Universality – a Principle of European and Global Constitutionalism

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Introductory Remarks

1. Is there, based upon a universal notion of *the* law, a global or universal legal order? Is there a universal source of judgement? The universality of common moral values as well as common legal principles, giving rise to a step by step development of a basic legal order for all mankind, may very well be considered as a dangerously *Euro-centric*, presumptuous utopia. However, such a development seems to be the inevitable consequence of what is called globalisation.[1] The "global village" – describing

[1] *P. Häberle*, Das "Weltbild" des Verfassungsstaates – eine Textstufenanalyse zur Menschheit als verfassungsstaatlichem Grundwert und "letztem" Geltungsgrund des Völkerrechts, in: FS M. Kriele, 1997, p. 1277 ff., 1278; as to the globalisation *R. Dahrendorf*, Anmerkungen zur Globalisierung, in: U. Beck (ed.), Perspektiven der Weltgesellschaft, 1998, p. 31 ff.; *R. Dolzer*, Globalisierung und Wirtschaftsrecht: Ein deutsches Interesse, NJW 2001, p. 2303 ff.; *R. Durth*, Globalisierung und Wirtschaftswachstum, Aus Politik und Zeitgeschichte, B 48/2000, p. 5 ff.; *K. König*, Öffentliche Verwaltung und Globalisierung, Verwaltungsarchiv 92

manifold worldwide interdependencies in fields such as technology, economy, politics – for sure is a serious challenge to the traditional categories of legal thinking. Many ambiguities have to be taken into consideration: the lack of normativity of a global legal system, many indifferent associations connected with the idea of globalism respectively universalism.[2] Therefore, rethinking the relationship between universality and cultural/historical particularity becomes all the more necessary. To provoke the solemn pathos of "universality" or global law would not be sufficient. Quite the contrary, it would rather sound like a suspicious excuse for a desired but not existing vision of "our one planet earth". Universality is well known in different contexts: the universal dimension of religions, the missionary aims of ideologies, the discursive world public forum of philosophical debates, the universal history by *Voltaire*, the "Weltgeist" by *G. F. Hegel* or the "weltbürgerliche Absicht" by *I. Kant*. The collapse of the communist systems in Eastern Europe after 1989/1999 raised hope that a "new world order" under the United Nations could become effective. However, in the post Iraq war period one needs to pay attention to rather precarious dialectics between "global law" and global power". Not a universal "rule of law" but a global *state of emergency* might turn into a quite disputable paradigm of the worldwide "anti terror war".[3]

2. The process of structuring universal law, of outlining its chances and limits, requires a thorough scientific approach. The analyst not only has to be aware of the historical but also the comparative dimension. Universality might be understood as a pre-existent Platonic idea(l) as well as a concrete real life phenomenon originated by very specific historical developments. Universality is deeply rooted in cultural traditions. It is a concept used by many scientific disciplines. In the legal context, universality is an intrinsic expression of the very legal culture a political community is based upon. Even more, this article will try to show that universality is a *constitutional principle* itself. Since 1789, the principle of universality – born in the aftermath of the French Revolution and expressed in the "Déclaration des droits de l'homme et du citoyen" – has been written down in

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(2001), p. 475 ff., at 475–479 (globalisation and global governance); *P. Zumbansen*, Spiegelungen von Staat und Gesellschaft: Governance-Erfahrungen in der Globalisierungsdebatte, in: ARSP, Supplement 79, 2001, p. 13 ff.; *P. Robejsek*, Globalisierung – Eine kritische Untersuchung der Tragfähigkeit eines populären Konzepts, in: D. S. Lutz (Hrsg.), Globalisierung und nationale Souveränität, FS W. Röhrich, 2000, p. 61 ff.; *M. Kotzur*, Grenznachbarschaftliche Zusammenarbeit in Europa, 2004, p. 5 ff.; *Th. L. Friedmann*, The Lexus and the Olive Tree. Understanding Globalization, 1999; regarding open and global markets see also *P. Kirchhof*, Der demokratische Rechtsstaat – die Staatsform der Zugehörigen, HStR., Bd. IX, 1997, § 221, Rn. 135.

[2] See *E. Zeller*, Auslegung von Gesetz und Vertrag, 1989, p. 110 ff.

[3] Among many newspaper articles e. g. *A. Kreye*, Krieg ist nur ein Wort, SZ of January 7, 2003, p. 13; moreover *R. Müller*, Außerhalb des Rechts. Der amerikanische Krieg gegen den Terror und internationale Grundwerte, FAZ of December 28, 2002, p. 8; *G. Nolte*, Weg in eine andere Rechtsordnung. Vorbeugende Gewaltanwendung und gezielte Tötung, FAZ of January 10, 2003, p. 8; *M. Kotzur*, Die Weltgemeinschaft im Ausnahmezustand?, AVR 42 (2004), p. 353 ff.; *E. Sarcevic*, Notstand und völkerrechtliches Verfassungsexperiment, in: GS J. Burmeister, 2005, p. 359 ff.

many constitutional texts of various different legal cultures and found resemblance in public international law treaties such as the UN-Charter or the International Covenant on Civil and Political Rights. If public international law shall be (or become) a meaningful instrument to developed a rule of law based and accordingly "constitutional" legal texture for the aforementioned processes of globalisation and internationalisation, it needs to be universal in nature. And it needs to meet universal expectations. An *inter-constitutional* concept of public international law[4], shaping universal principles by comparing national constitutions, will help to clarify the possible content as well as the possible functions of universal law.

I. The Idea of Universality

3. The terms „universal" or „universality" are of Latin origin. The American Heritage Dictionary of the English Language (4th ed. 2000) describes universality as (1.) "the quality, fact, or condition of being universal" and (2.) "universal inclusiveness in scope or range, especially great or unbounded versatility of the mind". What is universal, exists and prevails everywhere. It has a certain relation, extension and applicability to more or less everything. Therefore, a merely Platonic approach as to virtues, the good, justice or (human) rights would result in a shortcoming. Universality rather "should be looked for, not in abstract theoretical `principles´ or other a-historical judgement or vision, but in concrete experience", which is to say: "normative authority, in so far as it exists for man, resides in historical particularity".[5] Let us pay attention to some of these historical particularities. Platonic philosophy itself has a historical momentum. Only in a vivid debate with the Pre-Socratic or Pre-Platonic achievements of Greek philosophy, Plato could create his world of ideas associating the universal "with ascent from the world of change and particularity".[6] The universal highest good will last and never change. Many universalists followed Plato: Aristotle, Seneca and Cicero – at least to some extent –, in the Christian Tradition Thomas Aquinas. The Christian religion put a special emphasis on the universal – with obvious consequences for the law. Modern public international law is deeply rooted in the idea of a Christian-European "family of peoples" – the so called *universitas christi-*

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[4] This approach is encouraged by the early studies of *A. Verdross*, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung, 1923, p. 126 ff.; *id.*, Die Verfassung der Völkerrechtsgemeinschaft, 1926; furthermore *id./B. Simma*, Universelles Völkerrecht, 3rd ed. 1984, p. 59 f.; for more recent variations as to the topic see *B. Fassbender*, Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls, EuGRZ 2003, p. 1 ff.; *Ch. Walter*, Constitutionalizing (Inter)national Governance: Possibilities and Limits to the Development of an International Constitutional Law, in: German Yearbook of International Law 44 (2001), p. 170 ff.

[5] *C. G. Ryn*, Universality and History: The Concrete as Normative, in: Humanitas, Volume VI, No. 1, Fall 1992/Winter 1993.

[6] Id.

ana.[7] However, this notion of universality soon was challenged by the discovery of America, the Reformation and religious wars in Europe.

4. Humanity itself, the universal *societas humana* as one cornerstone of rationalistic natural justice[8], became the legitimising point of reference for a truly global legal community. [9] In the 18th century *E. de Vattel* framed his "humankind-oriented" concept of a „société des nations".[10] However, the strong focus on the human being *as an individual* at the same time questioned whether universality could be a source of normativity. Fundamental dichotomies emerged from the universal-individual model: universality versus particularity, universality of values versus relativity of values, universality versus diversity. Once more, universality seemed to be the Platonic ideal, particularity the empirically profound real world description. Not surprisingly, thinkers like *E. Burke* and others represent a historical emphasis on a connection between particularity, diversity etc. on the one, normativity on the other hand. Notwithstanding the impressive intellectual level of the philosophical universality-particularity debate, a black-and-white scheme of the universal and the particular-individual is not able to explain today's theory and practice especially of human rights protection.[11] Human rights are both – universal and individual/particular in nature. They are based upon the *universal* notion of human dignity and the *particular* realisation thereof in a particular legal culture at a particular moment in time. This notion of universality can look back on the great tradition of the Virginia Bill of Rights (1776) or the French Declaration (1789), the latter one saying in its article 16: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution". Modern human rigths texts some-

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[7] *A. Verdross*, Die Wertgrundlagen des Völkerrechts, in: AVR 4 (1953), p. 129 ff., at 129, describes public international law as a product of Western and Christian culture.

[8] See *R. Pound*, The Revival of Comparative Law, in: Tulane Law Review V (1930), p. 1 ff., 9, 11 („comparative law as declaratory of natural law").

