ABHANDLUNGEN / ARTICLES

50 years of "VRÜ / Law and Politics in Asia, Africa and Latin America": History and Challenges

By *Brun-Otto Bryde**

This conference[1] celebrates 50 years of our journal "Verfassung und Recht in Übersee".[2] "Verfassung und Recht in Übersee", literally "constitution and law overseas", was founded in 1968. In 1974, acknowledging the fact that from the outset it was addressed towards an international audience it got an English subtitle: "A Quarterly on law and modernization". In 1984, to avoid all complex theoretical discussions about concepts like modernization, development, developing areas, third world etc. the subtitle was changed to "Law and Politics in Africa, Asia and Latin America". These changes provide the first hints about the story I will tell. The birth of the journal within the framework of traditional German comparative law and state theory, the decision to link up with the international law and development community, and in the end the more modest claim to be an interdisciplinary journal that focusses on geographical areas neglected in German scholarship.

A. Verfassung und Recht in Übersee

The year 1968 in post-war German history has a special meaning. The international reform and revolutionary movement of the late 60s is in Germany, as a shortcut, identified with the "68ers".[3]

Now it would be nice to claim that the founding of the journal was somehow connected to this reform movement but this would be far from true. The founding was very much a product of the old – unreformed – German university in which an almighty professor as chair-holder and director of an institute could decide he would like to have a journal without asking the permission of faculty councils or similar bodies. That makes my task to shed

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1 This article is based on the "Herbert Krüger Memorial Lecture" held by the author on the conference "The Global South in Comparative Constitutional Law". The conference celebrated the 50th anniversary of "VRÜ / Law and Politics in Africa, Asia and Latin America" and was held in Berlin from 13 to 15 July 2017.

2 For the first 30 years see: *Brun-Otto Bryde*, Überseeische Verfassungsvergleichung nach 30 Jahren, Verfassung und Recht in Übersee 30 (1997), p. 452; *Philip Kunig*, Völkerrecht und Übersee, VRÜ 30 (1997), p. 465.

3 *Ingo Cornils*, Writing the Revolution –The Construction of „1968" in Germany, New York 2016.

light on the foundation somewhat difficult. Some years later, there would have been minutes of councils and discussions among the institutes' members. I could find no evidence of such deliberations.

The founder, Herbert Krüger,[4] was possibly the only German professor of public law to develop an interest in what was then called developing countries. In 1962, after the wave of decolonization, he gave a report on the International Congress for comparative law in Hamburg on "Basic features of constitution making in the new states."[5] He noticed that there was little expertise or even interest in these countries among German legal scholars. While not himself seriously engaging in research in this field or planning to do so, he tried to remedy this situation. In 1965, he created a tenured research position in the Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht of Hamburg University - today the Institut für Internationale Angelegenheiten - for the study of the "constitutional development and international relations of the new states overseas." It was the first holder of this position, Dieter Schröder, who developed the idea of a journal and sold it to the director.

Dieter Schröder left the institute 1969 only one year after the inauguration of the journal.[6] I became his successor right after my second state exam and while working on a doctorate in European comparative constitutional law and government. I inherited the fledgling enterprise without bringing much expertise to it. However, I was very excited about this adventure and I have been connected with the journal in different roles now for 49 of the 50 years of its existence.

When we look at the intellectual history of our field the founding of the journal also falls into an important period, the beginning of the law and development movement. Marc Galanter's seminal article "The modernization of Law" is from 1966,[7] in France Eugene Schaeffer published "Droit du development" in 1968.[8]

It might be tempting to make the founding of the journal part of this development but again it would be misleading. If we reread Herbert Krüger's key note article for the first issue[9] the main focus was not on development. It was rather an innovative blending of tra-

4 On Herbert Krüger cf. *Thomas Oppermann,* Herbert Krüger, in: Peter Häberle/Michael Kilian/Heinrich Amadeus Wolff (eds.), Staatsrechtslehrer des 20. Jahrhunderts, Berlin 2015, pp. 689 ff.

5 *Herbert Krüger,* Grundzüge der Verfassungsbildung in den neu entstehenden Staaten, in: Hans Dölle (ed.) Landesreferate zum VI. Internationalen Kongreß für Rechtsvergleichung, Hamburg 1962, pp. 309 ff.

6 Dieter Schröder's further career is remarkable. He had worked on transit problems in the institute – he wrote a book on the access of landlocked countries to the sea (Der freie Zugang der Binnenstaaten zum Meer, Hamburg 1966)– and the Senate of West Berlin hired him to work on West Berlin's transit problems with the German Democratic Republic. In this position, he was at the very heart of Berlin politics and rose to the rank of head of chancery. After reunification, he became social democratic Mayor of Rostock.

