12 Transformations and Continuities. Some general Reflections

Hans Jörg Sandkühler

Germany underwent four radical transformations in the 20th century — after 1919 and the fall of the empire, after 1933 and the Nazis' usurpation of power, after the total defeat of 1945, and after 1989 and the unification of the two German states. Born in 1940, I have experienced the resistance of the old and the ambivalence of the new: In societal processes, there is never the "zero hour" one dreams of that relieves one of the burdens of the past. Transformations are prepared slowly; they become apparent without initially being recognized as such by those involved; they break out seemingly as suddenly as a natural event; yet they prove to be enduring, tenacious struggles between the new one hopes for and what has survived of the old.

The German and French universities at which I have studied since 1960 have not been "new" or transformed universities; my areas of study, philosophy and jurisprudence, were not "new" or transformed fields. The *habitus* of professors were often the *habitus* of authoritarian personalities who did not dare openly to defend the old, who concealed their own histories of complicity with the old system, who remained silent regarding their sense of guilt, and for whom recalling those times was treacherous. Precisely this is the norm in times of transformation. Was no one ever a supporter of the emperor, nobody a Nazi, nobody a Stalinist... and nobody an opportunist?

Societal normality and the stability and dynamics of convictions

Every society develops its own *normality*. In this normality, collective social and political options become individual convictions, and from these *convictions* follow adaptation and affirmation or refusal and resistance. "Transformation" does not only mean the transition from bad to good, but also a partially forced, partially unimposed change in public and private normality. So, for example, the transformation of the Weimar Republic into the "Third Reich" attests to the fact that — like other transformations

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— transitions from one normality to another normality — such as that from the socialist or communist progressive movement to the reactionary National Socialist protest against modern capitalist society — are fluid. In times of radical upheaval — not only in 1933, but also 1919, 1945 and 1989, and now 2011 — something manifests that is too often neglected in the historiography of mentalities: the dynamics and the stability of convictions. Convictions can survive crises, remaining stable under changed cognitive and social conditions. Convictions can change in special ways during crises, shifting their contents as if from plus to minus, but retaining their function and operations; structurally, the habits of conviction remain unchanged, determining theorems about reality and conduct through propositional attitudes. A conviction defines the sphere of what can be seen; this sphere of perception produces a common style of thought. Not only does this field of perception limit the scope of knowledge; ignorance also shapes the prevailing style of thought.

Philosophy of coexistence — cooperation without hegemony

My experiences with Islamic Arab countries and with Arab universities have come since 1998, primarily in Tunisia, and to a lesser extent in Algeria and Morocco. From 2000 to 2011, the UNESCO Chair for Philosophy at the University of Tunis cooperated with the Center for the Philosophical Foundations of the Sciences that I run at the University of Bremen along with the German section on "Human Rights and Cultures" at the European UNESCO Chair of Philosophy/Paris, which I founded on behalf of UNESCO, in the form of an annual French-language symposium that alternated between Tunis and Bremen — a collaborative project that took place under conditions of dictatorship in Tunisia, but which was nevertheless an outstanding example of cooperation with Arab partners, whose critical spirit enabled collaboration in full freedom. The main emphasis was on problems of legal and state philosophy and ethics in a world of cultural diversity; problems such as political integration in a post-national era; the rule of law; democracy and justice; and human rights and tolerance. A second focus was on issues of communication and transculturality under conditions of globalization.

In 2001, the second colloquium took place in Tunis under the heading "The Stranger and Justice". It was officially opened by the minister for education and science. For the German participants, one element of this was

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a shock: Before the minister's speech, the police expelled the students from the lecture hall. Following the ban on the "Ligue tunisienne des droits de l'homme", the Bremen delegation used this occasion to plead for greater respect for human rights in Tunisia. This provoked objections, and some understandable allusion to the disregard for Palestinian rights and the humiliations of the Arab world. It again became clear how inappropriately ideological today's Western political rhetoric is when sweeping references to *the* Arab world and Arab fundamentalism are made. Taking stock of this tremendously fruitful project, in which young scholars from Algeria were also involved, I would say cooperative initiatives of this kind can prepare the terrain for open, prejudice-free mutual learning, unencumbered by hegemonic claims; yet it is also certain that transcultural, interdisciplinary cooperation requires perseverance.[1] For the Germans, the presentations of their Arab colleagues on the traditions of Islam and Islamic philosophy, as well as on current problems, were extremely informative. For their own part, they were themselves able to contribute to deepening the understanding of the significance of democracy, the rule of law, and human rights. To me, the degree to which religion gained in importance in these years, particularly among young women, was striking, highlighted by the increasing prominence of the headscarf. A vehement protest rose from among their ranks when, while giving a lecture in Tunis, I criticized the Islamic and Arab declarations of human rights as the declarations of authoritarian states. Without meaning to, I had wounded religious sensibilities.