[9] *W. Grewe*, Epochen der Völkerrechtsgeschichte, 2nd ed. 1988, p. 689.

[10] Ibidem., p. 686; *C. W. Jenks*, The Common Law of Mankind, 1958, p. 19 et passim.

[11] See *L. Kühnhardt*, Die Universalität der Menschenrechte, 1987; furthermore *F. Ermacora*, Allgemeine Staatslehre, 2nd vol., 1970, p. 731 ff.; *Ch. Tomuschat*, Is Universality of Human Rights Standards an Outdated and Utopian Concept?, in: Gedächtnisschrift Ch. Sasse, vol. 2, 1981, p. 585 ff.; *K. Stern*, Staatsrecht, vol. III/1, 1988, p. 209 ff.; *W. v. Simson*, Überstaatliche Menschenrechte: Prinzip und Wirklichkeit, in: FS K. J. Partsch, 1989, p. 47 ff., 50 ff.; *H. Bielefeldt*, Menschenrechte und Menschenrechtsverständnis im Islam, in: EuGRZ 1989, p. 489 ff., 490 ff.; *J. Rüsen*, Theorieprobleme einer vergleichenden Universalgeschichte der Menschenrechte, in: FS H.-U. Wehler, 1991, p. 58 ff.; *A. B. Fields/W.-D. Narr*, Human Rights as a Holistic Concept, in: Human Rights Quarterly, Vol. 14 (1992), p. 1 ff.; *R. Higgins*, Problems and Process, 1994, p. 96 ff.; *Ph. Alston*, The UN's Human Rights Record: From San Francisco To Vienna and Beyond, in: Human Rights Quarterly, Vol. 16 (1994), p. 375 ff., 380 f., 382 ff.; *H. Maier*, Wie universal sind die Menschenrechte?, 1997; *E. Klein*, Universeller Menschenrechtsschutz – Realität oder Utopie?, in: EuGRZ 1999, p. 109 ff., 109 f. As to the universality of the "rule of law" see *H. Hofmann*, Geschichtlichkeit und Universalitätsanspruch des Rechtsstaates, in: Der Staat 34 (1995), p. 1 ff.

what absorb theses classical texts.[12] The following examples may give proof of such a "process of reception". The first quotation stems from the "Bangkok Declaration" representing the human rights idea in an Asian cultural context:

5. „(...) recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[13]

6. The universality of human rights also was a topic of the Vienna Conference in 1993. The final document, the Vienna Declaration, strongly rejects any kind of cultural, religious or historical relativity of human rights. Before outlining the different principles of a global or universal legal order in more detail, § 1 of the Vienna Declaration may provide for a rather ardent prologue:

7. „The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question." [14]

II. Universal/Global Law as Constitutional Law of the International Community

8. Global law can be defined as the complex of all the rules that claim to be of universal normativity. This normativity does not depend on the question which kind of formal or material source of the law it refers to. It can be law made by the United Nations, the European Union/the European Communities or the single national states. For some, global law is next to national and international law a "third legal system of its own" [15], for others it is just some part of traditional private or public international law,

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[12] This model of "reception", may it be the reception of the wording, the reception of theories or the reception of great judgements by the courts, has been developed by *P. Häberle*, Textstufen als Entwicklungswege des Verfassungsstaates, in: *id.*, Rechtsvergleichung im Kraftfeld des Verfassungsstaates, 1992, p. 3 ff., 9; see also *id*., Klassikertexte im Verfassungsleben, 1981.

[13] Quoted according to *Ph. Alston*, The UN's Human Rights Record: From San Francisco To Vienna and Beyond, in: Human Rights Quarterly, Vol. 16 (1994), p. 375 ff., 382.

[14] UN Doc. A/Conf. 157/22 of July 6 1993. German translation in: EuGRZ 1993, p. 520 ff.

[15] See *G. Teubner*, Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus, Basler Schriften zur Europäischen Integration Nr. 21, 1996, p. 4 ff.

domestic law or law generated by (supranational) regional entities such as the European Communities under the roof of the European Union. One has to be very careful to claim that without any intervention by traditional law making bodies, private global players could create a legal system *"sui generis"*.[16] Of course, it is a quite tempting idea to develop a non State-centred universal legal system shaped by a global civil society – if something like that exists at all: by multi-national enterprises, the mass media, NGOs, human rights organisations and so on.[17] A „lex spontiva internationalis" might be the transnational result. In private international law, the „lex mercatoria" his controversially discussed.[18]

9. If law made by national Parliaments is particular in nature, a law made by the aforementioned global actors might be the universal alternative. However, their freedom and power to be directly or indirectly engaged in law making processes – if they have any – is granted to them by national constitutions. The members of the civil society can act because of their fundamental rights and freedoms, the guarantee of which is found in national (to some extent also international) "constitutional texts" and the protection of which is first and foremost ensured by the national states. This relation between the ability of the civil society to politically act and the relevant provisions in the national constitutions finds its parallel in the way national and international public law interact. The universal principles of public international law are all the more effective if they are similarly expressed by national constitutional guarantees and vice versa the national constitutions can open the formerly closed, meaning self-centred, nation state to allow him to act on the universal level. So, the particular nation state will participate in creating norms with universal normativity – human rights law and international criminal law give a good example.[19] This process of participation and creation can rely on a great

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[16] As to the idea of „Global Governance" see *D. Held*, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance, 1995; with a special emphasis on environmental protection *O. Young*, International Governance. Protecting the Environment in a Stateless Society, 1994.

[17] *V. Ronge*, Am Staat vorbei, 1980; *M. J. Bonell*, Das autonome Recht des Welthandels – rechtsdogmatische und rechtpolitische Aspekte, 42 RabelsZ (1978), p. 485 ff.; *J.-Ph. Robe*, Multinational Enterprises: The Constitution of a Pluralistic Legal Order, in: G. Teubner (ed.), Global Law Without A State, 1996; *G. Teubner*, Privatregimes: Neo-spontanes Recht und duale Sozialverfassung in der Weltgesellschaft, in: Liber amicorum S. Simitis, 2000, p. 437 ff.

[18] *R. Meyer*, Bona fides und lex mercatoria in der europäischen Rechtstradition, 1994; *U. Stein*, Lex mercatoria. Realität und Theorie, 1995; *K. Highet*, The Enigma of the Lex Mercatoria, 63 Tulane Law Review (1989), p. 613 ff.; *G. Teubner*, Globale Bukowina. Zur Emergenz eines transnationalen Rechts-pluralismus, Basler Schriften zur Europäischen Integration Nr. 21, 1996, p. 3; very critical *O. Sandrock,* Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland – Europa – und die Welt, JZ 1996, p. 1 ff., 9.

[19] *M. Kotzur*, Weltrecht ohne Weltstaat – die nationale (Verfassungs-)Gerichtsbarkeit als Motor völkerrechtlicher Konstitutionalisierungsprozesse, DÖV 2002, p. 195 ff.; *W. Weiß*, Völkerstrafrecht zwischen Weltprinzip und Immunität, JZ 2002, p. 696 ff., 698 ff.; *Ch. Safferling*, Zum aktuellen Stand des Völkerstrafrechts, JA 2000, p. 164 ff. Regarding the „Statute of Rome" see the draft of the statute: A/CONF. 183/9 of July 17, 1998 (EuGRZ 1998, p. 618 ff.); furthermore *Ch. Tomuschat*, Das Statut von Rom für den internationalen Strafgerichtshof, Friedens-Warte 73 (1998), p. 335 ff.; *A. Zimmermann*, Die Schaffung eines ständigen internationalen Straf-

philosophical tradition. *Aristotle's* famous studies of a wide range of legal materials, such as the specific characteristics of a large number of city-state "constitutions," indicate an – at least vague –awareness, that "particularity is in some way knowable and a guide to the universal".[20]

10. This way of creating new law can be described as co-operative. The law is emanated by co-operative mechanisms between the national and the international level. It is made in co-operation of the national and the international political community/communities. This kind of law may be qualified as global or universal law. It is universal because of its universal normativity (comparable to the *erga-omnes*-rules or the *ius cogens* in public international law) but it is not limited to the formal sources of public international law as written down in Art. 38 sec. I ICJ-Statute. Global law combines elements of national and international law and forms a new constitutional legal order of the world community.[21] This kind of global or universal law can be conceived as constitutional law in a twofold way: (1.) it is shaped by national constitutions and (2.) it helps to develop constitutional structures in public international law. Its subject is the international community as such[22], its public forum is a global civil society being quite more than a mere "societas mercatoria".[23] Of course, such an approach requires new perspectives in the science of public (international) law. Whereas the preamble of the Canadian Constitution Act (1867) rather particularly wanted "(to) promote the interests of the British Em-

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gerichtshofs, ZaöRV 58 (1998), p. 47 ff.; *C. Stahn*, Zwischen Weltfrieden und materieller Gerechtigkeit: Die Gerichtsbarkeit des Ständigen Internationalen Strafgerichtshofs (IntStGH), in: EuGRZ 1998, p. 577 ff., 590 f.; *U. Fastenrath*, Der Internationale Strafgerichtshof, JuS 1999, p. 632 ff.; *K. Ambos*, Der neue Internationale Strafgerichtshof – ein Überblick, NJW 1998, p. 3743 ff., 3746; *id.,* „Verbrechenselemente" sowie Verfahrens- Beweisregeln des Internationalen Strafgerichtshofs, NJW 2001, p. 405 ff.; *Ch. Walter*, Zwischen Selbstverteidigung und Völkerrecht: Bausteine für ein internationales Recht der "präventiven Terrorismus-Bekämpfung", in: D. Fleck (ed.), Rechtsfragen der Terrorismusbekämpfung durch Streitkräfte, 2004, p. 23 ff.; *G. Werle*, Völkerstrafrecht, 2003; *F. Selbmann*, Der Tatbestand des Genozids im Völkerstrafrecht, 2003; *J. Schlösser*, Mittelbare individuelle Verantwortlichkeit im Völkerstrafrecht, 2004.