7 *Marc Galanter*, The Modernization of Law, in: Myron Weiner (ed.), Modernization; the dynamics of growth, New York 1966, p. 153.

8 *Eugène Schaeffer*, Droit du developement, Bull. Inst. Int. Adm. Publ. 1968, p. 57.

9 *Herbert Krüger*, Verfassung und Recht in Übersee – das Programm, VRÜ 1 (1968), p. 3.

ditional German state theory and Anglo-Saxon political science. The assumptions about the state's beneficial role in modernization, secularization and rationalization might appear somewhat naïve seen in retrospective but they were very much in line with the modernization theory in contemporary writings in political and social sciences. The belief in enlightened elites using the state as an instrument for modernization was common in the development literature from Almond and Coleman[10] to David Apter.[11] Herbert Krüger draws on these studies extensively and comprehensively. I very much doubt that there were other German legal scholars at this time who even knew these names. I suspect that the idea of a modernizing elite or developmental dictatorship of modernization theory got its main inspiration from one single case, a man whose legacy is at the moment being dismantled in Turkey, Kemal Ata Turk.

When I took over the responsibility for the journal in 1969, the enterprise was in constant danger of collapsing. Its strength was at the same time its weakness. It had filled a glaring void in German legal scholarship but this meant at the same time that there was no body of authors. There were e.g. only a handful of lawyers who had done doctoral research in the field. Most of them became authors in our journal[12] but they could not report the findings of their dissertations more than once. Every three months I was happy when I had managed to fill the journal at all. There was help from the regional studies institutes for Africa, Asia Near East and Latin America under the umbrella of the "Überseeinstitut" in Hamburg. Without their expertise and contacts it would not have been possible to get the journal off the ground. However, their contribution while valuable remained limited. They had their own journals and competed for good articles, and their main emphasis was on economic affairs in close cooperation with the Hamburg traders associations doing business in the respective continents, which led to a different perspective. Over time, the lack of authors in Germany could be compensated by tapping into the much broader international community but it took some time before enough international contacts had been established[13].

Also financially, the journal was always in danger of closing down. The journal constantly ran on a deficit. That it addressed subjects outside the mainstream of interests of the German legal community meant also that there were few readers and even less buyers. We hoped that its broad scope of both law and social science in three continents should make the journal of interest to very different institutions and libraries but the opposite was true.

10 *Gabriel A. Almond/James S. Coleman*, The Politics of the Developing Areas, Princeton 1960.

11 *David Apter*, The Politics of Modernization, Chicago 1965.

12 The Journal was accompanied by a series of monographs (Beihefte) and the first was perhaps the best of these early dissertations: *Enno Kliesch*'s study of the new francophonic constitutions (Der Einfluß des französichen Verfassungsdenkens auf die afrikanischen Verfassungen, Hamburg 1967), still a valuable reading today.

13 As evidence of our success in building international contacts we published an issue on occasion of Herbert Krüger's 70th birthday to which only non-German authors had contributed: VRÜ 8 (1975), p. 317.

Regional studies centres, e.g. an Institute for African Studies, were not necessarily keen on a Journal that might have issues completely devoted to other parts of the world, e.g. Latin America. For many social science libraries, there was too little social science, for some law libraries too much. We slowly increased our circulation and won a loyal readership but had to rely on outside funds. A charity, the "Hamburger Gesellschaft für Völkerrecht und auswärtige Politik" (Hamburg Society for International law and Foreign Politics) was founded for this purpose. It has been effectively administered for many years by Karl Hernekamp. Herbert Krüger managed repeatedly to find donors but regularly he helped with his own money. The journal does not only owe him its existence but also its survival.[14] After his death, a foundation founded by his daughter Gabriele Krüger took over a supporting role. Since 2015 Nomos publishers have taken the financial responsibility. I would like to mention that this generosity of the founder was not due to excessive wealth. Herbert Krüger had an admirable principle. His motto was: what is earned by scholarship should go back into scholarship. Therefore, when he made money beyond his professorial salary by honorariums, writing advisory opinions or as counsel in constitutional court cases he channelled this money back into scholarly projects like the journal.

B. A quarterly on law and modernization

I was not present at the beginning and cannot shed too much light on the invention of the name "Verfassung und Recht in Übersee". However, I was involved when the journal got the subtitle "A quarterly on law and modernization". After two years of law teaching in Ethiopia I spent a year as Law and Modernization fellow at Yale.[15] I got not only in contact with the main actors in the law and development movement I could rightly consider myself as a member of this growing international community. When I came back to Hamburg and again took over the responsibility for the journal, we tried to link it with these international developments. Being marginal in Germany it was a consolation to know that on the international level one was part of a strong movement.

