

ABHANDLUNGEN / ARTICLES

Constitutional Law in "old" and "new" Law and Development

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For an internationalist constitutional lawyer who has always deplored the parochialism of traditional constitutional law scholarship, the internationalization of constitutional law¹ is a very exciting and welcome development. As a member of the German Federal Constitutional Court I am an active participant in this process.² As the liaison officer of our court with the Venice Commission³ I regularly get queries from other courts on our experience with specific questions and answer them as well as I can, but never without a slight misgiving because I am also a critical law and society scholar. My introduction to this field came more than 30 years ago when I was a law and modernization fellow at Yale, and this was the time when the law and development movement had overcome its naïve beginnings⁴ and had become critical.⁵ At the centre of this critique were doubts about the wisdom of legal transfers.

In the 1960s the decolonization process had already resulted in a certain kind of internationalization of constitutional law *avant la lettre*. We did not call it that way: we called it – positively – modernization⁶ or – negatively – colonialism. The colonial powers intro-

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¹ *B.-O. Bryde*, The Internationalization of Constitutional Law in: T. Groß (ed.), Legal Scholarship in International and Comparative Law, 2003, p. 191 ff.

² *B.-O. Bryde*, The Constitutional Judge and the International Constitutional Dialogue, Tulane Law Review 80 (2005) p. 203 ff.

³ *J. Jeffrey*, The Venice Commission: Disseminating Democracy through Law, Public Law 2001, p. 675 ff.

⁴ On the history of the law and development movement see *J. Merryman*, Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement, American Journal of Comparative Law (AJCL) 25 (1977), p. 457 ff.; *B.-O. Bryde*, Die Rolle des Rechts im Entwicklungsprozeß, in: *B.-O. Bryde* / F. Kibler (Hrsg.), Die Rolle des Rechts im Entwicklungsprozeß, Frankfurt/M. 1986, p. 9 ff.; *Burg*, Law and Development: A Review of the Literature and a Critique of "scholars in self-estrangement" AJCL 25 (1977) p. 492 ff; *Gardner*, Legal Imperialism – American lawyers and Foreign Aid in Latin America, 1980.

⁵ Seminal: *D. Trubek/M. Galanter*, Scholars in Self-Estrangement, Wisconsin Law Rev. 1974, p. 1062 ff.; cf. Fn 4 for further references.

⁶ The modernization paradigm informed also the beginning of our journal: *H. Krüger*, Das Programm, Verfassung und Recht in Übersee (VRÜ) vol. 1 (1968), p. 3 ff., cf. also *B.-O. Bryde*, Überseeische Verfassungsvergleichung nach 30 Jahren, VRÜ 30 (1997), p. 452 ff.

duced their constitutional models, which resulted in very similar if not identical constitutions of either the French 5th Republic model⁷ or the Westminster model, all over the world.⁸ This heritage has influence until today. In the "old" law and development discussion this colonial imposition⁹ was often conceptualized as modernization. The new constitutions were supposed to lead backward societies towards economic development and constitutionalist democracy.¹⁰

This first transfer of constitutionalism was not very successful. Ten years after independence most newly independent states in Africa were either military regimes or one-party-systems¹¹ of which only few (e.g. Tanzania and Kenya) allowed a certain amount of participation within the framework of "democratic one-party-systems".¹² Similarly, in Asia only few countries retained their independence respective postwar constitution, here too military regimes and authoritarian dictatorships took over in many places. The expectations of modernization theory proved wrong for the same reasons that were developed in the self-critique of the law and development movement: they were naïve because they overestimated the reformist zeal of ruling elites, and they were ethnocentric because they saw the own respective model of the foreign adviser as the best road to development without due regard to the conditions of the receiving country (or even other models in other parts of the world).¹³

In the last decades we have experienced a renewed process of democratization and constitution-making. This process started with the disappearance of the last right-wing dictatorships in Southern Europe, was followed by the breakdown of communism in Eastern Europe and has become a world-wide phenomenon most remarkably in Latin America but also in Africa and Asia. While setbacks are common the overall process is significant.

