

Classical Literature in Constitutional Evolution

Goethe  
in the Thought of  
Peter Häberle



With Interviews by  
Hèctor López Bofill and Raúl Gustavo Ferreyra

Ettore Ghibellino (ed.)

With 180 selected quotations from *Goethe*, a panorama of the literary production of the influential German constitutional law teacher *Peter Häberle* emerges here. While his erudition spans broadly, *Goethe* proves to be the most cited classical writer in his entire oeuvre. *Goethe* is continually “taken along” across the entire breadth of modern constitutional law in the 21<sup>st</sup> century, surpassing by far classical writers of state theory, such as *Plato*, *Aristotle*, *Locke*, *Montesquieu*, *Kant*, and *Popper*, who are often quoted by *Häberle* but limited to a few constitutional law topics. *Häberle* appropriates *Goethe*’s thinking to relate it in the context of constitutional law and further its development. At first glance, this may seem surprising, as *Goethe* was known as the ‘super minister’ of the minor principedom of Saxe-Weimar and Eisenach, and an ever-reliable servant of enlightened absolutism. However, *Goethe* experienced wars, upheavals and new orders first hand: the American Revolution (Declaration of Independence in 1776) and the French Revolution (1789), the comprehensive, epoch-making legislation of the Napoleonic Empire, as well as the further development of the United States of America as a democratic, federal constitutional republic, which implemented fundamental rights and the separation of powers while declaring the common good to be the primary goal of the state. *Goethe* reflects on these events in his literary works, especially in his educational novel ‘*Wilhelm Meister*’ and in ‘*Faust*’, which foresaw astutely the evolution towards the modern constitutional state.

The panoramic view of *Häberle*’s work, gained in the first part through updated *Goethe* thoughts, is expanded and deepened in the second part: firstly, through a more recent lecture by *Häberle*, illustrating his ingenious concept of a ‘Constitutional Theory as Cultural Science’ from the perspective of ‘Poetry and Constitution.’ This is followed by interviews involving the experts *Hèctor López Bofill* and *Raúl Gustavo Ferreyra* on ‘Poetry and Culture in Constitutional Law’.

*Häberle* proves to be a cartographer who was one of the first to explore and describe the terra incognita, the “Univer-



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Edited by Ettore Ghibellino

For Peter Häberle  
on his 90<sup>th</sup> birthday  
May 13<sup>th</sup>, 2024



**Peter Häberle**

At the congress “Constitutionalism of the 21st Century in its State, Supranational, and Global Dimension” on May 13, 2014, in Lisbon, held in his honor on the occasion of his 80th birthday.

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Goethe

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Anna Amalia und  
Goethe Stiftung



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Villa Barthl  
Im Park an der Ilm

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# Classical Literature in Constitutional Evolution

## PART ONE

# Goethe in the Thought of Peter Häberle

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## A. CONSTITUTIONAL THEORY

### I. BASIC CONCEPTS

#### 1. Constitution

However, “merely” legal descriptions, texts, institutions and procedures are not enough. The constitution is not only a legal order for lawyers, to be interpreted by them according to old and new rules of art – it also essentially functions as a guideline for non-lawyers: for the citizen. Constitutions are not only a legal text or a normative “set of rules”, but also an expression of cultural development, the means of cultural self-expression of the people, a mirror of their cultural heritage and the foundation for renewed hope. Living constitutions are the joint product of all the constitutional interpreters of an open society. They are far more in their form and substance than mere expressions and conveyances of culture – they are a framework for cultural (re)production and reception and at once a memory of overcome cultural “norms”, experiences, occurrences and wisdom. Consequently, their – cultural – validity runs much deeper. This is most beautifully captured in Goethe’s image, activated by H. Heller, that the constitution is: “A moulded form that develops as it lives.”

[I 21, 31, 43, 84; III 32, 50, 160; V 44, 68; X 59; XI 84; XIII 64, 213, 299, 440, 601, 717, 741; XIV 133, 299; XV 285, 303 seq.; XVI 58, 304; XVIII 637]



Goethe

Johann H. Lips, 1791



Hermann Heller

1891-1933



## 2. Constitution as Culture

The Constitution is not an “economic good”, but culture, and it is less involved in economic competition<sup>1</sup> than in processes of production and reception concerning constitutionalism worldwide. In this regard, I contradict Federal President H. Köhler’s opening speech at the 67<sup>th</sup> German Lawyers’ Day in Erfurt<sup>2</sup>: “He who fearlessly accepts and grows in the worldwide competition of legal orders fares best.” In my opinion, however, the constitutions are based on cultural contexts, not primarily on economic principles. Am I allowed to distance myself from economical or presidential terminology? At the very least, it is necessary to ask what holds our nation “in its inmost folds” together. It is certainly not the market, but rather: the language (of Luther, Kant and Goethe), the whole of German history including the Reformation, the Weimar Classicism, the German national anthem, the national flag and probably also the guilt incurred in two world wars and the persecution of the Jews and the Basic Law of the reunited “European Germany” (T. Mann). Also, the homogeneity and plurality of our (cultural) federalism and the reputation of the Federal Constitutional Court. Some (especially students) may also accept the successes of the German national soccer team as an integrating factor (as a constitutional law teacher, you had to accept this at least at the Soccer World Cup in Berlin in 2006).

[XIII 187]

## 3. Spirit of the Constitution

This draft constitution [of Estonia, December 1991] has established Article 42, which, seen in a global comparison, currently represents probably the best solution for its area of concern. Article 42 reads:

The rights, liberties and duties listed in the present Chapter shall not preclude other rights, liberties and duties which are in the spirit of the Constitution, or are in concordance with it.

Thereby an exemplary “fundamental rights development clause” has been achieved, meaning the constitutional legislator lea-

<sup>1</sup> On this however *G. Wegner*, Nationalstaatliche Institutionen im Wettbewerb, 2004.

<sup>2</sup> Cited as per FAZ from November 20, 2008, p. 11.



Republic of Estonia  
in Europe

ves the further development of fundamental rights open beyond the written text; anticipating it in the sense of a kind of “constitutional law in action”. What in other constitutions is often laboriously and artificially based on a fundamental right text, which in truth is the creation of fundamental rights, can develop more freely, openly and honestly according to Article 42 of the Estonian draft constitution. The invocation of the “spirit of the constitution” is particularly successful in providing strength and space for the future development of fundamental rights. The addressees are all three branches of state power. This formula of the “Spirit of the Constitution” – the memory of Montesquieu’s “The Spirit of Law” is obvious – creates a delicate balance between elements of preservation and openness, of static and dynamism. The “spirit of the constitution” initially refers to the spirit of the constitution in force, but this does not depend on the letter and, although it does not “blow where it wants”, it is nevertheless in Goethe’s or Heller’s sense: “A moulded form that develops as it lives.”

[XI 330 seq.]

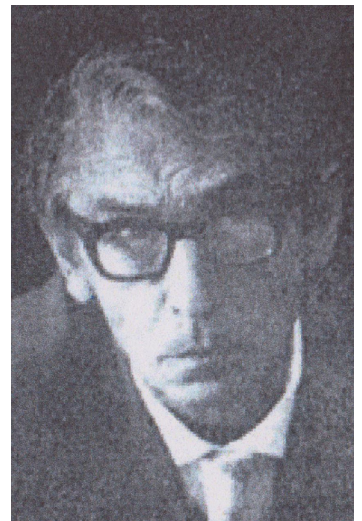
#### 4. Fourth Element of State

The traditional chapters of the general theory of the state<sup>3</sup> include the three “elements of the state”: the national people, state power and state territory. Typically, the “constitution” does not (yet) have a place in this triad – this is what characterises “general doctrines of the state”, but also makes them questionable. A “constitutional theory” worthy of its name must seek categorisation: Constitution is, if not already the “first” element of the state, at least an essential one. Specifically, the doctrine of the elements of the state must be declined (conjugated) from the aforementioned concept of culture. The constitution is a part of culture; it forms, if one wishes (or more correctly: must), at least a “fourth” element. G. Dürig tended to venture this early on (1954), but did not elaborate it any further.<sup>4</sup>

Today at the latest, this step should be taken in a constitutional doctrine. This means that the other elements of the state must also

As on the day that lent you to  
the world  
The sun stood to greet the  
planets,  
You instantly thrived and  
continued to do so  
In accordance with the law  
by which you made your  
appearance.  
Thus, you must be, you cannot  
escape yourself,  
Thus, sibyls and prophets have  
already spoken,  
And no passage of time nor  
any power can break into bits  
**A moulded form that develops  
as it lives.**

‘Primal Words. Orphic’  
in Goethe: On the morphology,  
Tübingen 1820



**Günter Dürig**  
1920-1996

3 Partly critical *P. Perenthaler*, *Allgemeine Staatslehre und Verfassungslehre*, 1986, p. 82, 35 et seq., 111 et seq. See now also the criticism from *P. Saladin*, *Wozu noch Staaten?*, München 1995, p. 16 et seq.