[20] *C. G. Ryn*, Universality and History: The Concrete as Normative, in: Humanitas, Volume VI, No. 1, Fall 1992/Winter 1993.

[21] *M. Nettesheim*, Das kommunitäre Völkerrecht, JZ 2002, p. 569 ff., 578; more sceptical and very critical *U. Haltern*, Internationales Verfassungsrecht?, AöR 2003, p. 511 ff.

[22] *R.-J. Dupuy*, La communauté internationale entre le mythe et l´histoire, 1986, p. 180 : «(...) la communauté internationale ne rassemble pas que des gouvernements mais avant tout des hommes groupés dans des systèmes socio-culturels » ; *R. Falk*, Die Weltordnung innerhalb der Grenzen von zwischenstaatlichem Recht und Recht der Menschheit : Die Rolle der zivilgesellschaftlichen Institutionen, in : M. Lutz-Bachmann/J. Bohmann (eds.), Frieden durch Recht. Kants Friedensidee und das Problem einer neuen Weltordnung, 1996, p. 170; see also FS für K. Ginther (1999) with its very programmatical title: „Das Humanitäre Völkerrecht auf dem Weg vom Zwischenstaaten- zum Weltrecht".

[23] A classical writing as to the „Weltgesellschaft" (Global Society) is *N. Luhmann*, Das Recht der Gesellschaft, 1993, p. 551 ff.; moreover *J. Habermas/N. Luhmann*, Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?, 1979, p. 46 ff., 84 ff. et passim; *R. Stichweh*, Zur Theorie der Weltgesellschaft, in: Soziale Systeme 1 (1995), p. 29 ff.; *M. Schulte*, Eine Theorie der Gesellschaft und ihre „Feinde", Rechtstheorie 32 (2001), 451 - 463.

pire“, the German Basic Law (1949) gives in its preamble an expression of what a national constitution can contribute to innovative structures of global constitutional law: “Inspired by the determination to promote world peace as an equal partner in a united Europe”.[24] Art. I-3 European Draft Constitution opens equally wide horizons.[25] Not only these examples but many further constitutional texts, especially preambles[26], write what one could describe as a *textbook* of constitutional history and comparative constitutional theory. They do write – sometimes admittedly the do re-write – the history of universality in a legal context. They furthermore describe how global law is made in a process of *mutual comparison* as well as *reciprocal reception* of national and international law.[27]

III. Universal Law “Drafted” by National Constitutions – an Overview

1. The National and the Universal, the National State and the World – Cognitions and Confessions Typically Found in Preambular Formulations

11. In the preamble of the constitution, the constitutional state describes its legitimacy and its identity[28]. The preamble qualifies as the *narrative* of political history, it outlines a sometimes realistic, sometimes idealistic, even utopian future. In the preamble, very often stories of integration are told – stories that start with the individual, that go on with the whole nation and finally refer to the international community or the national responsibility for the wellbeing of all mankind. What preambles therefore call the reader’s attention to is the “tug-of-war” between the individual,

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[24] For the following quotations of constitutions: All constitutions of the EU-Member States are quoted according to the volume edited by A. Kimmel/Ch. Kimmel, 5th ed. 2000. All other constitutions are quoted according to Blaustein/Flanz, Constitutions of the Countries of the World.

[25] Most recently *R. Streinz/Ch. Ohler/Ch. Herrmann*, Die neue Verfassung für Europa, 2005, p. 54 ff.; *M. Kotzur*, Die Ziele der Union: Verfassungsidentität und Gemeinschaftsidee, DÖV 2005, p. 313 ff.; *F. Reimer*, Ziele und Zuständigkeiten - Die Funktionen der Unionszielbestimmungen, Europarecht 38 (2003), p. 992 ff.

[26] *P. Häberle*, Präambeln im Text und Kontext von Verfassungen, in: FS J. Broermann, 1982, p. 211 ff., 231 f.; *L. Waser-Huber*, Die Präambeln in den schweizerischen Verfassungen, 1988, p. 150 ff.; *A.-C. Kulow*, Inhalte und Funktionen der Präambel des EG-Vertrags, 1997, p. 165 ff.; *M. Kotzur*, Theorieelemente des internationalen Menschenrechtsschutzes, 2001, p. 60 ff.; regarding the topos, the structure and the functions of preambles in international treaties see *N. D. Himmelfarb*, The Preamble in Constitutional Interpretation, Seton Hall Constitutional Law Journal, Vol. 2 (1991), p. 127 ff. (including many further reference); recently *G. Robbers*, Die Präambel der Verfassung für Europa - Ein Entwurf, in: Liber Amicorum P. Häberle, 2004, p. 251 ff., and *A. v. Bogdandy*, The Preamble, in: de Witte (ed..), The Reflections on the Constitutional Treaty for Europe, 2003, p. 3 ff.

[27] For this kind of reciprocity see *A. Cassese*, Modern Constitutions and International Law, RdC (1985-III), p. 331 ff.

[28] *P. Häberle*, Präambeln im Text und Kontext von Verfassungen, in: FS J. Broermann, 1982, p. 211 ff.

the national state/national society and the world community/international society.[29] Some illustrative examples have to be introduced.[30] For the Asian legal cultures, the Indonesian Constitution (1945) gives proof of a universalistic self-conception. However, the universal is first and foremost an anti-colonial dimension: „Whereas freedom is the inalienable right of all nations, colonialism must be abolished in this world as it is not in conformity with humanity and justice". The preamble of the Chinese Constitution (1982) outlines in a rather lengthy way the revolutionary history as a story of undoubtedly great success. Nevertheless, China is very aware of being dependent on the world community. Here the impressive text – that has to be compared to a not all that impressive political reality:

12. "China's achievements in revolution and construction are inseparable from support by the people of the world. The future of China is closely linked with that of the whole world. China adheres to an independent foreign policy as well as to the five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries".[31]

13. Similar to the German Basic Law, the Japanese Constitution (1946/47) tries to "overcome" the entanglement of Japan in the injustice and unique wrongdoings during world War II. In the centre of a new political and constitutional beginning, one will find universalism and the emphatical reference to humankind:

14. „We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression, and in-

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[29] In this context, national constitutions very often make reference to "all humankind", for the theoretical background as well as examples see *P. Häberle*, Das "Weltbild" des Verfassungsstaates – eine Textstufenanalyse zur Menschheit als verfassungsstaatlichem Grundwert und "letztem" Geltungsgrund des Völkerrechts, FS M. Kriele, 1997, p. 1277 ff.

[30] The selection of course is difficult. The risk of eclecticism might be high. To avoid it, different legal cultures from all over the world have to be included and the texts have to be read very critically, being aware of the quite often very different reality. See e. g. the Constitution of Eritrea (1996): „Convinced that the recognition, protection and securing of the rights and freedoms of citizens, human dignity, equality will guarantee a balanced development"; the Constitution of Honduras 1982: "para la plena realización del hombre, como persona humana"; the Constitution of Haiti 1987: "Ensure their inalienable and imprescriptible rights to life, liberty and the pursuit of happiness; in conformity with the Act of Independence of 1804 and the Universal Declaration of the Rights of Man of 1948."

[31] *W. Lasars*, Die Machtfunktion der Verfassung – Eine Untersuchung zur Rezeption von demokratisch-rechtsstaatlichem Verfassungsrecht in China, JöR 41 (1993), p. 597 ff.

tolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

15. The last section of the preamble very purposefully makes an illusion to the famous "Four Freedoms", declared by US-President *Roosevelt* as the foundations of a new world order – a world order of human dignity.[32] Without such an explicit quotation but not less decidedly South Africa, having overcome the Apartheid-Regime, searches for its new role in a human dignity based international community:

16. "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; (...) Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations".[33]

17. A short glance on the Eastern European reform societies: Albania (1998) confesses "universal values" and the "Protection of human dignity", Croatia (1990) would like to be conceived as "a sovereign and democratic state in which the equality of citizens and human freedoms and rights are guaranteed and ensured". The preamble of the Bulgarian Constitution (1991) reads as follows: "by pledging our loyalty to the universal human values of liberty, peace, humanism, equality, justice and tolerance". The constitution of the Czech Republic evokes "the spirit of the inviolable values of human dignity and freedom" – a spirit that can turn Czechia into a "part of the family of European and world democracies". The introductory sequences of the Constitution if Belarus use terms such as "world community" and expressly confirms "our adherence to values common to all mankind"). And so does Russia (1993): "asserting human rights and liberties, civil peace and accord, (...) being aware of ourselves as part of the world community."[34] A reference to international human rights can be found in the Constitution of Bosnia and Herzegovina (1995):

18. "Based on respect for human dignity, liberty, and equality, Dedicated to peace, justice, tolerance, and reconciliation, (...) Determined to ensure full respect for international humanitarian law; Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic,

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[32] See *L. Kühnhardt*, Die Universalität der Menschenrechte, 1987, p. 112 f.; moreover *H. Lauterpacht*, An International Bill of the Rights of Man, 1945, p. 6 f. und p. 84 f.; *H. Floretta/Th. Öhlinger*, Die Menschenrechtspakte der Vereinten Nationen, 1978, p. 9; *M. Kotzur*, Theorieelemente des internationalen Menschenrechtsschutzes, 2001, p. 245 ff.