⁷ E. Kliesch, Der Einfluß des französischen Verfassungsdenkens auf Afrikanische Staaten, Beihefte zu VRÜ, Nr. 1 (1976).

⁸ For Africa cf. B.-O. Bryde, the Politics and Sociology of African Legal Development, 1976, p. 23 ff.

⁹ S. Burmann/Harrell-Bond, The Imposition of Law, 1979.

¹⁰ In his classification of constitutions according to their relation to the power process („normative, nominalist, semantic“) Karl Loewenstein reserved one of the categories („nominalist“) for this case: „nominalist“ he calls constitutions still ineffective but supported by the honest wish of those in power to make them effective. K. Loewenstein, Verfassungslehre, 2. ed. Tübingen, 1969, p. 151 ff. For a critique B.-O. Bryde, Verfassungsentwicklung, Baden-Baden, 1982, p. 28 Fn. 4; a more differentiated analysis of Loewenstein’s theory in relation to constitutions in developing countries (containing some valid criticism of my own attempt at categorizing constitutions) can be found in: M. Neves, Symbolische Konstitutionalisierung, 1998, p. 90 ff.

¹¹ For a survey cf. B.-O. Bryde, (Fn 8) p. 23 ff.

¹² H. Rogge, Die Verfassung des afrikanischen Einparteistaates, 1974.

¹³ Cf. References in Fn 3, 4 and L. Nader, Promise or Plunder? A Past and Future Look at Law and Development, Global Jurist 7 (2007) 2, p. 1 ff.

The open question remains whether the international diffusion of constitutionalism has a better chance this time. This is not just a political question, but also a question for law and society scholarship. Will socio-legal scholarship confront the subject more maturely this time, drawing on the experience of the old law and development movement or fall again into the trap of naivety and ethnocentricity? Obviously, the protagonists of the old law and development movement, including the most critical, have not given up hope but are again engaged in the project.¹⁴

There is a certain danger that the old mistakes are repeated. Like in the 1970s when the ironical name of "legal missionaries"¹⁵ held more than a kernel of truth, we can again detect a certain missionary zeal to distribute one's own model world-wide without due regard to the problems of such transfers. "What works well at home" is expected to work in the new democracies.¹⁶ In drafting new constitutions and reform-legislation we can again detect attempts at one-sided insistence on foreign models and reliance on the untested reception of such models. Fights between legal missionaries to sell their product and the influence of international donors can all again be observed and criticised.¹⁷ This problem is reinforced by the fact that like in the 1960s the development of the field runs the risk of having its research strategies imposed by donors who pursue their own economic and political agendas. The dependence from a neo-liberal paradigm might today even be stronger than in the 1970s when alternatives to the commanding modernization paradigm were discussed with much more force (a problem, however, that might be more relevant for other fields of law, especially economic law¹⁸ than constitutional law). Like in "old" law and development, public aid agencies and foundations exert a great influence. And similar to the late 1970s funding might dry up when research turns critical¹⁹. The colonial legacy, too, remains strong. The colonial heritage still circumscribes the alternatives for constitutional drafting to a large extent: former British colonies will usually remain within the framework of commonwealth constitutionalism and former French colonies regularly adapt the constitution of the French 5th Republic to local conditions.

I think scholars should therefore carefully look at the old literature. However they need not be discouraged because there are differences which allow a much more optimistic

¹⁴ D. Trubek, The "rule of law" in development assistance: past, present, and future, in: Bäuerle u.a. (Hsg.), *Haben wir wirklich Recht? Zum Verhältnis von Recht und Wirklichkeit*, 2004, S. 33 ff

¹⁵ Gardner, (Fn.4) p. 282 ff; cf. also P. Carrington, *Spreading America's Word. Stories of Its Lawyer-Missionaries*, New York, 2005.