Stressing legal development beyond constitutional law made also sense because by the mid-70s it had become problematical to put the focus on constitutional law. When the journal was founded, there was a wave of new constitutions after decolonization which asked to be studied. It is quite clear from the first issues that the founders expected a close study of these new constitutions, their relationship with the metropolitan models (the trendy word constitutional transition had not been invented then) and constitutional innovations to be the main topic of the journal. A special field of interest were the various attempts at federal models.[16] 10 years later most of these constitutions had disappeared. In Africa only two in-

14 This is even more remarkable as he never tried to interfere with the editing of the journal – he saw every issue when it came off the press.

15 During my absence Knud Krakau and Henning von Wedel kept the project going.

16 *Dieter Schröder*, Die Bundesstaatlichkeit in Nigeria, VRÜ 1 (1968), p. 30.

dependence constitutions (Gambia and Botswana) survived,[17] in Latin America even old established democracies like Chile were toppled by military regimes[18] and the same was true for Asia.

Authoritarian constitutionalism is one of the subjects of our conference. The subject appears to enjoy a certain popularity.[19] Part of this newer literature gives the impression that it has detected something new. However, in our journal we were confronted from the beginning with the dilemma of running a constitutionalist journal in view of authoritarian constitutions. There were of course exceptions. It is no coincidence that the journal has published many articles on India. There were also some interesting developments in Africa, e.g. the democratic one-party-state in Tanzania. One could also study the various ways in which military regimes organized themselves[20] and managed a return to civilian rule. Researchers interested in the relationship of authoritarian politics and constitution could find a wealth of material in this period especially in Africa. It is remarkable to what extent and with what openness it was the constitution that was used to build authoritarian systems. A ruling politician did not stay in power by cheating at elections but was made president-for-life in the constitution. Ruling parties did not guarantee their position by gerrymandering but the constitution created a one-party-state. There was also some relevant material because the courts especially in common law countries tried to preserve the rule of law also in military regimes and one-party-states. However, a journal concentrating exclusively on comparative constitutional law would have been a rather frustrating enterprise in these years.

Thus, it was farsighted that the founders had envisaged a broader scope for the journal from the outset: it was also to cover international law and international relations, comparative politics and general legal development.

While the journal was never meant to be a comparative law journal reporting about the dogmatic niceties of foreign private or criminal law, the study of the role of law in developing societies was at the heart of the project from the beginning and became more prominent in these years. This includes especially the question of reception or better imposition of western law – one reason why we never excluded highly developed Asian societies like Japan or Korea from our coverage. Another important field where we took up the international discussion in sociology and anthropology of law was legal pluralism and the role of autochthonous and Islamic law. This broad approach to law and social change means that you will find quite a few articles on private or criminal law, which you might not expect in a journal with "Verfassung", constitution, on its front page.

17 See the survey in *Brun-Otto Bryde*, The Politics and Sociology of African Legal Development, 1975, pp. 23 ff.

18 *Henning von Wedel*, then editor-in-chief, condemned the Chilean Coup in an unusual editorial: VRÜ 6 (1973), p. 379.

19 *Roberto Niembro Ortega*, Conceptualizing authoritarian constitutionalism, VRÜ 49 (2016), p. 339.

20 *Tilman Evers*, Die Gesetzesdekrete argentinischer Revolutionsregierungen, VRÜ 1 (1968), p. 333; *Herbert Krüger*, Über Militärregime in Übersee, VRÜ 9 (1976), p. 5.

We also published a lot of international law in these years. Philip Kunig has given an extensive report on Verfassung und Recht in Übersee as an international law journal when we celebrated our 30th year 20 years ago, suggesting tongue in cheek that the V in the abbreviation VRÜ could also stand for "Völkerrecht" (Public International Law).[21] Obviously, not only in state-theory but also in international relations the arrival of so many new actors on the scene was exciting for scholarly observers. In the very first issue of our journal in 1968 there was a programmatic article. The foreign minister of Senegal, Doudou Thiam, wrote "L'Afrique demande un droit international nouveau," Africa demands a new international law.[22] Especially this subject, the question how international law had to adapt to the fundamental change in its membership became an important topic.[23] For many German scholars interested in the developing continents international law was a more convenient field than comparative constitutional law. There was more literature and better material from international organizations. Articles on international law also graced the list of publication for a German academic career much better than articles about the constitution of some little known African country. Therefore, in this field it was easier for the editors to reach out to the profession and to find authors and reviewers. This is not to suggest that our journal on this field just went with the mainstream. International law scholarship in western countries, and this is certainly true for Germany, was on the whole defensive and rejected the claims of the new members for a new international law und the different new orders – new economic order,[24] new information order etc. – that were advocated by the developing countries. In giving room to their position and in the attempt to interpret the international law taking the view of the new majority into account the journal was a trailblazer in German international law scholarship. However, even for a journal that focusses primarily on constitutions a serious coverage of international law makes sense.