4 *Der deutsche Staat im Jahre 1945 und seither*, VVDStRL 13 (1955), p. 27 (37 et seq.).



Johann G. Herder

1744-1803

Friedrich Rehberg  
Oil painting, before 1800

be “fulfilled” from a cultural science viewpoint. Starting with the people as a “collective body of individuals under the laws” (I. Kant), but precisely because of this existing within a “status culturalis”. The varying identities of European peoples are of such a cultural nature, and this diversity defines Europe. The national territory is culturally characterised land, a “cultural space”, not a *factum brutum*.<sup>5</sup> J. G. Herder’s understanding of history as “geography set in motion” may be helpful.<sup>6</sup> State power, in turn, should be conceived of as culturally determined, not acting by nature: it is normatively justified and limited in the constitutional state, and it is in the service of cultural freedom. ...

This leads to a multitude of specific cultural freedoms, such as the freedom of faith, art and science – deeply tied together in Goethe’s dictum: “Whoever masters science and art, also has religion; those without the former two, surely needs religion”<sup>7</sup> – and this continues in the understanding of articles about language and public holidays, of state symbols (such as anthems) as well as in the intensifying protection of cultural assets, which can be documented both nationally and transnationally, especially in recent times, in textually impressive cultural growth processes (keyword: “cultural heritage” of humanity or nations).

[XI 622 seq.]

## 5. The Concept of Fundamental Rights

The question arises as to whether the universal, national and regional human rights texts have not long since required the integration of modern anthropology into legal scholarship. Human condition, human dignity, the innate rights of every individual are the common subjects matter here and there. Article 1 of the UN Universal Declaration of Human Rights of 1948 states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” This is a “dogma”,

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5 On this my contribution: *Das Staatsgebiet als Problem der Verfassungslehre*, FS Batliner, 1993, p. 397 et seq. as well as below *incurs* (number 8).

6 See my studies on developing countries and micro-states (1991), in: *Rechtsvergleichung im Kraftfeld des Verfassungsstaates*, p. 791 et seq., 735 et seq. as well as above Part Four 1, *incurs* A and B.

7 On this the “implementation” in my study: *Die Freiheit der Kunst in Kulturwissenschaftlicher und rechtsvergleichender Sicht*, in: P. Lerche et al. (eds.), *Kunst und Recht*, 1994, p. 37 et seq.



a basic anthropological text and at the same time a legal principle. Anthropology and constitutional theory are perhaps closer together in no text than here. And yet, as far as I know, the two “neighbouring sciences” have not yet found a viable relationship with each other. Thus, the universality of human existence and the resulting “fundamental rights” – including fundamental duties – for now, may “only” be grasped by the poetic words of Goethe:

God’s is the Orient!  
God’s is the Occident!  
Northern and southern lands  
Rest in the peace of His hands.

This sentence does not exclude the diversity of cultures, but it gives hope for a coordinate system in which the universalist theory of human rights can flourish: the status mundialis hominis as a “fundamental right” of a world culture that differentiates itself into East and West, North and South. Today, Spain is increasingly moving towards the centre of this crosshairs: Until 1492, it practiced the coexistence of many religions and denominations, peoples and cultures in an exemplary manner like no other country. In this regard, it could serve as a model for us in 1993.

[XIV 322]

## 6. Legislation

**O**n article 70 et seq. Basic Law (Legislation): Classic quotes from Goethe: “Whoever draws up a law, consider the meaning of his times.” [Official Vote: Reflections on the Church Penance to be Abolished, 1780], “All laws are made by old men, young men and women want the exception, old men want the rule.” [Wilhelm Meister’s Journeyman Years – From Makarien’s Archive, 1821/1829].

[III 25; XIII 180]

## 7. Parliament Act

**T**he question of the meaning and function of the law, more precisely the “Parliamentary Act”, is among the conventional topics of jurisprudence. However, it can only be addressed



Goethe as student  
at Leipzig

Anton Johann Kern  
Around 1765



**Immanuel Kant**

1724-1804

Johann G. Becker, 1768



**Gustav Radbruch**

1878-1949

within the gravitational pull of the relevant classical texts from Plato and Aristotle through Dante, T. Hobbes and J. Locke, Montesquieu, J.-J. Rousseau up to Goethe, I. Kant and G. Radbruch, that is to say, today's discussion should be as broad as it is deep. Four sub-disciplines of jurisprudence would need to be integrated: legal and political philosophy, constitutional and legal history, the mainly by civil law developed legal methodology and the comparative operating constitutional doctrine. ...

In the "Internationale" of the constitutional state, in the "family" of constitutional states, the academic struggle over the parliamentary act should inherently adopt a (cultural) comparative approach in both time and space, this means in a legal-historical and contemporary comparative law perspective. Thus Goethe's "And law alone can set us free again" [Nature and Art, 1800] stands meaningfully alongside the congenial Art. 53 para. 1 sentence 2 of the Constitution of the Kingdom of Spain ("Only by a law, which in any case must respect the very substance [sc. of the rights and freedoms], can their exercise[!] be regulated")<sup>8</sup>.

[XI 300 seq.]

## 8. State Territory

Today, it is not only in small states that supra-regional, even global aspects are becoming increasingly apparent, and it is not only in Europe that large markets have been emerging since the 1990s and in the new millennium: thanks to multimedia mobility, a dynamic, globally reaching communication community is forming worldwide, rendering the concept of "State territory" seemingly outdated and old-fashioned. Hasn't the idea of "State territory" (and the "static" that resonates with it) long since evaporated, even dissolved in the dynamic processes of an open, multinational global media society, in which everything seems to move, expand into the vastness and little is permanently "fixed"? Given the supra-national interconnectivity of today's cosmopolitan constitutional state, the so-called state element of "State territory" cannot remain unaffected by these processes.

But this is only one side of the apparently accelerating developments. Conversely, there is a renewed focus on the "small" local aspects, a retreat to the manageable space, to "region" and "ho-

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<sup>8</sup> My contribution to this is in the volume edited by A. López Pina: *La Garantía Constitucional de los Derechos Fundamentales*, 1991, p. 99 et seq.

meland”: real or perceived nation-states are disintegrating into “micro-states”, ethnic groups are demanding minority rights, regionalism is gradually maturing into the structural principle of many previously centralized constitutional states (from France to Great Britain: Scotland? – in 2012), federalism continues its triumphant advance worldwide.

All of this specifically points towards the territorial aspect. At the same time, one realises the ambivalence of the word “border”: On the one hand, it points to limitation, to one’s own identity, but on the other hand, from within a defined space, it is possible to reach out to what is foreign, new, and distant. This dialectic is particularly apparent to micro-states (like Liechtenstein and Luxembourg). They receive and integrate a lot from “outside” in order to assert themselves better (for instance, through the presence of foreign judges in their State court). Perhaps the poet J. W. von Goethe’s words “And law alone can set us free again” can be varied in terms of territory and space: Man, in his fundamental freedom, would literally fall into the abyss if there weren’t a culturally formed “secure” ground from which he could step out into the environment.

[XIII 47]

## 9. Local Self-Government

This major theme should keep in mind the Athenian democracy, remember the “citizens” of Athens, the invention of freedom in classical Greece, the creation of the public sphere – the agora, the arena and the amphitheater (from Athens to Segesta and Syracuse) – and one might feel less than a dwarf standing on the shoulders of giants like Plato and Aristotle. However, we can also consider later times: the City Republics of Northern Italy in the Renaissance era, the German Hanseatic Cities and Free Imperial Cities in the Holy Roman Empire,<sup>9</sup> as well as the emergence of specific advanced culture, which especially in Germany made Goethe’s and Schiller’s Weimar appear as the “Athens of the North”, or the label of “Florence on the Elbe” for Dresden, which

9 Cf. in general *L. Benovolo*, *Die Stadt in der europäischen Geschichte*, 1993; see also *P. Blickle* (ed.), *Landgemeinde und Stadtgemeinde in Mitteleuropa* (1991); *idem* (ed.), *Gemeinde und Staat im Alten Europa*, 1998; *idem*, *Kommunalismus: Kommunalismus*, vol. 1, *Oberdeutschland*, vol. 2, *Europa*, 2000; *idem*, *Das alte Europa: Vom Hochmittelalter bis zur Moderne*, 2008.

## Nature and Art

Nature and Art, they go their  
separate ways,  
It seems; yet all at once they  
find each other.

Even I no longer am a foe to  
either;  
Both equally attract me  
nowadays.

Some honest toil’s required;  
then, phase by phase,  
When diligence and wit have  
worked together  
To tie us fast to Art with their  
good tether,  
Nature again may set our hearts  
ablaze.

All culture is like this; the  
unfettered mind,  
The boundless spirit’s mere  
imagination,  
For pure perfection’s heights  
will strive in vain.

