of himself: as a *Kāfir* (Nonbeliever) who expresses, as he says, a “neurotic view of the outside and inside worlds”. From a sociological point of view, one witnesses how much the differentiation from the inside and the outside, the demarcation line drawn among the enemy and the friend, the brother and the other’s world, is functional for the creation of one’s identity. But the identitary consequences are too dangerous to build society upon such an ambivalent code. Raja Sakrani subsequently questions the use of “Sharia” references in different contexts: from the “shahid”, a central figure in the imagery of Islamic symbolism, to “Sharia” as the source of any legislation, the lack of knowledge of the factual ‘a-validity’ of Islamic law. She also critically investigates a claim by Ghanouchi to the effect that “Sharia” must be introduced to Tunisian Law because 90% of the legal material were informed by Islam. This observation by a legal historian of the Maghreb normative world is thought to at least bring more new realism into the self-proclaimed reference to “Sharia” than the illusion that Islamic interpretations are completely absent, for example, in family law.

Yet the question remains what the reference to religion, to be precise the reference to Islamic traditions, means for the reorganization of the broken authoritarian regimes. Tariq Ramadan, professor of Islamic Studies at Oxford and grandson of the founder of the Muslim Brotherhood, Hassan al-Banna, derives legitimacy as follows: “Les partisans de l’islam politique jouissent d’une légitimité historique reconnue pour s’être opposés aux dictatures et en avoir payé le prix par l’emprisonnement, la torture et/ ou l’exil forcé.”³⁷ Does this still

³⁷ Ramadan, Tariq: *L’Islam et le réveil arabe*, Paris 2011, p. 164.

apply if the Revolution was evidently initiated by very different carriers, particularly the young deprived, sometimes possessing academic titles, who had no societal claim to political or economic participation? The fact remains that even in times of supposed, or imposed, secularism, Islam remained very much part of everyday life in the societies experiencing upheaval, such as in Tunisia, Egypt, and Libya. Yet what does “reference to Islam” mean today, when Salafists in Egypt and Tunisia hold almost contrary positions regarding the tricky question of whether and how to apply Sharia law? It also remains questionable how far the claims of this “validity culture” reach. Do they refer to the constitutional reference to the Sharia or even the Muslim Brotherhood’s claim that “the Quran is our constitution”? In the formal sense of constitutions, this applies to a variety of countries including Mauretania, Libya, Egypt, Sudan, Saudi Arabia, the United Arab Emirates, Yemen, Oman, Kuwait, Bahrain, and Qatar. For family law, we need to include Senegal, Sierra Leone, Nigeria, Somalia, Morocco, Algeria, and (with reservations) Tunisia, Jordan, Syria, Turkey, Iran, Afghanistan, Pakistan, the United Arab Emirates as well as, without being exhaustive, the Gulf States. The reference to arcane criminal law, hard for Western thought to comprehend, is limited to Mauretania, Nigeria, Sudan, Saudi Arabia, Somalia, Iran, Afghanistan, Pakistan, Bangladesh, and Indonesia.³⁸

While there is consensus among experts that the reference to Sharia points to a plural, normative reality³⁹, there has not been a lack of attempts to latch on to the etymological meaning in which Sharia is not understood as a set of norms, but rather as a dynamic perspective of norm-generation (whatever that may mean). For example, the following claim made by the aforementioned Tariq Ramadan should certainly be taken with caution: “sharî’a n’est pas une structure légale figée et sanctifiée, elle correspond plutôt à une dynamique spirituelle, sociale, politique et économique qui aspire à des finalités supérieures associées à une certaine idée de l’homme.”⁴⁰ Or does this legitimacy reference allude to a socialist interpretation of Islam that promises to avoid the “contradictions” of capitalism, particularly the recent catastrophes of financial capitalism?⁴¹ It is hard to deny that the Islamic reference to “justice” holds its own suggestive power to convince and seduce – a power that does not

³⁸ Cf. the useful map in: *Moyen-Orient*, Vol.13 (2012), Islam et démocratie, p. 17.