Hopes dashed by the state have focused on the renewal of a religion abused and distorted under dictatorships, on the renewal of an authentic form of Islam, on a daily religion that desires justice and peace, does not stand in the way of cultural and political pluralism,[2] and is compatible

1 The Franco–German series of books published by Triki and Sandkühler, *Philosopher le vivre-ensemble*, became a means of ensuring continuity; see the following volumes: Triki & Sandkühler (2002, 2003, 2004) and Poulain, Sandkühler & Triki (2009, 2010).

2 The problem of political pluralism, which is crucial for future development in the Arab countries, is also addressed by Florian Kohstall in this volume: "In Morocco, party pluralism and civil society were able to provide a filter to channel social demands and implement reform policies more effectively, while Mubarak's dependence on single-party rule through the National Democratic Party (NDP) limited the regime's reform flexibility […]. These were important findings for the uprisings that occurred later".

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with democracy. Verse 256 of the second sura of the *Quran* reads: “There shall be no compulsion in [acceptance of] the religion”. It should not be forgotten that, particularly in Algeria, mosques were a place of solidarity-driven social help for the poor, and that the justice no longer to be expected from the state could be spoken of by the clergy, the imams.

This is the horizon on which it is clearly becoming apparent why the Arab uprisings were shaped by an ordinary form of Islam rather than by Islamism. Fathi Triki (2011: 12 f.) says this about the Tunisian revolution: “Not only was it never led by a religious or non-religious elite — it also did not tolerate a single word from the language of the fundamentalist identity delusion. The revolutionary people thought of nothing more than freedom and dignity. In this case, the variability of identity shifted the path in the direction of a new tendency, toward a path that claims its share in universality.”

On the other hand, the finding by Fatima Kastner in this volume is unambiguous: “At this point one should also recall that neither religion in general, nor the contested category of *Sharia* in particular was originally behind the motives of the protest movements at the outbreak of the Arab uprisings, where there was on the contrary an urgent call for universal values and human rights”.[3] In this context, the question raised in this volume by Sarhan Dhouib is very important: “To what degree do cultural identities and the cultural pluralism often associated with them stand in opposition to the transculturality of human rights?”.

Transformation, injustice and justice: The example of Germany

Transformations do not *per se* have a vector toward the good; they are not *a priori* progressive. A fundamental reason for the dialectic between the intended new and the nearly unavoidable continuity of the old lies in the following: In the society to be transformed, no new personnel fall from the heavens. Teachers, judges, military staffers and so on are taken from the old totalitarian system, because it is impossible to conjure an unencumbered democracy from out of a test tube.

3 I am still of the opinion that the problematic of religion — mind you, of Islam as a symbolic form, not of political Islamism — deserved more attention in this book.

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It is thus all the more important that those who have suffered and whose dignity and rights have been violated do not give up their remembrances. And yet the remembrance of those who have suffered can be blocked by the perpetrators. This is exactly what happened in Germany, where there was little public interest in pursuing the perpetrators for quite a long time, and it was often the perpetrators themselves who were responsible for the prosecution of the crimes. There were too many perpetrators. The majority of German society was intertwined far too broadly with National Socialism to be able to effect a transformation from injustice to justice under its own power. This lack was compensated for by the victorious Allies, particularly through the Nuremberg trials.

After terror-based systems and dictatorships, after wars and revolutions, all societies face the moral and legal issue of how to deal with those who, as yet unpunished, have committed crimes under conditions of state terror. This is the context in which it becomes clear: *Justice emerges from the experience of injustice* (Sandkühler 2015 a, 2013). One is confronted with an alternative: *justice or legal certainty.* Three alternatives are available to solve the problem of practicing justice while guaranteeing legal certainty: (A) prosecution through a suspension of the principle of non-retroactivity *nulla poena sine lege,* as per the international criminal law developed after 1945; (B) amnesty laws, like those adopted in 1949 and 1954 in Germany with the goal of ending denazification and integrating the Nazi perpetrators into society, in large part through a questionable appeal to the principle of non-retroactivity; and (C) truth-and-reconciliation commissions such as that in South Africa after the end of apartheid, which leave confessed perpetrators unprosecuted at the expense of the victims' need for justice.