To achieve great things, we  
must be self-confined:  
Mastery is revealed in  
limitation  
And law alone can set us free  
again.

GOETHE, 1800



## Leipzig

View of the Grimma Gate  
 Carl Benjamin Schwarz  
 Coloured etching, 1793

– today, thanks to the fortunate reunification of 1989 – evoked the elective affinity between Florence and Dresden. In ‘Faust’, Goethe referred to Leipzig as “Little Paris” and there are certainly other great words of this nature, for example in reference to the “Second” and “Third” Rome.

[XIII 408]

## 10. Preamble

**F**rom a cultural science point of view, preambles are similar to the overture or “prelude” in music and the prologue in a theatre play such as Goethe’s ‘Faust’. They contain the identity-defining elements of the political community.

[V 334]

## 11. Typical post-communist Constitutional Needs

**T**ypical post-communist constitutional needs such as pluralism clauses as a response to the overcome totalitarian system, the emphasis on the rule of law principle, of the fundamental rights status negativus in the sense of G. Jellinek with only relatively few state goals or constitutional mandates and fundamental rights participation structures, expansion of constitutional jurisdiction, the strengthening of the third power in general, protection of the very substance of fundamental rights and eternal guarantees such as Articles 19 para. 2 and 79 para. 3 German Basic Law – all this forms a unique combination in today’s Eastern Europe. This illustrates the extent to which a worldwide community of production and reception has formed beyond Europe in matters of constitutional state, how intensively comparative law is used to prepare constitutional policy work – parallel to its role as a “fifth method of interpretation” – and how fruitful the textual stage analysis (which is related to Goethe’s metamorphosis paradigm) is: The new constitutional texts in Eastern Europe not only adopt the textual images from older and newer constitutions (including those of developing countries and micro-states), universal and regional declarations of human rights, CSCE documents (e.g. Copenhagen and Paris, 1990), they also process the dogmatics, jurisprudence and constitutional reality of the “old” constitutional states by incorporating them to new texts. It remains uncertain if,



## Title page of The Metamorphosis of Plants

1<sup>st</sup> edition

when, and how they will create a constitutional reality that aligns with these texts (discrepancy between the stored reality there and the expected reality here). The processing of written and unwritten constitutional development, occurring through evaluative legal comparison, reveals an impressive panorama of pan-European and transatlantic processes of learning and exchange, which could hardly be more fascinating.

[XIV 118]

## II. HUMAN DIGNITY AND FUNDAMENTAL RIGHTS

### 12. Cultural Rights

From the perspective of comparative constitutional doctrine, which is based on cultural science, we subdivide cultural rights into the areas of religious freedom, academic freedom and artistic freedom. The rights of citizens to their own cultural identity have been newly added, particularly in Latin American constitutions. In my view, the three classical cultural rights are the original rights of man and citizen (for high culture, popular culture and alternative cultures: an open cultural concept). None other than Goethe tied them together in a wonderful dictum: “Whoever masters science and art, also has religion; those without the former two, surely needs religion.”

[I 289, 394 seq.; III 65, 290; XIII 418; XIV 311]

### 13. Goethean Triad I

However, in the constitutional state the creation of meaning also takes place specifically via the Goethean triad of religion, art and science: opinions blow away day by day like waves and sand. The freedoms that are possible and practised thanks to Articles 4 and 5, para. 3 of the Basic Law (also on a global scale) have a lasting impact on cultural creation. The fundamental rights protection areas of Article 5, para. 1 of the Basic Law are rather precursors, preconditions, “courtyards” to the “cultural crystallizations” and objectifications of religion, art and science.



Goethe

Friedrich Bury  
Chalk drawing, 1800



## Tame Xenia IX.

“Tell, what does Church history  
contain?  
In my thoughts, it’s all in vain;  
Endless tomes for me to peruse,  
But what was all that about, to use?”

Two opponents in the boxing ring,  
Arians and Orthodox, they swing.  
Through many centuries, the tale  
unfolds,  
Until the Judgment Day it holds.

The Father eternal in tranquil repose,  
Absorbed the world, as the story  
goes.

The Son undertook a grand endeavor:  
To redeem the world, He came,  
however;  
Has taught well and endured way,  
How that [?] even today in our days.

But now comes the Holy Spirit near,  
On Pentecost, He mostly appears.  
Where it comes from, where He  
goes,

No one has truly explored.  
Only a brief moment they insist,  
Since He’s the First and Last to  
persist.  
So we faithfully, undisguisedly  
declare,  
The ancient Creed, a solemn prayer:  
Adoringly, we stand prepared,  
For the eternal Trinity, revered.

Why bother with Church history, I  
ponder?  
All I see are Holy Joes and yonder;  
Concerning Christians, the commo-  
ners and their fate,  
Nothing significant is to relate.

I could have said parish as well,  
Nothing to ask, as far as I can tell.

Don’t think I’m rambling or compo-  
sing a verse;  
Look closely and find a different  
course!  
The entire Church history, don’t  
extol,  
A mix of error and oppressive  
control.

(So basically every new revolutionary art movement seeks to re-define truth.)

[II 84]

## 14. Goethean Triad II

This begins with educational goals such as tolerance, a sense of responsibility and new: environmental awareness (cf. East German constitutions such as Art. 28 Brandenburg, Art. 22 Thuringia, previously also Art. 131 para. 2 Bavaria). A reference to today’s third topic: the concretization of the rule of law with regard to the environment – and ends or begins with education on human rights, as demanded by more recent constitutions in their text. This leads to the abundance of specific cultural freedoms such as the freedom of religion, art and science – profoundly tied together in Goethe’s dictum: “Whoever masters science and art, also has religion; those without the former two, surely needs religion.”<sup>10</sup>

[V 70; XV 340]

## 15. Classical Texts related to Humanity

Codified legal texts do not fall from heaven. They have their cultural history and some of it has matured into classical texts. These are often statements by philosophers or poets. Let me quote just two examples from German Idealism and Weimar Classicism: J. G. Herder’s book ‘This, too, a Philosophy of History for the Cultivation of Humankind’ (‘Auch eine Philosophie der Geschichte zur Bildung der Menschheit’), Riga 1774, and J. W. von Goethe’s dungeon scene from ‘Faust I’: “A shudder, long unfelt, comes over me;/ Mankind’s collected woe overwhelms me, here.”

[I 104]

## 16. Humanity

J. W. von Goethe sees humanity “more realistically” [than Friedrich Schiller], which should be taken seriously. This begins with the admonition in the ‘Song of the Fates’ (“Let the

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<sup>10</sup> On this the “implementation” in my study: *Die Freiheit der Kunst in kulturwissenschaftlicher und rechtsvergleichender Sicht*, in: P. Lerche et al. (eds.), *Kunst und Recht*, 1994, p. 37 q.



human race fear the gods!”), reaches a climax in the poem ‘Limits of Humanity’ (“When the ancient Holy Father ...”) and turns into the abyss:

In frozen stillness, I seek not my salvation,  
The shudder, mankind’s finest sensation;  
No matter how the world may stint his emotion’s course,  
Affected, he deeply feels the tremendous force.

[‘Faust II’, Dark Gallery]

In Goethe’s ‘Faust I’ we hear the sentence in the dungeon scene: “The whole misery of humanity seizes me.”<sup>11</sup> While “World and Posterity” is prominently mentioned in ‘Tasso’ (1<sup>st</sup> act, 3<sup>rd</sup> scene), in J. P. Eckermann’s ‘Conversations with Goethe’<sup>12</sup> they become key themes together with “Humanity”. In Goethe’s ‘Faust I’, we hear the sentence in the dungeon scene: Here are some examples: “If humanity could be made perfect, a perfect state would also be conceivable; But as it is, it will ebb and flow forever, one part will suffer while the other is well” (1824). Goethe later names “charitable things” for humanity (1827) and he anticipates the “common heritage of humanity” in the great sentence (1827): “I

Oh, believers! Do not boast your creed,  
As the only one! We also believe,  
indeed.

The scientist will by no means be  
deprived,  
Of heritage – to me – and all the world  
prescribed.

A Sadducee I’ll choose to remain! –  
Despite the crowd here causing strain.  
If eternity would also be confined,  
By this populace unrefined,  
It would be just the same old splash,  
Up there, only glorified balderdash.  
“Don’t be so fiery, don’t be so blind!  
Up there, everything transforms in  
kind.”

It’s also a form of comfort, you see;  
Who wants to live without such grace,  
Must endure great toil and embrace:  
To walk alone, self-sufficiently,  
Trust oneself, and others faithfully,  
And indeed, with confidence true,  
God, from above, might look upon you.

Whoever masters science and art  
also has religion;  
those without the former two  
surely needs religion.

No one should enter a cloister  
threshold,  
Unless he might be well-stocked  
With a proper sin crate;  
So that as early as late  
He may not lack pleasure,  
To torment himself with remorse.