[33] *U. Karpen*, Südafrika auf dem Weg zu einer demokratisch-rechtsstaatlichen Verfassung, JöR 44 (1996), p. 609 ff. (at 614 as to the preamble and the applicability of international human rights, at 615 ff. as to the fundamental rights and freedoms).

[34] *B. Meissner*, Das sowjetische Verfassungsrecht unter Gorbačev, JöR 40 (1991/92), p. 191 ff.

Religious and Linguistic Minorities, as well as other human rights instruments (...)".[35]

19. Of course, in Western European constitutions the human rights universalism since 1789 is of great importance. In its preamble, the French Constitution directly refers to the Declaration of 1789 as a measure and example for all constitutional states. Liberty, equality and brotherliness are a universal issue.[36] Post-Franco Spain (Constitution of 1978) is seeking "friendly co-operation" between all people of the earth. All these preamble texts are not only *narrative*, they own a *normative* dimension. It is the normativity of general principles not of strict rules. Being known and present in so many different legal cultures, these principles become a universal benchmark for all kind of "legitimate" law – national or international law.[37] At least two of the principles, which as of today may be considered as international *ius cogens*, can be found in the preambles: (1.) the right of any state not to be attacked by the armed forces of any other state, and (2.) the individual right to life and a minimum standard of liberty.[38] So, national constitutions, the UN-Charter, the Universal Declaration of Human Rights (1948) and the International Human Rights Covenants *cooperate* in formulating these universal principles. A "Multilevel Constitutionalism" (*I. Pernice*) of national, European and Universal Principles becomes reality – especially in the field of human rights.[39]

2. Universal Human Rights Standards as Inter-Constitutional Principles

20. The highly disputed universality of human rights gains credibility if not only conceived as a theoretical philosophical concept or as a moral value, but found in the normative texts of different constitutions.[40] Not-

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[35] Similar examples can be found in African (legal) cultures, see the Constitution of Congo (1992): "preserve the sacred character of the human person (...) contribute to world peace as a member of the United Nations Organization (UN) and the Organization for African Unity (OAU)".

[36] The Constitution of Ecuador (1998) directly quotes the Declaration of 1789: „fiel a los ideales de libertad, igualdad, justicia, progreso, solidaridad, equidad." For the spirit of brotherliness and an international right to development see *J. Luther*, Zur Entwicklung des Rechts auf Entwicklung - Europäische Beiträge, in: Liber Amicorum P. Häberle, 2004, p. 337 ff.

[37] *J. L. Brierly*, The Future of Codification, in: British Yearbook (...), p. 1 ff., 2: „The materials of the international codifier do not consist of known and accepted rules, and before he can even begin the process of clarifying and systematizing them, he finds himself confronted by another and more difficult task, that of securing an agreement of the substance of the rules themselves." See also *H. Lauterpacht*, Codification and Development of International Law, in: American Journal (...), p. 16 ff., p. 22 („bringing about an agreed body of rules").

[38] *G. Nolte*, Weg in eine andere Rechtsordnung. Vorbeugende Gewaltanwendung und gezielte Tötung, FAZ of January 10, 2003, p. 8.

[39] *Ch. Callies*, Europa als Wertegemeinschaft - Integration und Identität durch Europäisches Verfassungsrecht, JZ 2004, p. 1033 ff.; *Th. Oppermann*, Europäischer Vertragskonvent und Regierungskonferenz 2002 - 2004, DVBl. 2004, p. 1264 ff.; *D. Th. Tsatsos*, Zur Entstehung einer europäischen Verfassungsordnung, Liber Amicorum P. Häberle, 2004, p. 223 ff.

[40] *M. Kotzur*, Theorieelemente des internationalen Menschenrechtsschutzes, 2001, p. 328 ff.

withstanding the gap between textual confessions and political realities, international human rights guarantees do not only pay lip service to the concerned world public, if they help to ensure and enforce quite effective constitutional human rights standards on the international level. [41] In summary: Human rights form particular constitutional guarantees as well as *universal* principles. Both of them refer to the *human being* as the ultimate source of legitimacy for any kind of public authority.

21. *a) Human Dignity*: The universality of human rights becomes most obvious where human dignity is the source of legitimacy.[42] Dignity is granted to any person anywhere under whatever circumstances. It is granted to the human being just *because of* being a "human being". Art. 1 sec. 1 and sec. 2. German Basic Law give a classical example, see particularly sec. 2:

22. „The German People therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world."

23. As of today, human dignity provisions made a worldwide career.[43] The EU-Charta of Human Rights, an integral part of the future constitution, starts off with the reference to human dignity. The Charta makes clear that human dignity entitles the human being to have rights.[44] Art. 6 sec. 1 Bulgarian Constitution knows the title "Human Dignity, Freedom, Equality" and says: "All persons are born free and equal in dignity and rights". The context of equality and dignity is emphasised in Art. 41: „dignidad humana". The Constitution of Eritrea (1996) demands **(**Article 16 Abs. 1 – Right to Human Dignity): "The dignity of all persons shall be inviolable**"**. South Africa, in a rather pragmatic way, links human dignity to sovereignty and democracy, see **"**Section 1: Republic of South Africa": "The Republic of South Africa is one sovereign democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms". Regarding the individual human being the constitution goes on under "Section 10: Human dignity": „Everyone has inherent dignity and the right to have their dignity re-

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[41] See also *W. Schreckenberger*, Der moderne Verfassungsstaat und die Idee der Weltgemeinschaft, Der Staat 34 (1995), p. 503 ff., p. 507 ff.; more recently *F. Schorkopf/Ch. Walter*, Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law, GLJ 4 (2003), p. 1359 ff.

[42] *P. Häberle*, Die Menschenwürde als Grundlage der staatlichen Gemeinschaft, HStR, vol.1, 2nd ed. 1995, § 20, Rn. 46 ff. (now 3rd ed. 2004); *R. Gröschner*, Die Würde des Menschen, in: P. Bavatstro (ed.), Individualität und Ethik, 1997, p. 15-35.

[43] For Switzerland see *J. P. Müller*, Grundrechte in der Schweiz, 3. Aufl. 1999, p. 1 ff.

[44] Regarding human dignity as a "right to rights" *Ch. Enders*, Die Menschenwürde in der Verfassungsordnung, 1997; for comprehensive further reference regarding the EU-Charta see *R. Streinz*, Charta der Grundrechte der Europäischen Union (Commentary), in: id. (ed.), EUV/EGV, 2003, p. 2571 ff.; J. Meyer (ed.), Kommentar Charta der Grundrechte der Europäischen Union, 2003; *R. Streinz/Ch. Ohler/Ch. Herrmann*, Die neue Verfassung für Europa, 2005, p. 78.

spected and protected." Under very different religious and cultural circumstances Israel[45] confesses in its Basic Law (1994):

24. „Human Dignity and Liberty: Section 1 Basic Principles: Basic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom, and these will be respected in the spirit of the principles of the Declaration of Independence of the State of Israel.

25. Section 1a: Purpose: The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law (...) values of the State of Israel as a Jewish and democratic state."

26. The heritage of human dignity is not exclusively Christian, it is also Jewish. To find its identity[46], the Jewish-Christian Occident has to be very well aware of the religious as well as cultural heritage. Under the regime of *S. Hussein* nobody would have expected that just the Interim-Constitution of Iraq (1990) gives an outstanding example for human dignity provisions in the Islamic world. Art. 22 (Dignity, Personal Integrity, Arrest, Home) reads: „The dignity of man is safeguarded. It is inadmissible to cause any physical or psychological harm."[47] The gap between wording and reality is obvious. However, there is also a chance for upcoming processes of development. We shall never forget that in 1789 the human dignity visions were only little less utopian. Keeping this in mind, furthermore relying on the critical power of a world public opinion, the world community can stand the aforementioned gap.[48] Today's normative lie can become tomorrow's legal reality: Therefore, even the Constitution of Iran can be encouraging (e. g. as to the relationship between believers and non-believers):

27. **"**Article 14 (Non-Muslims' Rights): In accordance with the sacred verse "God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes" [60:8], the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights."[49]

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[45] *C. Klein*, La nouvelle législation constitutionnelle d´ Israel, JöR 42 (1994), p. 553 ff., 558 ff. (regarding the principle of human dignity).