(A) In modern legal culture, the problem of legal certainty finds an apparently clear answer: *nulla poena sine lege*. The guarantee function of criminal law incorporates four normative premises: (i) the requirement of certainty within the criminal law (*nulla poena sine lege certa*), (ii) the prohibition of analogy *(nulla poena sine lege stricta)*, (iii) the prohibition of applying common law to the offender's detriment *(nulla poena sine lege scripta)*, and (iv), the principle of non-retroactivity *(nulla poena sine lege praevia)*. The prohibition on retroactivity is considered to be a basic principle of justice. However, this is not always the case. In the example of West Germany's history following the terror of National Socialism, it was clearly necessary — and clear why this was so — to exceed the *bounds of the prohibition on retroactivity* for reasons of justice. The protected legal

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interest of “no punishment without a law in place at the time of the deed” becomes questionable if it serves to protect the perpetrator and injure the victim once again. This example also shows how the alternative “justice or legal certainty” overlaps with another alternative: legality or expediency.

The Nuremberg trials, which were carried out from 1945 to 1949 against the chief war criminals and other figures from the National Socialist era who bore responsibility for the crimes committed — such as judges, doctors, diplomats and functionaries within the terroristic administration — as well as other trials carried out after 1945 by the allied military courts against those responsible for crimes in concentration camps,[4] made legal history; they revolutionized international law and international criminal law.[5] For the first time, neither national laws nor state immunity offered absolute protection from prosecution. The fundamental judicial right of non-retroactivity was set aside for certain crimes, especially for *crimes against humanity*.

In the Nuremberg judgment, it was stated: “It was urged on behalf of the defendants that a fundamental principle of all law — international and domestic — is that there can be no punishment of crime without a pre-existing law. ‘Nullum crimen sine lege, nulla poena sine lege.’ […] In the first place, it must be to be observed that the maxim ‘nullum crimen sine lege’ is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obvi-

4 After the main trial, 12 additional large trials against Nazi war criminals took place in front of American military courts. A total of 185 people were charged, including 39 doctors and judges (cases I and III), 56 members of the SS and the police forces (cases IV, VIII and IX), 42 industrialists and executives (cases V, VI and X), 26 military leaders (cases VII and XII), and 22 ministers and high-ranking government figures (cases II and XI).

5 Constitutional and international law expert Hermann Jahrreiß declared in Nuremberg: “Insofar as the statute supports all of this with its provisions, it fundamentally lays down new law, if, with the Lord British Chief Prosecutor, one measures it against existing international law. That, which – coming from Europe – was ultimately adopted across the entire world, and is called international law, is in its essence a legal system for orderly coexistence, coordination, and sovereign associations of autonomous entities. If we measure the provisions of the statute against this legal system, it must be said that the provisions of the statute negate the foundations of this law, that they anticipate the legal system of a world state. They are revolutionary. Perhaps they belong in hope and yearning to the people of the future” (Jahrreiß 2004: 521).

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ously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished" (Jahrreiß 2004: 244 f.).

After 1945, the goal was, as stated by the military government's Law No. 1, the "elimination of the core ideological components through legislation in the form of open catalogs, expandable at any time" and the "control of justice-system personnel who, from practical considerations, are not wholly replaceable, through the commitment to a new system of values" (Stolleis 1994: 252) in order to "eliminate from German law and administration within the occupied territory the policies and doctrines of the National Socialist Party, and to restore to the German people the rule of justice and equality before the law" (Military Government-Germany, law No. 1 1948: 42).

Yet as long as there was little consciousness of guilt within the German population after 1945, as long as repression reigned instead, and as long as the democracy imported by the victorious powers was largely a *democracy without democrats*, the political and judicial systems could feign blindness with regard to the prosecution of Nazi perpetrators. Especially within the judicial system, perpetrators remained not only undetected, but many were assimilated into the new legal system. Even 20 years after the war's end, for example, 55 percent of the leading Ministry of Justice personnel were former members of the Nazi party.