Let only the Holy Joes tell you,  
What the crucifixion did accrue!  
No one ascends the highest tower,  
Of tiara and order’s power,  
If one hasn’t beforehand  
Been first harshly threshed.

To the Germans, it’s a source of pride,  
That they despised Christianity far and  
wide,  
Until Charlemagne irksome blade,  
Over the noble Saxons laid.

...

GOETHE, From the  
unpublished works

11 The romantic foresight should at least be mentioned, e.g. *J. von Eichendorff*: “A song sleeps in all things,/ they dream on and on,/ and the world begins to sing,/ if you just find the magic word”. – *Novalis*: “Be human, and human rights will come to you by themselves.” – However see also *G. Büchner*, ‘Danton’s Death’ (1835), 2<sup>nd</sup> act, 7<sup>th</sup> scene, St. Just: “The revolution is like the daughters of Pelias: it dismembers humanity in order to rejuvenate it. Humanity will rise from the cauldron of blood.” *Ibid.*, Scene 8, Payne on the question of whether God created the world. *Shakespeare* is only mentioned here, not explored in turn: cf. his “The whole world is a stage” (‘As You Like It’, II, 7). Examples of statements about humanity in *Shakespeare*: ‘Timon of Athens’ (IV/1, 3 and 4), ‘Troilus and Cressida’ (11/3), ‘Macbeth’ (11/4) and ‘The Tempest’ (V/ 1). In ‘Hamlet’ (Act I, Scene 7), there is mention of the “judgment of the world.” In the final scene (V/6), for Horatio the “world” is an authority that needs to be told “how these things happened”. – *J. Milton*’s ‘The Lost Paradise’ (1667), is productive for the “world”, people and humanity, about humanity in the 3<sup>rd</sup> book (lines 86, 360), 4<sup>th</sup> book (line 637), 11<sup>th</sup> book (line 830), quoted from the Reclam edition 1969. ‘The Great Theatre of the World’ by Calderón de la Barca, the “Theatrum Mundi”, is a classic topos of intellectual history and the world up to *B. Brecht*.

12 Cited as per 3<sup>rd</sup> edition, 1988, R. Otto (ed). – See also *Goethe*’s ‘Wilhelm Meister’s Journeyman Years’, 1<sup>st</sup> Book 4<sup>th</sup> Chapter: “What a journey humanity did not have to take before it reached the point where it could be gentle even towards the guilty, sparing towards the criminals, and humane towards the inhuman!”



**Goethe**  
Georg Dawe  
Oil painting, 1819

see more and more that poetry is a common good of humanity”, where the key word of “world literature” comes up. The statement made in the same year belongs in this context: “If only people, once they have found what is right, would not reverse and darken it again, then I would be satisfied; for humanity needs something positive that is passed down from generation to generation, and it would be good if the positive were at the same time the right and true” – an anticipation of the “cultural heritage”? Finally (1828): “Now it depends on what someone weighs on the scales of humanity” – a thought that combines the individual and humanity (close to Schiller).

[XI 1154 et seq.]

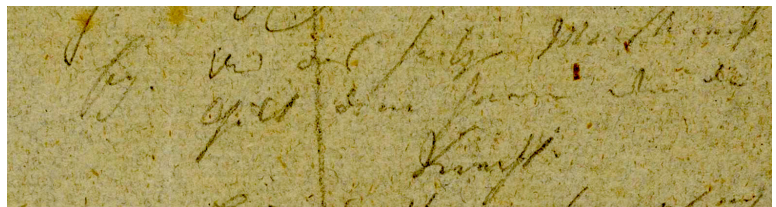
## 17. Sacred Human Right

**T**he background to the Basic Law includes “Herrenchiesee: On the Path to the Basic Law” (1947).<sup>13</sup> Its pioneering Article 1 reads: “The state exists for the sake of the people, not the people for the sake of the state.”<sup>14</sup> ...

On Article 1 para. 2 Basic Law: J.-J.-F. Le Barbier the Elder, “Declaration of the humans and citizens Rights” (1789);<sup>15</sup> Goethe:

And the sacred human right,  
Applies to lord and serf, in equal light.

[Und das heilige Menschenrecht / Gilt dem Herren wie dem Knecht.]



‘Faust II’, Paralipomena for Act 3, Egyptian

[III 17; XIII 172]

<sup>13</sup> With the same title with illustrations: Haus der bayerischen Geschichte, 1998.

<sup>14</sup> Cited as per JöR 1951, vol. 1, p. 48.

<sup>15</sup> Reproduced in: M.-L. von Plessen (ed.), Idee Europa, Entwürfe zum „Ewigen Frieden“, Ordnungen und Utopien für die Gestaltung Europas von der pax romana zur Europäischen Union, 2003, p. 164; see also the suggestive leaflet from 1798, reproduced in: W. Pleister/W. Schild (eds.), Recht und Gerechtigkeit im Spiegel der europäischen Kunst, 1988, p. 216.

## 18. Human Rights

Precisely because international law is not so thoroughly standardised, it tends to resort to the more open, less dense form of the preamble. There are parallels in the provisions of partial constitutions of associations of states (e.g. in the OAS or the EU): the EU Charter of Fundamental Rights from Nice (2000) deserves particular mention. The “human right in international law” likely finds its secret preamble author in J. Kant, as well as in Goethe.

[III 239 seq.]

## 19. Human Nature

People like to think of human rights as being inherent in human nature; they belong to everyone. Certainly. However: are they universally perceived the same way worldwide: in “North and South”, in the “Orient and Occident” – to allude already here to Goethe? Human rights do not only arise from “human nature”, if you will, out of “natural law”, they also emerge from culture, and that also means: they are national, regional, universally diverse, depending on the stage of development, customs, habits and traditions.

[III 257]

## 20. Mixed Conception of the Human Being

Until the year 1989, I was naive, if you will, starry-eyed, exclusively a proponent of John Locke’s optimistic view of humanity. Faced with the conflicts in your [Zvonko Posavec, here in conversation with Peter Häberle] Balkans in former Yugoslavia, the annihilation of minorities by the Serbs, the events in Kosovo involving Serbs and Orthodox, and, incomprehensible to me, actions against the Islamic minority, I began to have doubts whether we do full justice to the constitutional state and the people with a purely optimistic view of the conception of the human being. Do we not also need some thoughts of the skeptical Thomas Hobbes? That’s why I now advocate the so-called mixed conception of the human being: people are partly good, they can improve through educational goals, but we also have dark and negative aspects inside us. The great reformer Luther said that man is evil by nature. You know the classic passages in Machiavelli, Hegel is also rather critical of people, while Friedrich Schiller, my



John Locke

1632-1704

John Greenhill  
Before 1676



Niccolò Machiavelli

1469-1527

Santi di Tito  
Late 16<sup>th</sup> century



Goethe

Karl J. Raabe  
Miniature, oil paint  
on copper, 1811

Swabian compatriot, has a highly optimistic view of humanity. Goethe was more reserved and cautious, he knew the depths and shallows of humanity. For the concrete implementation now, moving from the philosophical and legal philosophical level to the constitutional legal level: Let me begin with the jurisprudence on the conception of the human being by the German Federal Constitutional Court (BVerfG).

[XV 370]

## 21. Competitive Relationships

There are certainly healthy competitive relationships between the three legal entities, universal, national and regional, with all “elective affinities” in the sense of Goethe. International law as universal human law should, for example, strive for better protection of fundamental rights. Europe and America should compete with each other particularly on this topic: just as individual constitutional states compete with each other, for example in matters of regionalism / federalism: Belgium, Italy and notably Spain.

[III 242]

## 22. Freedom of Religion I

The most beautiful overarching text comes from Goethe: “Whoever masters science and art / also has religion; / those without the former two / surely needs religion.”

[III 18]

## 23. Freedom of Religion II

The next foundation for the justification of constitutional friendliness towards religion is the freedom of religion. It is found, with whatever limitations, in almost all constitutions as well as in universal and regional declarations of human rights. Today as an expression of human dignity – an example of universal legal culture – freedom of religion has historically been regarded as an “original fundamental right” since G. Jellinek (1895). To grasp its depth, one can invoke to the words of Goethe: “Whoever masters science and art / also has religion; / those without the former two / surely needs religion.” Religion has thus moved into the most intense context of science and art. These three freedoms

and the “results” created by people thanks to them, as insights of science or works of art, come remarkably close to religion and its manifestations.

[XIII 676]

## 24. Citizen of the World

The three sub-themes of citizen, state citizen and, it should be added, European Union citizen or world citizen do not form an ascending line. Hierarchical concepts are just as wrong here as they are misleading in the fashionable “multilevel constitutionalism”. The national citizen is not somewhere “at the bottom”, the world citizen not “at the top”. The lives and works of the classics, from I. Kant through Schiller to Goethe teach us this. Goethe was undoubtedly a cosmopolitan, yet at the same time, he rooted himself in Weimar. Similar considerations apply to Kant in Königsberg. National citizenship is probably constitutive of cosmopolitanism. Shakespeare is something special here too: like no other, he sovereignly walked “through all times and spaces”.