³⁹ Distinctions already need to be made between the legal schools within Sunna and Shia, expert opinions by legal scholars and petit people, the respective local application of the Maliki school of law in Tunisia, the Hanafi school in Libya, the Shafi’i school in Egypt etc. Cf. the overview in Lafrance, Pierre: *La charia, une réalité plurielle*, in: *Le Monde*, 10 January 2012.

⁴⁰ Ramadan, Tariq: *L’Islam et le réveil arabe*, p. 184.

⁴¹ Cf. also Sakrani, Raja: *Das Verbot von Zinsnahme und Risikogeschäften. Theorie und Praxis islamischer Finanzethik*, in: Pfeleiderer, Georg/Seele, Peter (eds.): *Wirtschaftsethik kontrovers: Positionen aus Theorie und Praxis*, Zürich 2012, p. 181-195.

become obsolete through the West's suggestions that it has the character of an empty formula ("*Leerformel*")⁴².

In view of the extraordinary problems faced when trying to precisely grasp the Sharia, its mode of operation appears to be structurally related to the reference to "nature" in modern thought. Thus, this can be read as an attempt to pin down the particularity of *Islamic normativity* through its mode of generating validity.

For such an undertaking, the cultural reading of normativity is necessary in order to avoid losing oneself in the beauty of the Arabic language, the judicial technicalities of hybrid legal structures, or the reduction to some supposed interests to construct an orientalist or "occidental" understanding of how the search for social, political, gender, and economic justice is expressed in Islamic societies and by Muslims in the world.

The continuous tension between a religiously impregnated validity culture in some Islamic countries and the self-declared "secular" validity cultures exists, which is especially seen in the midst of Europe through pictures and images about the Prophet and the horrible reaction. Thus, immense amounts of mutual knowledge, understanding, and respect are necessary in order to avoid the "Hobbesian state of Nature", reach a state of conviviality, and remind one of a model that has been named "Convivencia", which regulated the relationship between Christians, Muslims, and Jews in Al Andalus. Raja Sakrani is following up on this historical myth and its "Kulturbedeutung" for our time in a cooperative project with the Max Planck Institut für europäische Rechtsgeschichte in Frankfurt am Main. The focus is on the question of whether the role of "dhimmi" attributes a constitutional guarantee for being protected and given a chance for peaceful coexistence. Does the normative order of Medina provide a kind of a pre-modern "constitution" of the rising community?

Contrary to the traditional view of legal functions forming a closed list of conflict resolution, integration, predictability of economic behavior, protection of the individual against collective powers etc., law seems to become more and more a *medium of communication* and expression of *collective identity*, thereby also taking on new risks of producing tension and conflict in society.

⁴² See one of the founding articles by Topitsch, Ernst: Über Leerformeln. Zur Pragmatik des Sprachgebrauches in Philosophie und politischer Theorie, in: id. (ed.): Probleme der Wissenschaftstheorie. Festschrift für Viktor Kraft, Wien 1960, pp. 239-264.

Country	Constitutional symbolism	Constitutional normativity	Ritual dynamics of constitutions	Constitutional organization
France	Between myth and rationality of the state	From modest to bold constitutionalism	Les lieux et les cultes de la mémoire comme fabrication d'une conscience collective	Conseil constitutionnel
USA	Constitutionalism as corner stone part of the civil religion	Amendment logics as expression of durability	Oath rituals etc., inauguration festivities, speech tradition	Supreme Court
United Kingdom	Substitution of the text by constitutional (royal) symbolism	"Tradition" as the source of legitimacy	The royal ceremonies and the cult of the kingdom as the constitution	Parliamentary sovereignty as "Leave argument"
Germany	From late constitutionalism over cynical to modest styles of representation, symbolic ascetism, and the constitutional court	From modest to bold constitutionalism	No constitution day, but day of unity/Distribution of the constitution	BverfG as "Deutungsmacht"
Japan	Ambivalent founding myth Restricted tenno-mythology	Imposed or forced constitutionalism?	Anti-Shintoritualism?	Constitutional divide (Art. 9)
India	Anticolonial birth with charismatic founding figures: Ghandi and Ambedkar	Pathos of the end of caste society and its inclusive semantics by safeguarding cultural and normative pluralism "basic feature doctrine"	Constitutional cult in creating the document Republic day (26 of January)	Judicial review