¹⁶ M. Krygier, *Parables of Hope and Disappointment*, Eastern European Constitutional Review 11 (2002).

¹⁷ B.-O. Bryde, Die Erfahrungen der "Law and Development"-Diskussion und die Transformationsforschung, in: Kirk u.a. (Hrsg), *Genossenschaft und Kooperation in einer sich wandelnden Welt*, Fs. f. Münker, 2000, p. 405 ff.

¹⁸ Cf. the examples criticised by Nader (Fn.13).

¹⁹ B.-O. Bryde (Fn. 4) p. 1 f.

evaluation of the globalization of constitutional law today – and ask for a much more differentiated research program.

One important difference is that the process – despite all international influences – is much more independent and self-sustaining. The move towards democratic constitutionalism in Eastern Europe, the defeat of the apartheid regime in South Africa and of military regimes and autocracies all over the world were the result of genuine revolutions and reform movements. While international influence and interference, possibly helpful in some cases, probably counter-productive in others, cannot be overlooked,²⁰ comparisons with colonial imposition processes would be inappropriate. Connected to this fundamental difference is the fact that the process is much more internationalized. There is no colonial or neo-colonial transfer of a constitutional model from country A to country B. Even in view of the colonial traditions just mentioned and even where constitutional drafting relies on foreign models and sometimes is heavily influenced by foreign experts or international organizations, it is purposefully comparative.

The South African case here is the outstanding example²¹ The choice of the constitutional court model in a common law country, hardly thinkable some years ago, is a good illustration for the influence of comparative constitutional law. It owes much to the experience of other countries that had to overcome a non-democratic past.²² Constitutional law is no longer a parochial subject but has become an international one²³, with a much better – and worldwide – infrastructure of scholars, academic societies and journals than in the past when "comparative law" usually meant private comparative law. The technical infrastructure of globalization like the internet with global access to a wealth of foreign legal materials make such a comparative approach much easier than in earlier decades. At the same time they make it much more difficult to outside advisers to sell idealized versions of their own systems since the actors in the receiving countries know the reality in the adviser's own society.²⁴

Thus, while "old" law and development theory should teach us to study these processes critically and to be aware of power relationships and hierarchies, one-way-streets in reception processes, and the sociological problems of legal transfers, it would be uncritical to import those old critiques wholesale and to overlook the much more participatory and egalitarian aspects of the new constitutionalism.

²⁰ For examples cf. *Nader* (Fn 13); cf. also the three case-studies in *Philipp Dann / Zaid Al-Ali*, The Internationalized Pouvoir Constituant – Constitution-Making under External Influence in Iraq, Sudan and East Timor, in: *Max Planck Yearbook of United Nations Law*, 10 (2006) p. 423 ff.

²¹ *H. Klug*, Constituting Democracy, 2000, p. 93 ff; *Venter* in this volume.

²² *B.-O. Bryde*, Constitutional Courts in Constitutional Transition, in: *Van Loon/Van Aeken* (eds) 60 maal recht en 1 maal wijn, Liber Amicorum Van Houtte 1999, p. 235 ff.

²³ The cross-cultural impact of constitutional law scholarship has also become a subject for socio-legal research cf. *Cousso* in this volume.

²⁴ *Nader* (Fn 13).

An important new development which changes the process fundamentally is the influence of international human rights, and its international actors. Human rights are central to the globalization of constitutional law. Most of the discussion about globalization or internationalization of constitutional law is actually about the globalization of human rights law which has become a much more internationalized subject than, e.g. questions of state organization. Human rights form an important link between a popular, non-hegemonic constitutionalism of civil society and professional constitutionalism of courts, drafters and academics. The mobilization of human rights for development from below had already become an alternative in law and development studies at the time of the demise of the first stage of law and development²⁵ and therefore human rights form also a strong bridge between "old" and "new" law and development.