[I 404]



Königsberg

Johann Georg Ringlin after  
Friedrich Bernhard Werner  
Coloured copperplate engraving  
Detail, around 1748

## 25. Cosmopolitanism I

With so much “reality”, economy, and also power, with so much real transgression of boundaries between good and evil, one should look for a constitutional philosophical orientation thanks to the classics: In my opinion, the globe is to be drawn proceeding from German Idealism and Weimar Classicism. Humanity, the “cosmopolitan intention” in the sense of I. Kant, the “cosmopolitanism out of art and culture” and especially Goethe’s poem should be taken as a benchmark: “God’s is the Orient! / God’s is the Occident! / Northern and southern lands / Rest in the peace of His hands.” While the UN has focussed on humanity in many texts, it was preceded by early German poets and thinkers from Herder to Goethe, from Kant to Schiller.

[I 408; III 16, 79, 260; XIII 172]

## 26. Cosmopolitanism II

Alongside to world peace and universal human rights, there is the protection of cultural property with its two levels. It “creates” out of many individual people “humanity”, not as an





Ernst H. Gombrich, 1975  
1909-2001

abstract concept, but as a living, tangible entity that is reflected and uplifted in culture. A cosmopolitan universality arises from culture, the true “Internationale of Humanity” on this one “blue planet”. “Cosmopolitanism” out of art and culture would be a programme to be designed in the spirit of Goethe. Perspectives on this can be found in E.H. Gombrich, the 1994 Goethe Prize laureate, and his speech ‘Goethe and the Spirits from the artistic foundations of the past’ (FAZ, August 29, 1994, p. 29). In such a perspective, thanks to the cultural world heritage, the citizen feels “at home” everywhere!

[IX 131 seq.; XI 1130 seq.]

## 27. Cultured Citizens

Europe needs “cultured citizens”, to borrow an old-fashioned German expression (*Bildungsbürger*). Especially in today’s boundlessly globalized and economized world, the program “Citizenship through Education” is indispensable. Kant and Goethe were “cosmopolite”,<sup>16</sup> few scholars like Leibniz, today a N. Mandela, was V. Havel, is probably also a Dalai Lama. J. S. Bach’s ‘Mass in B minor’ is considered by some to be a “piece of world religion”. We cannot and must not reach that high for ourselves. The so-called “common man”, meaning us as researchers and educators, must do everything in our power here and now to ensure that the project of citizenship through education can succeed in everyday life – not for the exceptional personalities mentioned, but for the normal “ordinary citizen”.

Civil society (“civic institutions”) refers to the “cooperative and common-good-oriented self-organizational competence of society”. It poses the question of how “at the level of everyday life activities, the sense and care for the organisation of life can be practised and encouraged” (J. von Soosten). Education and civil society in a constitutional state are an ideal. The values that bind them together are: Freedom and human dignity, democracy and responsibility, tolerance, solidarity, willingness to perform, reverence for life, peacefulness, capacity for criticism, a sense of justice also with regard to future generations and environmental

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<sup>16</sup> From the literature now: *B. Ehrenzeller* among others (eds.), *Vom Staatsbürger zum Weltbürger – ein republikanischer Diskurs in weltbürgerlicher Absicht*, 2011.



awareness (civic participation), reconciliation between nations. What are “educational goals” for young citizens become “orientation values” for adults. National and European identity go hand in hand. De Gaulle’s “Europe of the Fatherlands” retains its meaning. Education makes Europe the “motherland”,<sup>17</sup> perhaps even the world.

[XIII 377 seq.]

## 28. Euro-Islam I

Can Euro-Islam succeed? How compatible is Islam with democracy? Its commitment to human rights is subject to the reservation of Sharia. Let’s not forget: Muhammad was a military commander; Christ allowed himself to be crucified. Of course, we also recall Goethe’s wonderful poem: ‘Whether the Quran is eternal?’ [West-Eastern Divan].

[I 432]



### Muhammad

Around 570-632 CE

A depiction (with veiled face) advancing on Mecca from Siyer-i Nebi, a 16<sup>th</sup>-century Ottoman manuscript. The angels Gabriel, Michael, Israfil and Azrail, are also shown. Detail.

<sup>17</sup> From the relevant literature.: *H.-J. Blanke*, Europa auf dem Weg zu einer Bildungs- und Kultugesellschaft, 1994; *G. Böhme*, Die philosophischen Grundlagen des Bildungsbegriffs, 1976; *R. Dahrendorf*, Bildung ist Bürgerrecht, 1965; *U. Engelhardt*, Bildungsbürgertum, 1986; *M. Fuhrmann*, Bildung. Europas kulturelle Identität, 2002; *idem*, Der europäische Bildungskanon des bürgerlichen Zeitalters, 1999; *P. Glotz/K. Faber*, Richtlinien und Grenzen des GG für das Bildungswesen, in: Handbuch des Verfassungsrechts, 2<sup>nd</sup> edition, 1994, p. 1363 et seq.; *I. Kant*, Ausgewählte Schriften zur Pädagogik und ihrer Begründung, Ausgabe 1963; *F.-R. Jach*, Schulverfassung und Bürgergesellschaft in Europa, 1999; *K. Kroeschell*, Art. Bürger, in: HRG, vol. I, 1971, column 543 et seq.; *T. Litt*, Das Bildungsideal der deutschen Klassik und die moderne Arbeitswelt, 1955; *F. Meinecke*, Weltbürgertum und Nationalstaat, edition 1962; *C. Menze*, Art. Bildung, in: Staatslexikon, vol. I, 7<sup>th</sup> edition, 1985 and 1995, column 783 et seq.; *idem*, Art. Bildung, in: Enzyklopädie Erziehungswissenschaft, vol. 1, 1982, p. 350 et seq.; *J. Mittelstraß* (ed.), Art. Bildung, in: Philosophie und Wissenschaftstheorie, vol. 1 (1995), p. 313 seq.; *H. Münkler* (ed.), Bürgerreligion und Bürgertugend, 1996; *U. K. Preuß*, Der EU-Staatsbürger – Bourgeois oder Citoyen, in: G. Winter (ed.), Das Öffentliche heute, 2002, p. 179 et seq.; *I. Richter*, Bildungsverfassungsrecht, 1973; *J. von Soosten*, Art. Bürgertum und Bürgergesellschaft, in: Evangelisches Soziallexikon, 2001, column. 226 et seq.; *R. Vierhaus* (ed.), Bürger und Bürgerlichkeit im Zeitalter der Aufklärung, 1980; *M. Wittinger*, Der Europarat: Die Entwicklung seines Rechts und der „europäischen Verfassungswerte“, 2005; most recently *H. Wißmann*, Bildung im freiheitlichen Verfassungsstaat, JöR 60 (2012), p. 225 et seq.



Goethe

Karl Josef Raabe  
Oil painting on  
oak wood, 1814

## 29. Euro-Islam II

In other words: The “cultural heritage” is open to the times: perhaps in 30 years the mosques in Germany, together with the Christian churches, will be part of the cityscape (Goethe: “What you have inherited from your fathers, / acquire it in order to achieve it to own.” [‘Faust I’]).

[IX 136 seq.]

## 30. Freedom of Art

On Art. 5 para. 3 GG (Freedom of art): Classical quotations: ... “Art gives itself laws and commands the time. Dilettantism follows the tendency of the time.” [Goethe, ‘On Practical Dilettantism or Practical Amateurism in the Arts’, 1799] And “Every art requires the whole person, the highest possible degree of it requires the whole of humanity” [‘Theoretical writings. Introduction to the Propylaea’, 1798] ... “One does not avoid the world more surely than through art, and one does not connect with it more surely than through art.” [‘The Elective Affinities’, 1808/1809].

[III 19]

## 31.-32. Human Right to Art

This means that people owe their “upright walk” essentially to artistic freedom. Being human means opening up the path to becoming a producing or receiving artist – which is why the participation aspect of artistic freedom is so crucial in the welfare state. Freedom is culturally “fulfilled” freedom, primarily thanks to religion, art and science – freedom beyond the state of nature (humanity arising from culture). The freedom of art shapes also the status civilis as “status culturalis”. And today, this forms a status mundialis hominis. The freedom of art is an “innermost human right”, i.e. an artistic freedom that is limited to national citizens revealed to be itself a contradiction as well as ridiculous. As far as can be seen, no current constitutional text defines art as a “right for national citizens”; artistic freedom as a “right for Germans” would make a mockery of all humanistic heritage – especially the German idealism of Lessing, Kant, Schiller and Goethe. In other words: the often-mentioned world society – it exists without a “world state” – takes shape not least, but perhaps even “first” in

the “status mundialis hominis” of artistic freedom. The actively or passively fulfilled opportunity for art gives people dignity, although conflicts must of course also be kept in mind. Terms of human rights texts such as “Dignity”, “humanity”, “education”, “upbringing” and “culture” – presuppose “crystallisations” from art as part of culture, and at the same time they repeatedly create the framework for them.