In addition to the indifference of large portions of the population, reasons of Cold War expediency also contributed to hindering the new democratic beginning. In the interests of integrating the young Federal Republic of Germany into the West, and given the plans for its rearmament, the US High Commissioner for West Germany J.J. McCloy reduced numerous penalties in 1951, partially at the urging of the Adenauer government; most of those sentenced in the Nuremberg follow-up trials were released from prison by 1955.[6] In addition, the prosecution of Nazi crimes met with fierce resistance in West Germany independently of reasons of political expediency. For example, the Adenauer government decided in 1952 to abrogate the article of the European Human Rights Convention that en-

6 By 2005, a total of 172,000 investigative procedures had been carried out, producing 17,000 indictments and 15,000 trials. The result was 5,000 acquittals, 2,000 discontinuances and only 6,600 convictions (Perels 2013: 38.).

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abled the prosecution of Nazi crimes from an international-law perspective.

As after the end of other dictatorships, the post-1945 period was an era of exculpatory legends. People maintained: “Not the judicial system, but rather the legislator alone forsook the banner of the law” (Schmidt 1947: 231). Perpetrators often met with more understanding than their victims: Many of those who bore responsibility for the injustice in the political and judicial systems were rehabilitated within the context of the judicial policy (Stolleis 1994) that was now being carried out. This made possible the fact that of the 69 justices of the Federal Supreme Court (BGH), 27 had belonged to the National Socialist German Workers’ Party (NSDAP). “Of the remaining 42 federal justices [...] 11 must be categorized as Nazi judiciary-system criminals” (Schumann 2008: 193). It was not by chance that the BGH ruled in 1956: “In a time in which it was incessantly hammered home to the population that law is what the Führer dictates, it is possible that judges and prosecutors also succumbed to the legal thinking of the time”. It was also no coincidence that — with the exception of a few members of summary courts active in the last days of the Nazi regime — no Nazi judge was given a criminal sentence. The ideology of the Nazis had taken root in the convictions of many legal professionals.

In Germany, it was only in 1998, or 43 years after the end of National Socialism, that an “Act to Annul the Unlawful Criminal Verdicts of the National Socialists” was passed. The following conclusion can be drawn from such experiences: *After revolutions, the repeal of previous injustices will take at least a generation; hopes for quick successes are illusory.*

(B) The second variant of dealing with crimes is amnesty laws, as were adopted in Germany in 1949 and 1954 with the goal of ending denazification and integrating National Socialist perpetrators into society, in large part through a questionable reliance on the principle of non-retroactivity. In the three western zones, there were more than 2.5 million Germans whose trials had been decided in civilian denazification courts by 31 December 1949, with the following rulings: 54 percent were deemed to be no more than “followers”, 34.6% had their proceedings dismissed, 0.6% were recognized as opponents of National Socialism, and 1.4% were deemed primary perpetrators or incriminated persons. On 4 April 1951, with only two abstentions, the German Bundestag passed the “Law for the Regulation of the Legal Status of Persons Falling under Article 131 of the Basic Law”. This enabled reentry into the civil service except for people categorized in Group 1 (primary perpetrators) and 2 (incriminated persons).

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(C) The third variant for addressing injustice and the implementation of "*transitional justice*" (see Fatima Kastner's contribution in this volume) is that of truth-and-reconciliation commissions. These have the problematic goal of demanding on pragmatic political grounds that victims forgive and reconcile with the perpetrators, for example through the *Ubuntu* strategy in South Africa following the end of apartheid (Tutu 2000; Koné 2010, 2011). I regard this path as being very problematic, because it guarantees fair treatment to the perpetrators rather than to the victims, and produces impunity without atonement. The United Nations' Human Rights Council, in its Resolution 9/10 of 28 September 2009 on truth-and-reconciliation commissions, also noted that the reconciliation processes should not preclude the possibility of criminal proceedings. The Council "*emphasizes* the importance of a comprehensive approach to transitional justice, incorporating the full range of judicial and non-judicial measures, including, among others, individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials, or an appropriately conceived combination thereof, in order to, inter alia, ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law". It also highlights the point "that truth-seeking processes […] can *complement* judicial processes". The Human Rights Council "*stresses* the need within a sustainable transitional justice strategy to develop national prosecutorial capacities that are based on a clear commitment to combat impunity, to take into account the victim's perspective and to ensure compliance with human rights obligations concerning fair trials" (Human Rights Council 2009: 4). And it "*reaffirms* the responsibility of States to comply with their relevant obligations to prosecute those responsible for gross violations of human rights and serious violations of international humanitarian law constituting crimes under international law" with a view *to ending impunity* (ibid: 4).