International law has a constitutional dimension. In the absence of constitutional guarantees, international law, especially human rights law, provides an important resource for constitutionalist advocacy. International human rights pacts played an important role in bringing countries back to constitutional rule in the late 80s and early 90s. International human rights law, therefore, was an important topic in our journal.[25]

21 Cf. note 2.

22 *Doudou Thiam*, L'Afrique demande un droit international nouveau,VRÜ 1 (1968), p. 52.

23 *Marian Mushkat*, The Needs of the Developing Countries and the Shifting Views of International Law, VRÜ 4 (1971), p. 1; *Bassam Tibi*, Das Selbstverständnis der OPEC, VRÜ 12 (1979), p. 259.

24 *Zdenek Cervenka*, Africa and the New International Economic Order, VRÜ 9 (1976), p. 187; *Rolf Hanisch*, Kakaopolitik, VRÜ 11 (1978), p. 27; *Rainer Tetzlaff*, Die Forderungen der Entwicklungsländer nach einer neuen Weltwirtschaftsordnung, VRÜ 9 (1976), p. 33; *Isabel Feichtner*, Der Kampf um Rohstoffe im Völkerrecht, VRÜ 49 (2016), p. 3.

25 *Bruno Simma*, Der Schutz wirtschaftlicher und sozialer Rechte durch die Vereinten Nationen, VRÜ 25 (1992), p. 382; *Palamagamba John Kabudi*, The Judiciary and Human Rights in Africa, VRÜ 24 (1991), p. 271;

The journal was also from the beginning planned as an interdisciplinary project. The word "constitution" in "Verfassung und Recht in Übersee" was never intended to mean only constitutional law, certainly not in the view of the founder. Herbert Krüger was a pupil of Rudolf Smend. In the Weimar Republic Smend had written a famous book "Verfassung und Verfassungsrecht", constitution and constitutional law.[26] The title implies that the term "constitution" means more than constitutional law. The constitution is not only a legal instrument under the control of lawyers but the concern of all citizens. I do not know whether Mark Tushnet, writing his book "Taking the constitution away from the courts"[27] was aware of this forerunner. However, I am certain that it was this understanding of constitution that was on the mind of the founders when they distinguished between constitution and law in the title.

Thus, political science, especially comparative government was always present in the journal,[28] which again was helpful to fill the issues in the time when there was not much constitutional law to report about. In the absence of a constitutionalist constitution you could and should study government systems.

C. Law and Politics in Africa, Asia and Latin America

As mentioned above, in 1984 the journal got a new subtitle that it has kept until today despite occasional discussions among the editors whether a new title would be better: Law and Politics in Africa, Asia, and Latin America.

The old subtitle, a quarterly on law and modernization, had to go with growing critique of modernization theory. Already as "Law and modernization fellow" in Yale I had started not only to question the assumption that law could be used to transform traditional societies into modern ones but the very concept of modernization. Like many other scholars I recognized that modernization basically meant westernization and that we were dealing not with traditional societies but with modern marginalized ones. In the international discussion, there was an intense debate between modernization and dependency theories. Our journal joined in this debate.[29]

Everybody working in our field knows the problems of terminology. Development or modernization, Developing areas, third world or periphery, every term covers some aspects

Philip Kunig/Robert Uerpmann, Die Wiener Menschenrechtserklärung von 1993, VRÜ 27 (1994), p. 32; *Michaela Wittinger*, Die afrikanische Charta der Menschenrechte und der Rechte der Völker, VRÜ 33 (2000), p. 470.

26 *Rudolf Smend*, Verfassung und Verfassungsrecht, Berlin 1928.

27 *Mark Tushnet*, Taking the Constitution away from the Courts, Princeton 2000.

28 *Rainer Tetzlaff*, Staat und Klasse in peripher-kapitalistischen Gesellschaftsordnungen, VRÜ 10 (1977), p. 43; *Dirk Berg-Schlosser*, Demokratisierung in Afrika – Bedingungen und Perspektiven, VRÜ 27 (1994), p. 278.