The painter Ernst Fuchs even sees the freedom of art as the “only guarantee for human freedom.” Of course: As much as nature is brought into conceptual opposition to art here, we also recall Goethe’s possible synthesis: “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other.” Or in the words of Joan Miró: “I work like a gardener”. ... What’s more: because humanity is first constituted by the triad of art, science and religion, on these themselves. Occidental and Oriental customs find their expression in the human right to art.

W. A. Mozart’s and E. Schikaneder’s phrase “a prince – more than that: a human being” (‘Magic Flute’) is just as much an expression and “proof” as Goethe’s ‘West-Eastern Divan’. You have to rise to such heights and ideals in order to do justice to art and artistic freedom as the “root base” of the constitutional state committed to humanity.

[XI 697 seq.]

### 33. Freedom of Action

**R**egarding Art. 2 para. 1 Basic Law (Freedom of Action): Classical texts: J. W. Goethe: “Only he deserves freedom and life, who has to conquer it every day.” [‘Faust II’, Act 5] “... “And law alone can set us free again” [‘Nature and Art’, 1800] ... “Freedom? A fine word, for those who truly understand it. What kind of freedom do they want? What is the freedom of the freest? – To do right!” [‘Egmont’, 1788].

[III 17; XIII 172 seq.]

### 34. Academic Freedom

**O**n Article Article 5, para. 3 Basic Law (Academic Freedom): “The sciences advance not in a circle, but in a spiral line – the same thing comes again, but higher and further.” [Goethe in conversation with Casper von Voght, July/August 1806]; “The most beautiful happiness of the thinking man is to have



Wolfgang Amadeus Mozart

1756-1791

Johann Nepomuk  
della Croce  
Oil painting, detail  
around 1780



Johannes Daniel Falk

1768-1826

Henriette Westermayer  
Oil painting, 1805

explored the explorable and to calmly revere the unexplorable” [‘Maxims and Reflections. From the Estate, On Nature and Natural Science’]. However, he is also critical: “I compare the professors and their treatises, which are overflowing with quotations and notes, where they digress to the right and left and make the main point forgotten, with dogs that after pulling just a few times, lift a leg for all sorts of dubious activities, so that one doesn’t make any progress with the beasts at all, but spends days on end covering only a few miles.” [Goethe in conversation with Johannes D. Falk.]

[III 20; XIII 175]

### 35. Property

**O**n Art. 14 Basic Law (Property): – Classical quote from Goethe: “... acquire it in order to achieve it to own.” [‘Faust I’].

[III 21]

### 36. European City

**A**s far as the theoretical framework is concerned, the concept of the “European city” and “urban identity”, which can be understood in terms of legal and cultural science, is confirmed. The keynote address was and remains partly a description of what exists (heritage) and partly an encouragement to create something new (mission). Being a “European city” is never a secure possession; it always has to be worked out anew (to use Goethe’s words, “acquired”), by everyone involved, not least the citizens, who should be aware of their city culture.

[III 182]

### 37. School System

**O**n Article 7 Basic Law (School System): “If we only accept people as they are, we make them worse; if we treat them as if they were what they should be, we will bring them where they need to be brought.” [‘Wilhelm Meister’s Apprenticeship’, 1796. 8<sup>th</sup> Book, 4<sup>th</sup> Chapter].

[III 20; XIII 175]

### 38. Right to be Heard

Regarding Article 103 Basic Law (Right to Be Heard): Goethe: “Thus I practice now the judge’s first duty: to hear the accused. Speak then!” [‘Faust II’, Helena].

[III 25; XIII 181]

### 39. Natural Foundations of Life

On Art. 20a Basic Law: Classic quotes from Goethe: “Whoever denies nature as a divine organ, let him deny all revelation at once”. [‘Maxims and Reflections. From the Estate. On Literature and Life’] and “Nature hides God! But not from everyone!” [ibid.]

[III 23; XIII 178]

## III. FEDERALISM

### 40. Felix Helvetia I

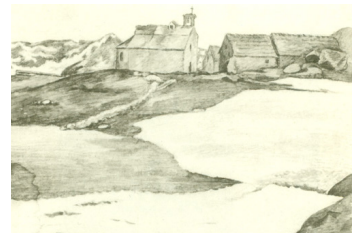
We should bear in mind that the seemingly small cantonal constitutions of Switzerland created texts that can be understood as “national world constitutional law” – parallel to my proposal of national European constitutional law, which can be found in the form of numerous European articles in national constitutions. Here, too, it becomes evident: “Felix Helvetia” or with Goethe, modified: “Switzerland, you have it better!” [original: “America, you have it better”.]

[I 406]

### 41. Felix Helvetia II

Some of the exaggerations, absolutizations, know-it-all attitude and school disputes that can still be found in Germany today, lose their sharpness and harshness in the light of Switzerland. None other than Goethe visited Switzerland three times. The Swiss themselves title him as a “friend of Switzerland”. The expression “Tu felix Helvetia!” is no exaggeration in the European context (the European Convention on Human Rights applies at the constitutional level!).

[IV 73]



On the St. Gotthard

Goethe

Drawing, 1775



Theodor Fontane

1819-1898

Carl Breitbach  
Oil painting, 1883

## 42. German Freedom out of Culture

From the depths of our constitutional history, it can be said: German freedom is federative freedom – the self-perception of Germans is strongly shaped by their “cultural landscapes” as Thuringians (Goethe’s/Schiller’s “Weimar”) or Saxons (Bach’s “Leipzig”), Brandenburgers (Fontane’s ‘Wanderungen’), (plurality of cultural identities).

[V 191, 282; XIII 564; XIX 557]

## 43. Border

However, this only represents one side of visibly accelerating developments. In contrast, there is a renewed focus on the “small” on site, a retreat to the manageable space, to “region” and “homeland”: Real or perceived nation states are disintegrating into “small states”, ethnic groups are demanding minority rights, regionalism gradually matures into the structural principle of many previously centralized constitutional states (from Spain to Great Britain), is continuing its triumphant advance worldwide. All of this specifically points to the territorial aspect. At the same time, one realises the ambivalence of the word “border”: on the one hand, it points to limitation, to one’s own identity; while on the other hand, from the delimited space, an expansion into the unfamiliar, new, and distant becomes possible. Micro-states in particular (such as Liechtenstein) are particularly conscious of this dialectic. They receive and integrate much from “outside” in order to assert themselves all the better. Perhaps one can vary J.W. von Goethe’s poetic words: “And law alone can set us free again”, in terms of territory and space: Man, in his fundamental freedom, would literally fall into the abyss if there weren’t a culturally formed “secure” ground from which he could step out into the environment. Today in particular, the constitutional state creates the optimal framework for such cultural freedom based on reason and grounds, and its territory forms a specific “cultural element” in the ensemble of its fundamental values.

[XI 631 seq.]

## 44. Regionalistic Papers

Mention should be made of the so-called cultural federal state theory, which would need to be further developed for the regions of Spain and Italy and also increasingly for Gre-



at Britain, in the sense of “Regionalistic Papers”. Especially in southern Germany, and since the reunification in 1989 in eastern Germany, we have recognized the fruitfulness of an understanding of federalism from the diversity of culture (Thuringia with Goethe/Schiller, Saxony with J. S. Bach in Leipzig).

[X 62; XIII 66]

## 45. Mythical Refoundation

**H.** Münkler initiated a discussion on the “mythical magic”.<sup>18</sup> He advocates the thesis: “Political action, even in the post-ideological age, needs to be embedded in a large narrative that connects the past with the future. It gives meaning to the sober decisions that have to be made every day. These myths can inspire courage, but they are always also a tool in the “struggle for power”. R. Miller had already recalled the “mythical refoundation of the republic”<sup>19</sup> in an earlier interview with H. Münkler. Examples mentioned include Barbarossa in the Kyffhäuser, the Nibelungs, Faust, classical Weimar, the Bauhaus in Weimar and Dessau, Luther, Canossa – the author, in his inaugural lecture in Bayreuth in 1982,<sup>20</sup> highlighted the historical dimension depicted in constitutional preambles and frequently brought up more recent examples, such as the constitutions in East Germany.<sup>21</sup>

[IX 145]

## 46. ‘Federalist Papers’

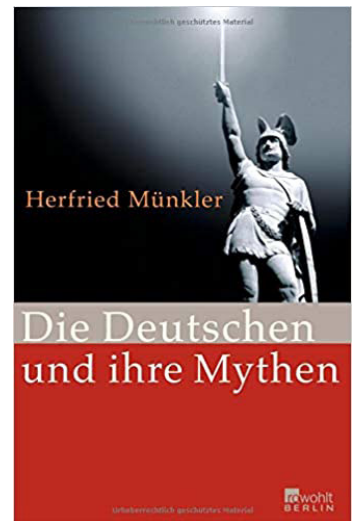
**M**oreover, one may indeed echo Goethe’s words: “America, you have it better”. However, one can also suspect that the spirit of renewal in 1787 there [in America], as well as external socio-cultural conditions, were more favorable to an open and public democratic constitutional process than some “circumstances” on the old continent. Nevertheless, in my opinion, the ‘Federalist Papers’ remain a “miracle”, their implementation and continuous development in U.S. constitutional law a fortunate

18 FAZ from August 10, 2010, p. 8.

19 FAZ from July 15, 2010, p. 6: “Newly emerged from disasters”.

20 Präambeln im Text und Kontext von Verfassungen, FS Broermann, 1982, p. 211 et seq.

21 Evidence in my contribution: Die Schlussphase der Verfassungsbewegung in den neuen Bundesländern, JöR 43 (1995), p. 355 (360 et seq.).