[46] *S. Korioth/A. v. Bogda*ndy, Europäische und nationale Identität. Integration durch Verfassungsrecht?, VVDStRL 62 (2003), p. 117 ff. respectively p. 156 ff.

[47] *This* heritage is of high value for an upcoming Iraqi Constitution.

[48] Of course, for a comparative study the legal practice is also of great importance, see *B.-O. Bryde*, Die Rolle des Rechts im Entwicklungsprozeß, in: ders./F. Kübler (ed.), Die Rolle des Rechts im Entwicklungsprozeß, 1986, p. 9 ff.

[49] For many further examples see *P. Häberle*, Die Menschenwürde als Grundlage der staatlichen Gemeinschaft, HStR, vol. 1, 2nd ed.. 1995, § 20, Rn. 4 (now vol. 2, 3rd ed. 2004).

28. b) *Human rights guarantees in general*: The normative principle of human dignity can be concretised in various legal enactments the most important of which are the specific fundamental rights and freedoms, especially the right to life. Here two examples taken from Latin-American respectively Caribbean legal cultures: The Constitution of Costa Rica (1949/2001) simply says in its Art. 21: „La vida humana es inviolable." The same is done by Art. 8, Sec. 1 Constitution of the Dominican Republic (2002): „La inviolabilidad de la vida." The Constitution of Jamaica(1962/1999) follows the European/North-American tradition of enacting a rather comprehensive catalogue of fundamental rights and freedoms (Chapter 3): It starts off with a "equal protection clause" and tries to connect the ideals of liberty and equality:

29. „Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

30. life, liberty, security of the person, the enjoyment of property and the protection of the law;

31. freedom of conscience, of expression and of peaceful assembly and association; and

32. respect for his private and family life, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

33. A connection between liberty and equality is also made by the Constitution of Slovenia (1991). This example gives proof how important universal standards of liberty and equality became for successful reform processes in the new Eastern European democracies[50]:

34. "Article 14: Equality before the Law: (1) In Slovenia each individual shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other beliefs, financial status, birth, education, social status or whatever other personal circumstance."[51]

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[50] See also *A. Nußberger*, Die "Zweite Wende": Zur Verfassungsentwicklung in den Ländern Mittel- und Osteuropas im Zuge der EU-Erweiterung, DÖV 2005, p. 357 ff.

[51] *I. Kristan*, Verfassungsentwicklung in Slowenien, JöR 42 (1994), p. 59 ff., p. 75 ff. (with special emphasis on the human rights provisions).

35. On purpose, the Constitution of Albania (1998) uses the typical language of international human rights documents: „The fundamental rights and freedoms are indivisible, inalienable, inviolable". For the Russian Constitution, the human being and his or her individual rights are "supreme values", see Article 2 – Protection of Human Rights: „Humans, their rights and freedoms are the supreme value. It is a duty of the state to recognize, respect and protect the rights and liberties of humans and citizens." The Constitution of South Africa (1996) connects human rights an democracy whereas in German legal writing many authors try to treat democracy and human rights as two separate categories. But of course, the political principle of democracy has to realise human rights and therefore has to be based upon human dignity.[52] In that regard, the South African text is very innovative and helps to universalise the "democratic values of human dignity, equality and freedom":

36. "Section 7, Rights (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

37. c) *References to international human rights documents made by national constitutions:* National constitutional provisions which refer not only to the wording but also to the spirit of international human rights documents are of obvious importance for the creation of universal standards. In some way the "merge" national and international law. In such a "melting pot", universal principles more easily can come into being and create elements of a universal legal order for all humankind.[53] The incorporation and implementation of universal human rights into particular national constitutions helps to make human rights effective. The national legal orders and the international law form a specially *co-operative* legal order. Human rights are to be made effective in *co-operation* between national, regional, and international political entities: states, international organisations, supranational organisations. Of course, the implementation is not a guarantee of immediate effectiveness, it is just a (sometimes very difficult) beginning. See again Haiti and the preamble of its constitution (1987) being a promise, not a description of the reality: "Ensure their inalienable and imprescriptible rights to life, liberty and the pursuit of happiness; in conformity with the Act of Independence of 1804 and the Univer-

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[52] *P. Häberle*, Die Menschenwürde als Grundlage der staatlichen Gemeinschaft, HStR, vol. 1, 2nd ed. 1995, § 20, Rn. 61 ff. (now vol. 2, 3rd 3d. 2004); moreover *D. Th. Tsatsos*, Von der Würde des Staates zur Glaubwürdigkeit der Politik, 1987; *M. Kotzur*, Die Demokratiedebatte in der deutschen Verfassungslehre, in: H. Bauer/P. M. Huber/K.-P. Sommermann (eds.), Demokratie in Europa, 2005.

[53] This is the idea of implementation, see *E. W. Vierdag*, Some Remarks about Special Features of Human Rights Treaties, in: Netherlands Yearbook of International Law 1994, p. 119 ff., p. 126 f.; see also *Ch. Walter*, Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß, ZaöRV 59 (1999), p. 961 ff.; *id.*, Nationale Durchsetzung der Grundrechte, in: R. Grote/Th. Marauhn (eds.), Handbuch des Grund- und Menschenrechtsschutzes, 2005.

sal Declaration of the Rights of Man of 1948".[54] Art. 19 adds: "The State has the absolute obligation to guarantee the right to life, health, and respect of the human person for all citizens without distinction, in conformity with the Universal Declaration of the Rights of Man."

38. The Constitution of Bosnia and Herzegovina (1995) goes one step further. Not only reference is made to international human rights standards. Moreover, the Constitution declares the European Human Rights Convention to be *directly applicable* in domestic law:

39. "Article II – Human Rights and Fundamental Freedoms:

40. Paragraph 1: Human Rights:

41. Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

42. Paragraph 2: International Standards:

43. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."

44. The Russian Constitution (1993) is also very open as to international human rights guarantees:

    (1) The basic rights and liberties in conformity with the commonly recognized principles and norms of the international law are recognized and guaranteed in the Russian Federation and under this Constitution.

    (2) The basic rights and liberties of the human being are inalienable and belong to everyone from birth (...)."

45. With special emphasis on the rights of the "Indigenous People", Art. 69 goes on: "The Russian Federation guarantees the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation." If human rights standards shall be universal, national constitutions ought to make clear that their human rights catalogues are not exclusive, but open to maybe further reaching or more innovative international standards. An example is given by the Constitution of Eritrea (1996), Article 29 (Residual Rights): "The rights enumerated in this Chapter shall not preclude other rights which ensue from the spirit of this Constitution and the principles of a society based on social justice, democracy and the rule of law". An interesting variation are clauses that

[54] *E. Schmitz*, Demokratie in Haiti – eine unerfüllbare Hoffnung, JöR 42 (1994), p. 613 ff.

declare the *superiority* of international human rights in comparison to less effective national standards. See Art. 10 Constitution of the Czech Republic (Human Rights Treaties): "Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law."[55]

46. d) *Constitutional provisions about the equal treatment of foreigners*: If foreigners are being treated in the same way as the own nationals, this is an impressive sign for the universality of the relevant legal standards. Universal norms have to be applicable to *everybody* notwithstanding his or her nationality. The European Union and the EU-Citizenship give a good example. Art. 191 Belgium Constitution (1994) or Art. 26 Bulgarian Constitution (1991) do the same. The latter one reads as follows:

> "(1) Irrespective of where they are, all citizens of the Republic of Bulgaria shall be vested with all rights and obligations proceeding from this Constitution.
>
> (2) Foreigners residing in the Republic of Bulgaria shall be vested with all rights and obligations proceeding from this Constitution, except those rights and obligations for which a Bulgarian citizenship is required by this Constitution or by another law."[56]

47. Many other constitutions would have to be taken into account[57], many further details had to be discussed.[58] Here only the bottom line can be made clear. Wherever the reference to human dignity gives proof that all human rights are rights of the human being as such, wherever national and international means try to co-operatively enforce human rights, wherever national constitutions implement international human rights

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[55] Similarly Art. 85 Nr. 6 Constitution of Bulgaria (1991).

[56] Further examples give the Constitution of Bulgaria (1990), Article 15 (Rights of Foreigners, Cultural Rights): "(1) Members of all nations and minorities have equal rights in the Republic of Croatia." For Latin America see the Constitution of Ecuador (1998), Art. 13 : « Los extranjeros gozarán de los mismos derechos que los ecuatorianos, con las limitaciones establecidas en la Constitución y la ley."

[57] *W. Ratler*, Die Verfassungsentwicklung und Verfassungswirklichkeit Tunesiens (1955–1990), JöR 39 (1990), p. 569 ff., 587 ff. (as to fundamental rights and fundamental duties); *H. G. Knitel*, Die algeri-sche Verfassung von 1989, JöR (47) 1999, p. 683 ff., 692 ff. (as to comprehensive human rights guarantees); *Y. Huh*, Die Grundzüge der neuen koreanischen Verfassung von 1987, JöR 38 (1989), p. 565 ff. (at 567 ff. as to the limits of all public power); *D. G. Belaunde*, The new Peruvian Constitution, JöR 41 (1993), p. 651 ff., 655 (human rights); *César Landa*, Constitutional Justice in Peru, JöR 44 (1996), p. 583 ff.; *O. Depenheuer*, Die vietnamesische Verfassung vom 15. April 1992, JöR 45 (1997), p. 675 ff.