Justice, democracy and the rule of law

Criminal trials or reconciliation commissions after the "Arab Spring"? In contemporary Arab societies, it appears there is no "political consensus about the best way forward" (Fatima Kastner in this volume) The finding that — as Fatima Kastner observes — "the concept of liberal democracy

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seems to have lost its brilliance, and it is no longer seen by a majority of the population as the only solution, but is rather regarded as part of a larger 'neo-colonial' problem" is particularly dramatic.

Tunisian constitutional scholar Ben Achour writes: "We have also understood that the legend of democracy, imported from the West, is dead. It was nothing but a lie circulated by all heads of state and government in the interests of the dictatorship, spread also by our Western friends in order to convince us that democracy is the privilege of the universe's beautiful noble nations, while for us dictatorship is better, as it gives us our daily bread. However, the country ultimately had neither a right to bread nor to freedom. The people rejected such lessons, and the idea of democracy thus received its honor and social dignity through the Tunisian people" (Ben Achour 2012).

Contemporary Western democracy undercuts its opportunities; it depends on conditions — equality under the law, freedom, justice and legality — that it increasingly fails to fulfill. Yet the human claim to dignity and equality is the foundation of democracy, and democracy must and can effect the protection of dignity and equality. That this can *de facto* only be achieved to a limited extent cannot mean that one should refrain from taking on this task. One insight is particularly important in this regard: *The way in which democracy guarantees dignity and equality of treatment is rooted not in popular sovereignty, but rather in the rule of law.* This rule is founded not on the strength of the strongest, nor in the opportunities afforded by a "free play of forces". The law is founded rather on a hierarchy of dynamic principles. We develop the law in our historical realization of ourselves as ends in ourselves. The dynamics of the principles are revealed in the historical differentiation of the principle of equality under the law as a human right: The normative concept of equality today includes the prohibition of de facto social inequality, discrimination against women and discrimination against foreigners, as well as the requirements of equal treatment, equal opportunity and equal distribution; material equality; the prohibition of arbitrariness; the prohibition of unconstitutional discrimination; and equal treatment in the legislative sphere.

If it is true "that current endeavors in the MENA region to initiate politics of transitional justice have been largely shaped by the objective of establishing classical national retributive judicial institutions rather than by mechanisms derived from the global transitional justice model" (Fatima Kastner in this volume), this could be due to two factors: (i) mistrust in the local ability to engage in mediation, or (ii) the desire to punish crimes. Fa-

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tima Kastner also identifies a third plausible factor: “simply the consequence of the persistence of the old regime’s institutions (army, police, judiciary, etc.)”. This argues that the restrained attitude toward non-judicial handing of the past is rooted in the fact that the “bitter hunger for justice and a better life” is linked with the hope — as yet unfulfilled outside of Tunisia — for a legal and constitutional democratic state.[7] This is attested to by Sarhan Dhouib’s contribution in this volume, for example: “The issue of compensation, raised in the context of the discussion on transitional justice and the work of the Tunisian Truth Commission, was rejected by all philosophers interviewed in the project. Personal compensation was impossible, they said; however, anchoring the value of human beings and their fundamental rights in the still-to-be-written Tunisian constitution was the most important political response to the injustice experienced” (see also Dhouib, 2016).

Irrespective of which path is selected, an important problem remains to be solved with regard to following the “call for universal values and human rights”, as noted by Fatima Kastner: While “the conventional global model is indeed prioritizing civil and political rights over other rights“, economic, social and cultural rights, which have not to date been viewed under the *jus cogens* as belonging to the minimal set of human rights, must be given greater consideration in the end.

However, the establishment of a rule of law that guarantees these human rights faces major problems of more than a purely political nature. It cannot be overlooked that most Islamic Arab countries feature dense interweaving of Quranic precepts, Arab common law, Roman and other legal system elements, and elements of European law imported during the colo-

7 In his contribution to this volume, Jan Claudius Völkel observes with regard to Egypt: “Hence, many students and professors have lost the enthusiasm for the subject initially shown during the 2011 events, and are afraid to defend their opinions in public. Under these conditions, it will be difficult or impossible to establish a competitive and fruitful coexistence between state officials and critical social scientists – a crucial goal if Egypt were working seriously to deepen its democracy”. Fatima Kastner states: “In the case of the post-“Arab Spring” societies, some former government leaders did indeed fall and new executive powers took their place, but overall, the hopes and dreams of most of the protesters did not came true. In fact some turned into true nightmares as documented by the exodus of hundreds of thousands of Syrians and other refugees from the MENA region to Northern Europe, fleeing the deadly threats of civil war, systematic terrorism and inhuman life conditions in their own countries”.