The new wave of democratization, too, has been influenced and prepared by the international human rights discourse. Worldwide, human rights movements fought (and still fight) for reforms in their respective countries by invoking international human-rights documents that were signed by their governments and are binding on them under international law (even though they are not kept in practice).²⁶ In the process of drafting new constitutions there was heavy reliance on the international human rights conventions, which has resulted in a worldwide process of reception of international human rights law into national constitutions.²⁷ The major distinction between different constitutional systems today might be between old constitutions which were drafted before the major international instruments were adopted and the vast majority of new constitutions drafted under the influence of international human rights law. This development of a common international human rights system transcends classical distinctions of comparative constitutional law such as between common law and civil law, presidential and parliamentary systems, or federal and unitary states.

This development is also the background for the globalization of case law. The reception of international human rights documents into national law has created very similar if not identical wordings of catalogues of rights. This creates a sphere of common human rights law in which precedents and doctrines travel freely.²⁸

The critical social scientist might question the egalitarian nature of this process. Employing the instruments used for establishing academic hierarchies ("ranking") one might empirically map lines of influence (citation indices) and to a certain extent – and

²⁵ *J.Paul / F. Diaz*, Developing Law and Legal Resources for Alternative People-Centered Development, in: B.-O. Bryde / F. Kübler (Hrsg.), *Die Rolle des Rechts im Entwicklungsprozeß*, Frankfurt/M. 1986, p. 61 ff; *B.-O. Bryde*, Menschenrechte und Entwicklung in: *Faber/Stein, Auf einem Dritten Weg*, Fs. für Helmut Ridder, 1989, p. 73 ff.; *Ginther*, *Zivilgesellschaft und Entwicklung*, VRÜ 30 (1997), p. 137 ff.

²⁶ *Ginther* ibidem.

²⁷ For references cf. *Bryde* (Fn 1).

²⁸ Cf. contributions in *Markesinis / Fedke*, *Judicial Recourse to Foreign Law*, 2006.

predictably – they are the old ones: new democracies of the periphery looking to old ones of the centre. But my hypothesis would be that, again, the international-law dimension is more important than post-colonial dependence structures. For the interpretation of constitutional provisions that have been drafted on the basis of international documents, the jurisprudence of international courts (and to a lesser extent other control agencies like the UN Human Rights Committees) is the most important source. These international courts appear to be a neglected field of socio-legal studies. We need more knowledge about their internal functioning and they would make a perfect field of impact studies.

Perhaps more important for our subject is their influence of these international bodies on the legal culture of the member countries. To take a simple formal point: the traditional dichotomy between civil and common law in Europe, which traditionally had been a real barrier to mutual understanding needs to be overcome if judges from both systems work together in one court: they have to find a common language. This is true even linguistically and has resulted in the invention of a new version of English which one might call European Legal English. It is very likely that the new African Court of Human Rights starting with a brilliant group of lawyers from different African jurisdictions who traditionally looked more to other common-law countries or to other francophone countries for inspiration than to their immediate neighbours will have a similar effect.

Even apart from the special role of international courts I would maintain that the respective influence of courts on other courts and of academic theory in other countries can not be conceptualized as a simple transfer of power and money into legal influence. While there is probably a holder of an American LLM on most benches of the highest national courts this does not result in a special place for precedents of the American Supreme Court in the international constitutionalist case law, where the jurisprudence of the Strasbourg court appears to be much more important. I do not claim that the ideal of an egalitarian constitutionalist dialogue²⁹ has already been reached or can ever be reached in a world marked by inequality. But soft skills like the ability to give one's judgments in a form that makes them a recognizable part of an international human rights project become important, and these skills are distributed much more equally throughout the world than money and military power.

As judges we should work on this project, the task of critical scholarship is to control us in this enterprise.

²⁹ B.-O. Bryde, North and South in Comparative Constitutional Law: From Colonial Imposition towards a Transnational constitutionalist Dialogue, in: W. Benedek u.a. (eds), *Development and Developing International and European Law, Essays in Honour of Konrad Ginther*, 1999, p. 697 ff.