29 *Kurt-Peter Schütt*, Imperialismustheorie und Modernisierungstheorie als Analyseschemata gesellschaftlicher Entwicklung und Unterentwicklung, VRÜ 9 (1976), p. 469.

of the phenomenon at best, but can easily be criticised. The term preferred at the moment which we use also for this conference is "Global South". I like and use it myself. Changing the name of our journal into "constitution and law in the Global South" might appear attractive. However, alas, fashions change quickly and the first critics of this term have raised their voice.

The modest sub-title, Law and Politics in Africa, Asia and Latin America, is, however, not just a capitulation in view of terminological problems. It is also a conscious choice for a less missionary approach to the countries in question. I was not only involved in the old law and development movement but I also joined the self-critique of this movement very early. When Marc Galanter and David Trubek wrote their self-critique "scholars in self-estrangement" in 1974 they stated somewhat melancholically that the law and development scholars had returned to their fields of comparative law and sociology of law.[30] In my own book "The politics and sociology of African legal development" from 1975 which was similarly critical of the instrumental top-down view of modernization through law I answered that this was not a bad thing at all. I wrote: "This is their proper place and at the same time the position from which a fresh and unbiased dialogue can be started".[31]

Thus, a title that simply describes subject and geographical focus appears appropriate.

One might ask, however, whether a journal with this geographical specialization is still necessary. Could and should we not leave the field to general comparative and international law journals?

One has to admit – and this is no reason to complain but rather to rejoice – that our project is no longer as marginal and unique as it was 50 years ago. At that time constitutional law not only of the south but in general was of little interest to comparative lawyers. The field was very much in the realm of teachers of private law. The International Journal of Constitutional Law is just 15 years old, not 50. As the founding of this journal and other publications, e.g. the recently published Handbook of Constitutional law, show the field is much more important today. Especially two developments have helped to make constitutional law an important field: human rights and constitutional courts and their study.[32] This is especially true for the south. The first certification judgment of the South African Constitutional Court did probably more than any other decision bring the field to worldwide attention. The Indian Supreme Court's public interest litigation, the remarkable jurisprudence of the Colombian Court and the jurisprudence of the Constitutional Court of Benin also helped to force comparative constitutionalists to stop ignoring the south.

However, at least in Germany the southern continents remain outside of the interests of legal mainstream scholarship. Comparative law – and this is not only true in Germany – still concentrates on comparing common law and civil law. Comparative constitutional law

30 *David Trubek/Marc Galanter*, Scholars in Self-Estrangement, Wisconsin Law Review 7 (1974), p. 1062.

31 *Bryde*, note 17, p. 194.

32 *Bryde*, Constitutional Law in "old" and "new" Law and Development, VRÜ 41 (2008), p. 10.

means for many authors comparing the United States with Britain, France and Germany. In international law voices from the south are heard much less than those from Europe and North America. Therefore, there is still room for a journal concentrating on the south and helping to de-colonize legal scholarship.

However, it does of course help that in this project we are less lonely than 50 years ago. We now find not only internationally but also in Germany many more researchers and teachers working in the field.

This increased interest in constitutional transition and development might change the main focus of the journal once again. In a way it may even point back to the beginning.

The founding of the journal was very much influenced by the fact that decolonization had produced many new constitutions that asked to be studied. In the absence of constitutionalist systems, the journal moved its focus to a certain extent away from constitutional law to other fields. While the outreach to international law and social science should be continued, we are again in a situation where new constitutions, constitutional reforms and constitutional court practice provide a fruitful field of research. Starting in the 80s we have again a wave of new democratic and rule-of-law constitutions. The journal can go back to its roots and concentrate on constitutional law in an interdisciplinary and social change perspective.

D. Conclusion

I come to the end of my report.

I am very proud that Verfassung und Recht in Übersee cannot only celebrate its 50th birthday but can do so with such an impressive conference. It has clearly arrived in the centre of a scholarly community eager to have an international global dialogue which transcends the classical boundaries of comparative law and constitutionalism.

The journal holds a very special place in my heart. Joining the enterprise one year after the foundation, I was present at the difficult start. I was afraid more than once that it would fold. For long stretches, it was kept alive by sheer idealism. When Philip Kunig and I who had worked on the journal together as young scholars became chair holders ourselves we could put some resources in the journal from our chairs and an impressive group of our assistants helped to run the journal over the years. However, Karl Hernekamp shouldered the main workload for the longest period of the journal's history. He did this in the spare time, which his full-time job as Administrative Court Judge left him.

Without him and many others who as students or junior scholars pitched in the journal would not be here today.

We owe them thanks.