Alexander Hamilton

1757-1804

Gilbert Stuart (Circle), 1795  
Hamilton wrote the main part of  
the 'Federalist Papers'

reconciliation of spirit and power, innovation and tradition.

[V 26]

## B. CONSTITUTIONAL CULTURE

### I. BASIC CONCEPTS

#### 47. Constitutional Doctrine as Cultural Science

This concept of constitutional doctrine as cultural science builds deep bridges to the other cultural sciences. It becomes all the more relevant, because Europe, in its unity and diversity, can only be understood through its legal culture.<sup>22</sup> Developments in human history and its achievements, as well as individual cultural advancements, can hardly be grasped with the typical “narrowness” of a purely dogmatic science. Even with this expanded approach, it is hardly possible for constitutional lawyers to build the final bridge to the natural and evolutionary history of humans. Not even Goethe’s “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other ...” can help. To still “find each other”, presumably it is necessary to work with different concepts of evolution that are specific to the sciences or disciplines.

[XI 162]

#### 48. Jurisprudence as a specialised Cultural Science

Shakespeare’s passage about grace in the ‘Merchant of Venice’<sup>23</sup> and Goethe’s Mephistopheles in the ‘Student Scene’

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22 On this *P. Häberle*: *Europäische Rechtskultur*, 1994, with further evidence – *I. Kants* ‘Zum ewigen Frieden’ (1795) is likely to be, as a concrete utopia, a piece of humanity’s “cultural gene”; cf. now *R. Merkel/R. Wittmann* (eds.), *Zum ewigen Frieden*, 1996, with contributions among others from *O. Höffe* (‘Eine Weltrepublik als Minimalstaat’) and *K. Ipsen* (‘Ius gentium – ius pacis?’). See also *M. Lutz-Bachmann/J. Bohman* (eds.), *Frieden durch Recht, Kants Friedensidee und das Problem einer neuen Weltordnung*, 1996.

23 *W. Shakespeare*, *The Merchant of Venice*, Act 4, Scene 1, Porzia:

belong at the beginning and end of all doctrines of positive law:

Laws and rights, a legacy spun,  
Like an enduring illness, they're passed on.  
They carry through generations with ease,  
Shifting gently, changing with each breeze.  
Reason becomes folly, goodwill, a plight;  
Woe to you, as a grandchild in this light!  
Of the right ingrained within our birth,  
Alas! The question is never unearthed.

In short: Legal sciences as a whole and in detail are a specialised cultural science, with their own methods (e.g. Savigny's canon of interpretation (1840), which now needs to be supplemented by comparative law as the "fifth" method of hermeneutical interpretation),<sup>24</sup> with their own subject matter, their "proprium" and contents (protection of human dignity, the idea of law with its three aspects of justice, expediency and legal certainty). They are understood too narrowly in the term "human sciences" because it does not express the aspect of "reality science". In their sub-fields such as legal history, legal philosophy, legal sociology or commercial law, the legal sciences are closely linked to the other disciplines. Their dimension of empirical science should not be underestimated. Its horizons as a "science of the future" in the sense of H. Jonas' 'Principle of Responsibility' (1979) for this one world, our blue planet, are only becoming visible in our days and demonstrate how environmental protection is becoming the – cultural – topic that brings together many sciences.

[XIV 19 seq.]



William Shakespeare

1564-1616

John Taylor

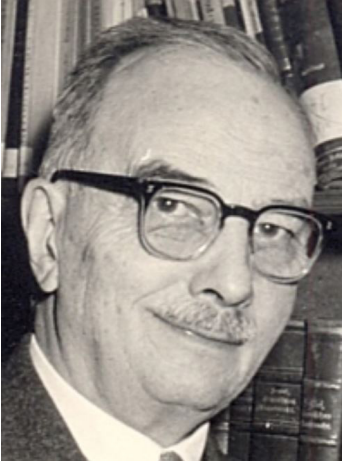
Around 1610

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The quality of mercy is not strained.  
It droppeth as the gentle rain from heaven  
Upon the place beneath. It is twice blest:  
It blesseth him that gives and him that takes.  
'Tis mightiest in the mightiest; it becomes  
The thronèd monarch better than his crown.  
His scepter shows the force of temporal power,  
The attribute to awe and majesty.

<sup>24</sup> On this P. Häberle, Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat (1989), now in: *idem*, Rechtsvergleichung im Kraftfeld des Verfassungsstaates, 1992, p. 27 et seq.

## 49. Causes



Rudolf Smend

1882-1975

Those parts of the constitution that are already *prima facie* “cultural constitutional law” have not taken up enough space in the discussion to date. Even in cases where the concept and substance of culture were prominently mentioned, such as in the Lüth judgment by the Federal Constitutional Court,<sup>25</sup> or where a dictum by R. Smend on fundamental rights (“Fundamental rights as an expression of a cultural and value system”) was cited or criticized,<sup>26</sup> the idea of culture is basically left out.

There are also much older, distinctly German causes to consider. The often-cited fractured nature of German national culture and history, the absence of a democracy developed within Germany itself as in England, a republican tradition comparable to that of France since 1789, the alienation and distance between the (constitutional) state on one hand and art and artists on the other (which already existed in Weimar) – all of these factors were not conducive to the development of a cultural scientific approach.

[XI 582 seq.]

## 50. Culture

A first rough approximation can be achieved based on the opposite concepts. Culture stands against “nature”, which is “creation” or the result of evolution. Culture is what humans

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<sup>25</sup> Decision of the Federal Constitutional Court (BVerfGE) 7, 198 (206): “... the entirety of the values that the people have achieved at a certain point in their intellectual and cultural development and fixed in their constitution.” See also BVerfGE 5, 85 (379): “The order in the Federal Republic is legitimate. It is so not only because it came about in a democratic way and has been repeatedly confirmed by the people in free elections since its existence. Above all, it is legitimate because, not necessarily in every detail but in principle, it is an expression of the social and political world of thought that corresponds to the *current cultural state reached* by the German. It is based on an unbroken tradition, which – nourished from older sources – led from the great political philosophers of the Enlightenment through the civic revolution to the liberal constitutional development of the 19<sup>th</sup> and 20<sup>th</sup> centuries, and which itself gave rise to the principle of the welfare state, i.e., the principle of social obligation. The resulting *value judgments* are approved by the vast majority of the German people with complete conviction.” (Emphasis by the author).

<sup>26</sup> Cf. especially *E. Forsthoff*, *Der introvertierte Rechtsstaat und seine Verortung*, in: *Der Staat* 2 (1963), p. 385 (388 et seq.), later in *idem*, *Rechtsstaat im Wandel*, 2<sup>nd</sup> edition 1977, p. 175 (177 et seq.)

create, *sit venia verbo*: a “second creation”. There are, of course, borderline problems: For example, the lawyer employed in the protection of cultural property is faced with the question of whether natural objects such as trees that are considered to be religiously “occupied” are therefore culture because certain so-called indigenous peoples connect their religious beliefs to them (“tree spirits”)? In my opinion, the answer is affirmative, just as we also speak of “natural monuments” (cf. Art. 40 para. 4 p. 3 Brandenburg Constitution of 1992). However, we should hold on to the fundamental difference between nature and culture, even if we have Goethe’s wonderful dictum in mind: “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other ...”.