[58] After 9/11 e. g. the relationship between liberty and security, between human rights and the "war against terrorism". See for a very early example the Constitution of Chile (1980) Artículo 9: „El terrorismo, en cualquiera de sus formas, es por esencia contrario a los derechos humanos."

standards, there a universal law of all humankind finds a prosperous beginning.

3. National Policy Objectives and Their Universal Dimensions

48. Many of the classical national policy objectives or basic institutional principles (as e. g. guaranteed by Art. 20 German Basic Law) reach far beyond the national state. Public welfare, public services and public utilities, the protection of the environment, the struggle for security and so many other duties and obligations cannot be properly fulfilled by one single national state. As far as the social dimension is concerned, the German legal scholar *H. F. Zacher* speaks about the "overlap" between the formerly closed, in our days open social welfare state and the international community.[59] After the devastating December 2004 Tsunami, the states, the civil societies, the citizens from all over the world assumed a global responsibility and hence gave an example of what could become *a global social welfare principle*.

49. European Community Law and public international law help to strengthen the European as well as the international dimension of national policy objectives, for the national constitutional texts now have to be interpreted "in the light" of the European and International (Treaty) Law.[60] Art. I-3 European Draft Constitution names many objectives of the Union, much more than usually mentioned in national constitutions. Therefore, the structures between the European and the national provisions are different, however, the functions are equivalent.[61] Special attention has to be paid again to the constitutions of the new Eastern European democracies. They create innovative variations of national policy objectives merging single elements from national and international texts. The result of this process are national policy objectives which are – due to the way of their coming into being – *universal* in nature. The Constitution of Croatia (1990) gives an example, see Art. 3. In the traditional manner of national policy objectives specific values are expressed - values that very well can be conceived as *values for all humankind*. And not surprisingly so, simply because Croatia implemented – and at the same time to some ex-

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[59] *H. F. Zacher*, Das soziale Staatsziel, HStR, vol. 1, 2nd ed. 1995, § 25, Rn. 12 (now vol. 2, 3rd ed. 2004).

[60] *G. Ress*, „Staatszwecke im Verfassungsstaat" – nach vierzig Jahren Grundgesetz, VVDStRL 48 (1989), p. 56 ff., at 79 ff. („international and European dimension of national policy objectives"); *K.-P. Sommermann*, Staatziele und Staatszielbestimmungen, 1997, p. 253 with many further reference; see also *U. Fastenrath*, Die „Internationalisierung" des deutschen Grundgesetzes – wie weit trägt die Entgrenzung des Verfassungsstaats, in: R. Pitschas/S. Kisa (eds.), Internationalisierung von Staat und Verfassung im Spiegel des deutschen und japanischen Staats- und Verwaltungsrechts, 2002, p. 37 ff.; for a Japanese perspective *K. Tonami*, Die Öffnung des japanischen Verfassungsstaates gegenüber regionaler und internationaler Verantwortung für Wirtschaft, Sicherheit und Umwelt, in: ibidem, p. 79 ff.

[61] *A. v. Bogdandy*, Zur Übertragbarkeit staatsrechtlicher Figuren auf die EU, in: FS P. Badura, 2004, p. 1033 ff.

tend re-shaped – international standards and standards which can be found in a variety of other, of older national constitutions:

50. “Freedom, equal rights, national equality, peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the human environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia.”

51. Of special universal importance is the protection of the environment. Many constitutions recently drafted clauses regarding the protection of the natural bases of life, e. g. Art. 26 Constitution of China (1982); Art. 65 Constitution of Congo (1992); Art. 52 Constitution of Croatia (1992). Art. 20 a German Basic Law is only one example among many others.[62] Very rightfully, the just mentioned section of the Croatian Constitution combines “nature” and “human environment”. Environmental protection – as well as all the essential safeguards of liberty, security and the social well-being – is a *natural* and a *cultural* base of all human existence. With regard to the culture and possible tensions between the national cultural heritage and the common cultural heritage of mankind see the following references. The Constitution of China (1982), Art. 22 sec. 2 invokes the “cultural heritage“. More progressively, the constitution of Congo (1992), Art. 35 Abs. sec. 1 (Culture**)** grants a “right to culture”: “Citizens shall possess a right to culture and to the respect of their cultural identity”. The Constitution of Ecuador (1998) in Art. 62 deals with “culture” and “identity”: „identidad nacional, pluricultural y multiétnica“. In a very open and pluralistic manner the text continues with a confession deserving unprejudiced attention: „equidad e igualdad de las culturas“.
52. That national policy objectives can be of *universal relevance* and vice versa international standards need to be *implemented* into domestic law, becomes most obvious where peace is at stake. To secure peace is the most important objective of the United Nations. Art. 1 Nr. 1 UN-Charta outlines the “peace programme”:

53. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.“ [63]

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[62] *H. Schulze-Fielitz*, in: H. Dreier (ed.), Grundgesetz-Kommentar, Bd. II, 1998, Art. 20 a, Rn. 4 ff.; *A. Uhle*, Das Staatsziel "Umweltschutz" und das Sozialstaatsprinzip im verfassungsrechtlichen Vergleich, JuS 1996, p. 96 ff.

[63] For a very early writing see *G. Schwarzenberger*, Machtpolitik, 1955, p. 263 ff.

54. This is a fundamental principle of public international law. At the same time, it is a fundamental principle of domestic constitutional law. It is a *national* and a *universal* policy objective.[64] Hence, national and international commitments as to the protection of peace fulfil *complementary* functions.[65] Many texts would give proof of this "universal harmony" of complementary "peace clauses", so without any doubt the preamble or Art. 25 of the German Basic Law. Most impressive is Art. 9 Japanese Constitution (1946/47). This classical constitutional "peace provision" shall be given a *universal memento*:

> "(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of aggression of the state will not be recognized."[66]

4. Especially an "International Rule of Law"

55. Universality means possible independence from the tastes and the impressions of the day. The impressions of today are strongly influenced by the global "war against terrorism", the "Iraq-war" and the ongoing discussions about pre-emptive self-defence strategies. Security first might be a key word. Therefore, a global "state of emergency" might rather be suitable to characterise the international scene at the beginning of the 21st century than an international rule of law. However, global law and constitutional structures of public international law will not be possible without the universal principle of a *„rule of law not men"*.[67] Its international recognition and global implementation is an indispensable prerequisite to turn the international society of states into an *international community* following constitutional principles and taking seriously the essential needs of

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[64] *K.-P. Sommermann*, Staatsziele und Staatszielbestimmungen, 1997, p. 237 ff.

[65] However, there are some limits. A "right to be peace" is more than questionable, see Constitution of Congo (1992), Art. 53: "The Congolese people shall have the right to peace". Such a right is nothing but a rather indifferent mixture of other rights (right to life etc.) and it never could be enforced.

[66] See also Art. 11 Constitution of Italy (1947); regarding Italy also *S. Kadelbach*, Internationale Verflechtung, in: B. Pieroth (ed.), Verfassungsrecht und soziale Wirklichkeit in Wechselwirkung, 2000, p. 160 ff., at 164; for an Austrian perspective already *L. Adamovich*, Handbuch des österreichischen Verfassungsrechts, 6th ed. 1971.

[67] *H. Hofmann*, Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats, Der Staat 34 (1995), p. 1 ff., 12 ff.

the human being.[68] A "state of emergency"-concept in the tradition of *C. Schmitt* can not provide for an adequate answer. After the military actions in Iraq, it becomes very obvious that unilateral actions would fail. The United Nations come back into the came. For the reconstruction and development of post-war Iraq international *co-operation* is necessary. And this co-operation is reality. The United States strongly rely on this co-operation, not on exclusive influence of the former so called "coalition of the willing". Global responsibility, not a global state of emergency fortunately prevails – at the very least in that regard. Responsibility, being conceived as legal concept, will be an integral part of a universal legal order. And so will be the rule of law. The European Union is an international political entity that relies on both.[69] In the *Golder*-Case (1975) the European Court ob Human Rights explicitly ranked the „rule of law" among the common heritage of European constitutional traditions.[70]

56. On the international level, the rule of law-principle is not as effectively structured as within the European Union and the European Communities. However, there are first international rule of law-elements, e.g. the primacy of the law in its relation to politics and the principle of legal certainty. The chance that rule of law thinking becomes truly universal, will be all the better the more national constitutions, particularly the constitutions of the new democracies, follow the rule of law. As of today, one can find many encouraging provisions: Art. 5 Constitution of Croatia (1990); Art. 4 sec. 1 Constitution of Bulgaria (1991), not without constraints Art. 5 sec. 3 Constitution of China, in a very questionable way linking the rule of law and the socialist system; Art. 1 sec. 1 Constitution of Eritrea (1996); Art. 1 Constitution of Honduras (1982): „Estado de derecho"; for the Baltic States see Art. 86 Constitution of Latvia (1922/98); Art. 3 Constitution of Estonia 1992[71].