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nial era. Nor can the conflict between norms — between the commitment to the *Quran* on the one hand, and to the United Nations Charter on the other — be dismissed. The majority of Islamic states have signed the UN Charter, and are thus committed to two contradictory systems of norms: one system that guarantees its citizens freedoms, and *Sharia*, which limits these freedoms.

Ideas, norms and concepts diffused in a context of mutual exchange

In the same way that this volume takes a transcultural perspective, the *Transformation Working Group of the Arab–German Young Academy of Sciences and Humanities* (AGYA) poses the question of “how ideas, norms and concepts are diffused in a context of mutual exchange, and how scientific relations between Europe and the MENA region can be improved”. This is an important and welcome initiative. This book, which reflects on transformations in scholarly disciplines, is of equally great importance for the Middle East and North Africa and for Europe, as much due to Fatima Kastner and Sarhan Dhouib’s fundamental reflections on legal philosophy and philosophy as to the studies on specific consequences of the revolutionary developments for political science, literature, communications studies, informatics and archaeology.

In his contribution to this volume, Sarhan Dhouib identifies the motive for this initiative, the strength of which lies in large part in the fact that the authors from different Arab and European academic cultures have an equal chance to have their say: “The liberation from authoritarian directives and fear-driven self-censorship offers us the chance to introduce themes into the scholarly discussion […] that reflect critically on contemporary society, social affairs and culture. These topics include the discussion of experiences with injustice, human rights violations and the limits of freedom of expression, for example, but also issues of transitional justice and the culture of remembrance. In post-dictatorial society, these issues prove to be particularly charged inasmuch as they can become an engine of social and political transformation”. What is key for Dhouib is “the recognition of cultural diversity and a plurality of forms of knowledge […]. The sensitivity to differences — whether this be within a culture or between cultures — leads to the demand that philosophers contextualize their guiding experiences and questions more strongly, both temporally and spatially. […] Transculturality thus does not emerge from the primacy

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of one dominant discourse over the others, but is rather the result of patient and open communication as well as constant critical engagement with one another". Especially under the current conditions of risky renationalization, this transcultural, transnational and transdisciplinary communication is essential.

The recognition of cultural diversity (without concessions to ethnic pluralism) and of epistemic and political pluralism is of crucial importance. "Pluralism" is the term for the attitude that it is more reasonable or sensible to embrace a heterogeneity, multiplicity and diversity of principles regarding what exists in the world, as well as toward epistemological and moral attitudes toward reality, than to believe in the homogeneity and unity of a world governed by a single substance or single unique principle, as asserted by ontological monism. From this mindset, with the recognition of de facto plurality in contrast to uniform compulsion, follows respect for diversity, difference and dissidence. One has to learn to resist the ravenous hunger for a *single* truth, and learn to deal with the problem of relativism without making concessions to an "anything goes" resignation. One then realizes that the pluralism of relations to reality in knowledge, in emotions, in value judgments and in modes of behavior is not a failing, but rather a form of human freedom. Freedom is not the same as chaos; it is not license for arbitrariness. Thinking and acting from a perspective of pluralism means presenting *truths in comparison*. From this emerge principles of a transformation without hegemonic claims — for example, those of Europe with regard to Arab societies; among these principles is what Sarhan Dhouib calls the "dual critique": "the critique of the dogmatic tendencies in the Arab–Islamic cultural area, but also of the hegemonic structures of the 'Western' states".

What is experimented with in thought, and remains a preliminary truth, must be accepted as a risk. There is no prescribed path. There is no such thing when dealing with truths. The contextuality of cultures of knowledge, which is tied to the diversity of cultures themselves, produces modest truth claims. Because of their individual particularities, cultures of knowledge are distinct ensembles of epistemic and practical contexts of representation. They shape the emergence and dynamics of knowledge, and claims to validity and standards for the justification of knowledge are articulated within their frameworks. In them are embedded a certain set of epistemic habits, certain kinds of evidence, perspectives and world-view-dependent presuppositions, convictions, semiotic conventions, conceptions regarding possible epistemic objectives, questions that are deemed

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useful or not along with their corresponding solutions, culturally specific practices and techniques, and the values, norms and rules recognized within such a context. However, there is one required path under the law — not the law per se, but the law in whose center stands the norms of respect for human dignity and human rights. *The contextuality of cultures of knowledge associated with cultural diversity does not justify legal relativism.* The legal system — insofar as it is a just legal system — sets limits to the free play allowed to relativity by means of legality with legitimacy.