Islamic countries	Foundation mythology of the constitution of Medina “Islamic constitution”	Sharia-reference or reference to Islamic law as general clause in more than 30 nations	Founding rituals of the <i>pouvoir constiuant</i> (e.g. Tunis 2012)	Differentiation vs. fusion of religious and juristic organizational structures
Global legal pluralist constitutionalism	Invisible constitution, decentralized symbolism, schematic imaging of normproduction	Cosmopolitan norms yielding the imbrication of local, national and the global	Decentralized ritualdynamics vs. Global medialization of the UN	Institutional designs, procedures and discursive practices to manage normative pluralism

V. Conclusion: Constitutional Cultures in a Conflict between Universalism and Particularism

Constitutions find themselves caught between universalistic claims and particular conditions of their realization. They must differentiate between local, national, and transnational claims of validity in their own order and find a balance.

It is fascinating to see how the idea of constitutions has not yet come to an end: the text of the state and the state community in the form of modern law – that is, of alterable, principally contingent law that at the same time has built up resistance to its change – rises to the highest norm, the “holy law”. The force of the “holy law” is based not only on the conviction of its arguments, but on the charisma of the text which is preserved in holy places, protected from any changes, and thus establishes a taboo order. The intertwining of law and religion is nowhere as close as in the constitution of the society that is based on secular grounds; yet, in the last point of reference of legitimate identity projections, it reveals a civil-faith foundation, which, of course, also coincides with material ideas of civil society. Nowhere is the binding force of the word so pathetically shaped as in the permanent incantations to the binding effect of the constitution! Nevertheless, the constitution divides the fate of modern law: Even if measures are taken to popularize constitutions, for example through the constitutionally-

ordered distribution of the constitutional text or even through the reduction of the text's complexity by way "Grundrechtskatechismus" (Friedrich Naumann), constitutions remain in part incomprehensible and inaccessible to the everyday actor.

Even the UN Charter as a constitution of the community of states and as a sacred, untouchable text, which could not be subdued by a practice of international law, would not eliminate this legal interpretation monopoly.

Thus, a truly interdisciplinary task is posed: one must trace the differences between constitutional cultures in order to rediscover their peculiar binding force and the charisma of constitutions as well as in order to understand the overarching conditions of a future civil society project in national terms, just as modernity once understood itself in its multiple forms.

For such a research program, it seems fruitful to be able to fall back on our experiences from the first academic phase at the Center: to fall back on a multidimensional concept of law that grew irritated through postcolonial discourse; rediscovered itself in a symbolically, normatively, ritually, and organizationally-formed dimension; and assured itself in the narratives of its founding myths. Just as fruitful as it is indispensable is the relationship to the religious sphere, which, even in the secular state, is at least capable of producing civil-religious resources for the constitutional state's legitimacy. The global dimension of regulatory relations as well as of public, private, medial, and face-to-face communication requires the use of the category of constitutions beyond the national state. On the other hand, conflicts of constitutional culture in international affairs are part of the terrible everyday life of a reality that exceeds constitutional provisions.

Lastly, the provocative question of legal aesthetics is at the center of the emblematic arrangements between symbolic austerity and symbolic expressiveness, whereas the legitimizing foundation of constitutional order typically draws neither on history itself nor even on nature, but rather increasingly on the cultural grounds of its validity. This intersects with the universalistic claims that are currently appearing in the constitutional pathos.

And they also intersect with the banality of the political, as we always define it: as a collectively-binding decision-making, as a collective decision of commonwealth, as a struggle for the last power resources in society, or, currently, as a civilizing of power phantasms for which we so far have not been able to find any better invention than the law, the constitution of society in legal form, and lived reality.

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