5. The Self-Determination of the Peoples and the Protection of Minorities – a Universal "Melting Pot" of International and National Law

57. The self-determination of the peoples and the protection of the minorities are another important field of law where a complementary interplay of national and international guarantees gives rise to universal principles. At first, Art. 1 Nr. 2 UN-Charter has to be mentioned: " To develop friendly relations among nations based on respect for the principle of equal rights

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[68] In this sense also *G. Schwarzenberger*, Über die Machtpolitik hinaus?, 1968, p. 52; see also *A. Watts*, The International Rule of Law, in: German Yearbook of International Law 36 (1993), p. 15 ff., 26 ff.

[69] For the rule of law part and the specific separation of powers topic see *H.-D. Horn*, Über den Grundsatz der Gewaltenteilung in Deutschland und Europa, JöR 49 (2001), p. 287 ff., 288;

[70] ILR 57, 201, 217.

[71] *M. H. Wiegandt*, Grundzüge der estnischen Verfassung von 1992, JöR 45 (1997), p. 151 ff.; *R. Steinberg*, Die neuen Verfassungen der baltischen Staaten, JöR 43 (1995), p. 53 ff., p. 58 ff. (rights of the citizens, protection of minorities), p. 62 ff. (fundamental rights as national policy objectives).

and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.“ Given its controversies with Russia, Chechnya strongly emphasises the self-determination of the own people. Section 1, Article 1 of the Constitution reads as follows: „Chechen Republic is a sovereign democratic legal state created as a result of self-determination of Chechen people.“ The idea of minority protection can not only be found in Western European constitutions or international conventions, but also in Asian legal traditions. Once more, the Constitution of China gives an example. And once more the reader has to be aware of the gap between reality and ideality, the discrepancy between what is and what ought to be:

58. ”All nationalities in the People's Republic of China are equal. The state protects the lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity, and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their secession are prohibited. The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities.”

59. A clause as to minority protection can be found in the Constitution of Congo (1992), Art. 50: „The State shall guarantee the rights of minorities.“ The special link between minority protection and the ethnical identity of a political community finds an excellent expression in the Constitution of Estonia (1992), ibidem Art. 49: „Everyone shall have the right to preserve his or her ethnic identity.“ And more precisely Art. 50 continues: „Ethnic minorities shall have the right, in the interests of their national culture, to establish institutions of self-government in accordance with conditions and procedures determined by the Law on Cultural Autonomy for Ethnic Minorities.” The clauses regarding minority protection and ethnical identity put emphasis on a momentum which a universal legal order always has to be aware of. Universality does not mean homogeneity. Global law needs the *cultural heterogeneity* of its constituents. One of the intentions of the “universal” is to effectively protect the “particular”.

6. The Open National State – Constitutional Provisions “Opening” the State as to the Global Law Dimension

60. As we have seen, universality and universal law are about the pursuit of ideals. Ideals themselves can be described as “values that are implicit or latent in the law, or the public and moral culture of a society or group that usually cannot be fully realised, and that partly transcend contingent, historical formulations, and implementations in terms of rules and principles and policies.”[72] Therefore, ideals – being to some extent expressions of

[72] *W. van der Burg*, The Importance of Ideals, in: Journal of Value Inquiriy, vol. 3.1, p. 25.

morality – cannot be directly applied in the legal practice. In a specific historical context, ideals have to be transformed into normatively effective and applicable rules, legal principles or at the very least public policies. If the national state shall be able to actively participate in a universal process of transforming universal ideals into universal legal rules, principles or political policies, the state has to be an "*open state*" – open with an emphasis of the acceptance and implementation of public international law.[73] Clauses such as Art. 23 (transfer of sovereign powers restricted to the process of European integration), Art. 24 (transfer of sovereign powers to international organisations), Art. 25 (international law as an integral part of federal law) German Basic Law give important examples how an *inter-constitutional* universal legal order can be shaped and vice versa international public law can be implemented into domestic law. Many modern constitutions do know parallel provisions. This is true for the EU member states, in a wider European context for Switzerland[74], this is also true for micro states or for young democracies in Eastern Europe, in Africa, Latin America or Asia. An unambiguous tendency appears. Wherever the farmers of the constitution take – first and foremost because of their own experience –globalisation, universal standards and worldwide legal networks for granted, the constitution is open for the world beyond the national state. This openness becomes an key element forming the very *identity* of the constitution itself.

61. That international law has to be a valid within the domestic legal system and that at least some minimum standards of homogeneity between national and international law have to be sought, is a demand of so different legal cultures such as Ecuador (Art. 4 of the 1998 Constitution) or Slovenia (Art. 153 sec. 2 I of the 1991 Constitution): "Laws must be in conformity with generally accepted principles of international law and with treaties ratified by the National Assembly (...)".[75] The Constitution of Albania contains a kind of "supremacy clause" in Art. 122 sec. 2: "An international agreement that has been verified by law has superiority over laws of the country that are not compatible with it." A very clear commitment as to interdependence between the national and the international

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[73] For the discussion in Germany see the basic and programmatic study by *K. Vogel*, Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit, 1964 („offene Staatlichkeit"/"open statehood"); *U. Di Fabio*, Das Recht offener Staaten, 1998, p. 139 ff.; *S. Kadelbach*, Internationale Verflechtung, in: B. Pieroth (ed.), Verfassungsrecht und soziale Wirklichkeit in Wechselwirkung, 2000, p. 160 ff., 160–164; for a theory of the open as well as co-operative national state see *P. Häberle*, Der kooperative Verfassungsstaat (1978), in: *id*., Verfassung als öffentlicher Prozeß, 3rd ed. 1998, p. 407 ff., continued in *id*., Verfassungslehre als Kulturwissenschaft, 2nd ed.1998, p. 175 ff.; furthermore S. *Hobe*, Der offene Verfassungsstaat zwischen Souveränität und Interdependenz, 1998; *id.*, Der kooperationsoffene Verfassungsstaat, Der Staat 37 (1998), p. 521 ff.; *Ch. Tomuschat*, Der Verfassungsstaat im Geflecht der internationalen Beziehungen, in: VVDStRL 36 (1978), p. 7 ff.; *K.-P. Sommermann*, Der entgrenzte Verfassungsstaat, in: D. Merten (ed.), Der Staat am Ende des 20. Jahrhunderts, 1998, p. 19 ff., p. 30 ff.

[74] *T. Cottier/M.Hertig*, Das Völkerrecht in der neuen Bundesverfassung, in: U. Zimmerli (eds..), Die neue Bundesverfassung, 2000.

[75] See for the full text JöR 42 (1994), p. 106.

legal order can be found in Art. 8 Constitution of Belarus: "The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles." Art. 18 sec. 1 holds the same principle to be valid for foreign policies: "universally acknowledged principles and standards of international law". For a very innovative version of the "open" Western European State see Portugal, Art. 8 of the Constitution:

> „(1) The rules and principles of general or ordinary international law are an integral part of Portuguese law.
>
> (2) Rules provided for in international conventions duly ratified or approved, following their official publication, apply in municipal law as long as they remain internationally binding with respect to the Portuguese State.
>
> (3) Rules laid down by the competent organs of international organization to which Portugal belongs, apply directly in municipal law insofar as the constitutive treaties as applicable provide to that effect."[76]

62. All these texts contain elements of a *universal constitutional law*.[77] Again, these elements are not strict rules, we have to speak about ideals and intrinsic values that need to be transformed into national and international norms, principles or policies. The transformation can take place in many different ways. The universal elements may give rise to new international customary law (longa consuetudo and opinio iuris). The elements might be – partly – codified by international treaty law. The elements might be implemented into domestic (constitutional) law. In whatever manner the transformation is done, the national law principles concerning the international dimension and the constitutional structures of international law "come together" and form a *co-operative legal system*. This co-operation, of course, is an always open process. And so is universality. Neither ethical nor legal insight must form apart from historical considerations. The "anti-historicist association of universality with abstract rationality or other ahistorical contemplation"[78] neglects the procedural character of how universal ideals become constitutional reality. Global moral authority is only the beginning of universality. Universality is not a catalogue of pre-existent principles given by nature, even though this "fiction" of universality in a Platonic or ius naturale-tradition is of some importance. At least equally important, however, is the notion that universality is *also* the

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[76] For further examples see *S. Kadelbach*, Internationale Verflechtung, in: B. Pieroth (ed.), Verfassungsrecht und soziale Wirklichkeit in Wechselwirkung, 2000, p. 160 ff., p. 163 (footnote 10).

[77] *P. Häberle*, Das "Weltbild" des Verfassungsstaates – eine Textstufenanalyse zur Menschheit als verfassungsstaatlichem Grundwert und "letztem" Geltungsgrund des Völkerrechts, FS M. Kriele, 1997, p. 1277 ff., 1293.