The law and democracy are based on a hierarchy of principles whose basis is *human dignity* (Sandkühler 2015 b). To be sure, "human dignity" is a legal term that — like all legal terms — is subject to interpretation due to its abstract nature and openness; yet the fact that it is interpretable takes nothing away from its de facto function as a cornerstone of the constitution. Beyond dignity is only injury — this is what democrats under the rule of law think. They know they can reciprocally only demand consent to a social and state order under a certain condition; this condition is that the legal and state order grants certain minimal guarantees of dignity: (i) the security of life and the freedom from existential worry are guaranteed; (ii) gender, race, language and social origin, even if causes of de facto inequality, are not also grounds for normative inequality; (iii) the autonomous individual can act freely in the context of the fundamental rights to free development of the personality; equal treatment of different convictions, religious and political beliefs; the freedom of conscience and religion; and other basic rights; (iv) the rule of law serves as protection against the arbitrary use of force; and (v) the fundamental rights to life and physical integrity are respected.

If these fundamental rights are violated, resistance is legitimate. The creeping process of the surrender of fundamental rights, observable today, goes hand in hand with the privatization of the public spaces of democracy and the retreat of the social state and rule of law that is driven economically by neoliberalism and politically by conservatism.

From the perspective of the right to dissent, human rights law must be further developed, while at the same time respecting all freedom of self-determination, a condition that is consistent with the respect for others. From this follows the necessity of a *neutral* conception of the law. From this demand for neutrality, it does not follow that the conception of the law must be *value*-neutral; rather, it must correspond to the moral intuitions and value judgments shared by the majority of the people, who can distinguish between right and wrong.

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A law committed to justice demands the inclusion of difference and respects the freedom of alterity. Therefore, international human rights law is taking on ever greater importance. Its positive legal norms are the mirror of a universalizable and universalized moral system; it combines in itself the moral intuitions that bring about the broadest possible consensus in the contemporary world. This legal system, which is at the same time a moral system, draws its transculturally universal grounds for validity from the fact that it is neutral toward ideologies, world views, religions, and any subjective or particular preferences derived from these. Spontaneous moral solidarity cannot be expected given the human "unsociable sociability" of which Kant speaks, or under the conditions of an unjust world order. What can be realistically expected, and is at least already partially realized in international law, is the *juridical cosmopolitanism of human-rights law*.

A conclusion

This law can only be realized following revolutionary upheavals if the transformation of the states into *states under the rule of law* succeeds. This not only means that law and statutory order prevail, but also that societies develop on the basis of the guarantee of fundamental rights and human rights, characterized by their openness to alternatives and the mutual recognition of people's legitimate needs and freedoms. Even for states that have *de facto* returned to a state of dictatorship, this is the only perspective.

After the injustice — as shown by the heterogeneous and perspectively diverse developments in the Middle East and in Arab States — there is certainly no panacea for handling the crimes committed under the dictatorships, which are being addressed by governments today to only a marginal extent if at all. However, four minimal principles can be identified, without which there can be no solution to the problem: (i) the prohibition on retroactivity is a legal interest that must be protected; it should be suspended only for the crimes identified in the Nuremberg principles or in the Rome Statute for the International Criminal Court. (ii) The only possible basis for dealing with injustice justly is the democratic state under the rule of law, with its justice system bound tightly by the strictures of law and statutory order. (iii) The normative basis for the judgment of injustice cannot be found in private morals and private conceptions of justice; rather, it

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inheres in the positive legal norms of respect for human dignity and human rights, the *jus cogens,* and international criminal law as standards of criminal prosecution. (iv) After dictatorships, an essential task for all state institutions and civil society rests in the clarification of the legitimacy of criminal law norms, and in the formation of a moral consciousness among individuals that enables them to recognize guilt and distinguish between right and wrong, between justice and injustice, and between perpetrators and victims, and allow them to administer a just punishment on perpetrators in order to prevent injuring the victims anew.

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