[78] *C. G. Ryn*, Universality and History: The Concrete as Normative, in: Humanitas, Volume VI, No. 1, Fall 1992/Winter 1993.

result of worldwide discourses, negotiations, treaty making processes, the development of customary international law and last but not least of political tensions.[79]

IV. Inter-Constitutional Global Law and Inter-Constitutional Universality – Methods, Perspectives, Limits

63. The scientific approach outlined in this article is a comparative one. However, it does not only deal with the comparison of legal texts, but also with the broader cultural, economical, political etc. "ambiance". Universal principles are the possible outcome of a comparative process and universality itself is rather a process than an ahistoric idea(l), rather a cultural product of real world interaction – political, scientific, philosophical, most importantly communicative interaction – than Platonic heritage. Or, to put it in slightly simplyfying terms: One has to look for certain legal principles being common to a vast majority of the legal systems and cultures all over the world.[80] This approach, though, brings about the problem of selection. Since a comparison of everything with everything is impossible, one has to examine which legal cultures have to be selected. Are there some further developed legal systems with a longstanding tradition of human rights, democracy and a highly developed rule of law-thinking that could play a leading role? Or, on the other hand, are the young and innovative legal systems and constitutions a challenge to re-read, re- or (horrible dictu) deconstruct even the great classical documents such as the French Declaration of 1789 or the US-Federal Constitution of 1787? One answer is very obvious. Given the sovereign equality of all states (Art. 2 Nr. 1 UN-Charter), the formula "civilized nations" in Art. 38 sec. I lit. c Statute of the International Court of Justice does not provide for reasonable criteria. A self-centred Eurocentric view has to be overcome.[81] Indeed, universality always has been a principle of European Constitutionalism and based upon the Platonic (or anti-Platonic) tradition of European philosophy, but the very idea of universality reaches far beyond the cultural boundaries of Europe. The origins of the "universality-approach" might be European, the concept itself, of course, is a global one. It requires worldwide law comparison including micro states, developing countries, reform democracies, societies in transition

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[79] As to the role of these tensions see *H.-P. Schneider*, 50 Jahre Grundgesetz, NJW 1999, p. 1497 ff., 1499 („Verfassungskämpfe", "struggles about constitutional principles"); furthermore *S. U. Pieper*, „The Clash of Civilizations" und das Völkerrecht, in: Rechtstheorie 29 (1998), p. 331 ff., at 342 ff.

[80] *O. Sandrock,* Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland – Europa – und die Welt, JZ 1996, p. 1 ff., 9.

[81] Examples can be found in J. Hoffmann (ed.), Begründung von Menschenrechten aus der Sicht unterschiedlicher Kulturen, 1991; S. Batzli/F. Kissling/R. Zihlmann (ed..), Menschenbilder, Menschenrechte, Islam und Okzident: Kulturen im Konflikt, 1994; see also *B. Fassbender*, The Better Peoples of the United Nations? Europe's Practice and the United Nations, in: EJIL 15 (2004), p. 857 ff.

from a totalitarian past to a democratic future. All the differences between the legal system and all the asymmetries as to the status of (political, social, economical etc.) development have to be taken into account.[82] Without any doubt, the awareness of these different, asymmetrical and therefore *particular* structures limits the possibilities of comparison, but at the very same time makes the outcome rational. The mere fact, that different legal texts in different cultural contexts use the same wording, does not mean a precise statement about a strictly parallel understanding, let alone a parallel reality of the law. However, the phrases used in the legal texts mark a starting point to elaborate elements of a universal legal order and to come to a *universal* understanding of these new elements.

64. Another aspect deserves a moment of attention. Most of the principles, which are of – at least some – universal quality, are not original products of international law but results of continuing comparative processes between the different legal systems.[83] Public international law is very well aware of the need for what could be described as "weighing law comparison" – a method which is very often applied by the European Court of Justice.[84] Art. 38 sec. I lit. c Statute of the International Court of Justice holds "the general principles of law recognized by civilized nations" to be a source of public international law. These general principles can only be shaped by the aforementioned „weighing" and „comparing" approach. However, law comparison must not be reduced to the semantic aspect of comparing words. Given the high technicality of legal terms, given the language problems when translating legal texts[85], a mere focus on semantics would be a futile endeavour. Consequently, the comparative method has to include other disciplines (such as history, philosophy, economy, social and political sciences) as well as the comparison of cultures. The *inter-constitutional* necessarily is an *inter-cultural* approach,

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[82] See also *R. Grote*, Rechtskreise im öffentlichen Recht, AöR 126 (2001), p. 10 f., 14 ff.

[83] See *P. Häberle*, Theorieelemente eines allgemeinen juristischen Rezeptionsmodells, JZ 1992, p. 1033 ff.; *id.*, Verfassungslehre als Kulturwissenschaft, 2nd ed. 1998, p. 104 ff. et passim; *G. Frankenberg*, Stichworte zur Drittwirkung der Rechtsphilosophie im Verfassungsrecht, in: R. Gröschner/M. Morlok (eds.), Rechtsphilosophie und Rechtsdogmatik in Zeiten Umbruchs, 1997, p. 105 ff.; *M. Kotzur*, Theorieelemente des internationalen Menschenrechtsschutzes, 2001, p. 31 ff., p. 47 f.; more sceptical *H. Krüger*, Das Programm. Verfassung und Recht in Übersee, VRÜ 1 (1968), p. 3 ff., 7 ff.

[84] The European Court of Justice is applying the "weighing law comparison"-method especially in the fields of human rights law and, moreover, whenever developing other general principles of European Community law, see e. g. *A. Bleckmann*, Die wertende Rechtsvergleichung bei der Entwicklung europäischer Grundrechte, FS B. Börner, 1993, p. 29 ff.; *Th. Oppermann*, Europarecht, 2nd ed. 1999, Rn. 684; *R. Streinz*, Europarecht, 6th ed. 2004, Rn. 360 f.; for a rather critical analysis *W. Weiß*, Die Verteidigungsrechte im EG-Kartellverfahren, 1996, p. 23 ff.

[85] Translating e. g. the German expression „Rechtsstaat" into the English „rule of law" would be quite misleading because of the very different categories of thinking *behind* the two principles. The meaning *behind* or *beyond* the written texts is the really important starting point of all kind of comparison.

too.[86] Of course, an important limit of the comparative method has finally to be mentioned. A *„maximum standard approach"* as sometimes applied by the European Court of Justice or the Swiss Federal Court[87], is not the adequate technique to develop general principles of law having a universal dimension. [88] Here, only a "minimum standard approach" can help to frame "*minimum constitutional structures*" of a universal legal order.

Final Remarks

65. Universality is neither the intellectualistic product of philosophical abstractionism nor a utopian escape from the real world. If one does not set aside the historical world, the dichotomy between ethical universality and historical/cultural particularity is not as insurmountable as it seemed to be at first glance. As we have seen, Platonic moral abstractions may very well be one, but not the only and not even the most decisive momentum of universality. On the contrary, universal principles manifest themselves in particular legal cultures and find significant expression in particular legal texts. Vice versa, especially these texts, most importantly the texts of national constitutions, mark a starting point to concretise new universal legal principles. This is especially true for preambular formulations, human rights standards, the universal dimension of national policy objectives and all the constitutional provisions "opening" the nation states as to a global legal order. Historically, universality has been a principle of European Constitutionalism. Today, universality might be describes as "*humankind* based". Universal legal principles are the outcome of legal reflections about human action, about human needs, about the most existential threats and dangers the individual human being is facing all over the world (the endangerment of life, liberty, to some extent property etc.), and last but least about the ever-present danger to abuse power.[89] Insofar, the positive *Lockean* and the negative *Hobbesian* "image of man" have equally universal implications. The human being herself/himself is the point of reference for any legal order and thus human action as well as human needs mark the benchmark of global law respectively universality. Universality requires an *anthropological* understanding. The anthropological element of the law is neither limited to statehood as such

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[86] For the idea of law comparison as a comparison of cultures see *P. Häberle*, Verfassungslehre als Kulturwissenschaft, 1st ed. 1982, p. 33, 2nd ed. 1998, p. 463 f. ; recently *R. Wahl*, Verfassungsvergleichung als Kulturvergleichung, FS H. Quaritsch, 2000, p. 163 ff., 173 ff.

[87] As to the maximum standard approach see *R. Streinz*, Europarecht, 6th ed. 2004, Rn. 362 f.

[88] *W. Weiß*, Allgemeine Rechtsgrundsätze des Völkerrechts, AVR 39 (2001), p. 394 ff.

[89] *H. Bielefeldt*, Menschenrechte und Menschenrechtsverständnis im Islam, in: EuGRZ 1989, p. 489 ff., 491; *W. Brugger*, Stufen der Begründung von Menschenrechten, in: Der Staat 31 (1992), p. 19 ff., 21; *W. Huber*, Die tägliche Gewalt. Gegen den Ausverkauf der Menschenwürde, 1993, p. 7 ff.; *H. Hofmann*, Geschichtlichkeit und Universalitätsanspruch des Rechtsstaates, in: Der Staat 34 (1995), p. 1 ff., 27.

nor to the particularities of single nation states. [90] However, it is based upon human dignity[91] and therefore universal in nature.

[90] *E. Denninger*, Das Verhältnis von Menschenrechten zum positiven Recht, JZ 1982, p. 225 ff., 227; *W. v. Simson*, Überstaatliche Menschenrechte: Prinzip und Wirklichkeit, in: FS K. J. Partsch, 1989, p. 47 ff., 65; *R. Higgins*, Problems and Process, 1994, p. 96 f.

[91] Most recently *M. Nettesheim*, Die Garantie der Menschenwürde zwischen metaphysischer Überhöhung und bloßem Abwägungstopos, AöR 130 (2005), p. 71 ff.