[183]

## 51. Cultural Assets

Respect for certain tribes in sub-Saharan Africa alone makes it necessary, especially today, to declare pieces of wood in which they believe to be “tree spirits” as protected cultural assets. Insofar as we are pantheists with Spinoza and Goethe (“*deus sive natura*”), this may be easy for us. But the constitutional texts compared with each other also suggest an extension: the inclusion of sport promotion is almost common German cultural constitutional law (cf. Art. 35 of the 1992 Brandenburg Constitution: Sport as a “part of life worthy of promotion”; see also Art. 11 para. 1 of the Saxony Constitution, Art. 36 para. 1 and 3 of the Saxony-Anhalt Constitution). The older concept of an open, pluralistic understanding of culture<sup>27</sup> from 1979 is now constitutionally affirmed by Brandenburg’s successful phrase: “Cultural life in its diversity and the dissemination of cultural heritage are publicly promoted” or Art. 11 para. 2 of the Constitution of Saxony: “Participation in culture in its diversity and in sport is to be made accessible for the entire people”. If one continues with the comparative text stage analysis, we arrive at the distinction between “high culture”, “folk culture” and alternative or subcultures, including popular culture (e.g.: the Beatles!). The more recent constitutions are eloquent enough. Swiss constitutions speak of the “cultivation of folklore” (§ 36 para. 3 of the Aargau Constitution



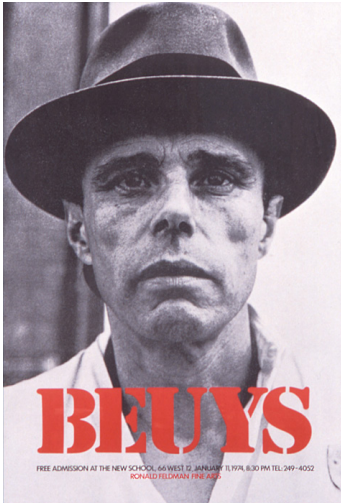
Baruch de Spinoza

1632-1677

Master unknown  
Around 1665

<sup>27</sup> P. Häberle, *Kulturpolitik in der Stadt – ein Verfassungsauftrag*, 1979, p. 20, 34 seq.





## Joseph Beuys

1921-1986

Poster for a lecture tour through the USA: 'Energy Plan for the Western Man', 1974, organized by the gallery owner Ronald Feldman, New York

of 1980), "local cultural heritage" (Art. 42 of the Uri Constitution of 1984), thus also considering folklore, include leisure activities (e.g. Art. 49 of the Bern Constitution of 1993), and recent South American and African constitutions use terms such as "folk cultures" (Art. 215 § 1 Constitution of Brazil of 1988), folk art and folklore (Art. 62 Constitution of Guatemala of 1985) or prohibit any "cultural discrimination" (Preamble Constitution of Ethiopia of 1994). After all this, the way is clear for a circumscription of the concept of culture with D. Grimm: the ideal reproduction of society.<sup>28</sup> For certain countries, one can also speak of a "multicultural understanding of culture" (such as Australia and South Africa). The thesis of J. Beuys: "Every person is an artist" – of course it has to be added: "but not every person is a Beuys" – may indicate in connection with the open concept of art of the Federal Constitutional Court (cf. Decision 67, 369 (376 et seq.)) the direction (H. Hoffmann's keyword "culture for all" and, as I have added since 1979, "culture by all", perhaps also "with all").<sup>29</sup>

[XIX 564]

## 52. Culture and Nature I

The boundaries should not be concealed. Concepts such as "cultural context", "freedom as culture" and "freedom out of culture", "cultural nation", "cultural federalism" and "cultural regionalism", even "cultural democracy" broaden and deepen conventional legal work, but they are not everything. The disciplining role of legal doctrine remains the "legal toolkit" with its classic four, in my opinion, now five methods of interpretation, the overall wealth of experience with which lawyers work (whether it is advisable for constitutional legislators to prescribe interpretation principles for fundamental rights, as is the case in South Africa, Kenya and Kosovo, remains open here); however, the cultural science approach provides an enrichment and raises

<sup>28</sup> D. Grimm, Kulturauftrag im staatlichen Gemeinwesen, VVDStRL 42 (1984), p. 46 (60). – A classic on the problem of the cultural state is E. R. Huber, Zur Problematik des Kulturstaats, 1958; on him: M.-E. Geis, Kulturstaat und kulturelle Freiheit, 1990. Most recently in general O. Schwencke (ed.), Kulturstaat Deutschland?, 1991; H. Glaser, Deutsche Kultur 1945-2000, 1998.

<sup>29</sup> So the "culture for all" concept from H. Hoffmann is still leading the way, not in the sense of a devaluation of high culture, but of taking alternative cultures seriously. Chancellor candidate G. Schröder's vote for a "broadly based, lively concept of culture" is too equivocal.



awareness of constitutional law for what is “behind” or “before” the legal norms. “Culture”, a term that is indebted to Cicero, means what is created by man. Distinctions are helpful: culture in the narrower sense of the “good, true and beautiful” of the ancient tradition, and in the broader sense: customs, manners, techniques. A. Gehlen’s “Back to Culture” is the counter-classic to Rousseau’s “Back to Nature”. Of course, the relationship between nature and culture ultimately may not be completely unraveled. Goethe’s “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other” gives us a tendency, but not an ultimate truth.

[XIII 214 seq.; XV 262]

### 53. Culture and Nature II

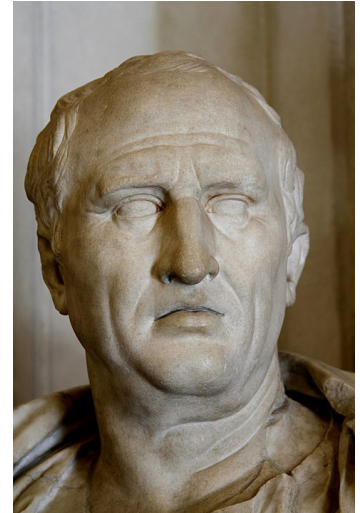
**A**lso, the Constitution of Spain addresses environmental and cultural protection in two consecutive articles (Article 45 and 46). This contextuality is probably rooted in the human condition, which is shaped by “nature and art” (or culture in general), which in turn stand in a context that even many classics are ultimately unable to grasp (cf. Goethe’s “Nature and Art, they go their separate ways ...”). The Unesco Convention of 1972 now raises this connection into the universal humanity scale. Human life can only flourish on the basis of national and global cultural and environmental protection. In this context, culture represents the “other” or the “second creation”.

[XI 1124]

### 54. Cultural Freedom I

**C**ultural freedom is a human need structure. In a deeper sense, all freedom is cultural freedom, freedom beyond the so-called “state of nature”, however indispensable this may be as a fiction in constitutional theory. Or, to think with A. Malraux: Man does not know himself and therefore needs art in order to establish contact with his own destiny, his humanity. This is where Goethe’s dictum belongs, that culture is nothing other than an unceasing series of preserving efforts that “one must not let go again (and) not give up at any price”. [In conversation with Chancellor Friedrich von Müller, 7 April 1830].

[XI 19 seq.]



Marcus Tullius Cicero

106-43 BC

Bust in the Capitoline Museums, Rome, detail



André Malraux, 1974

1901-1976

## 55. Cultural Freedom II

That and how the elements of the state can be “composed” from the perspective of cultural science shall only be outlined in keywords: Not only in the “cultural federalism” of Swiss and German character ... from the diversity of culture ... the formative power of the cultural for all constitutional states is obvious, it is expressed in all manifestations of cultural constitutional law. ... This leads to the abundance of specific cultural freedoms such as the freedom of faith, art and science – deeply tied together in Goethe’s dictum: “Whoever masters science and art, also has religion; those without the former two, surely needs religion” ...

[XI 86; XIX 563]

## 56. Culture of Peace

In conclusion, insights from great texts, classic poems, or statements of considerable thinkers are cited as encouragement: in the sense of “classical literature in constitutional evolution”. These major texts are intended to serve as “sources of inspiration”: for academic work on the principle of peace and for new expressions of the “language of peace” in national constitutional texts, in European legal and international political initiatives, and for the will for peace. ... J. W. Goethe:

Many marvellous things on earth  
Vanished away in war and dispute;  
Who shields, preserves what’s worth,  
Has won the most beautiful fate.

*From: 'On Art and Images, Shielded Arm'  
(‘Zu Kunst und Bildern, Beschildeter Arm’), 1826*

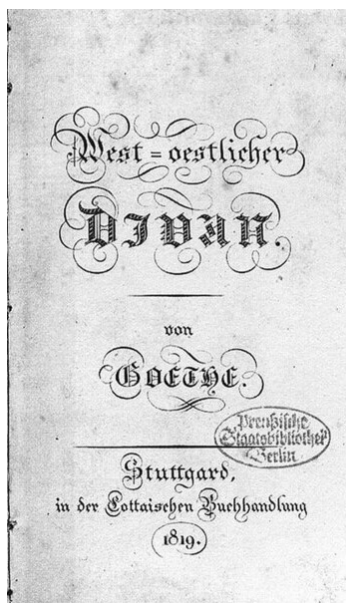
Soon, each knows but his own, grant the other  
His advantage, then eternal peace is made.

*From: 'Four Seasons, Autumn', 1796*

God’s is the Orient!  
God’s is the Occident!  
Northern and southern lands  
Rest in the peace of His hands.

*From: 'West-Eastern Divan', 1819*

[VI 195 seq.]



Title page of the  
West-Eastern Divan

1<sup>st</sup> edition

## 57. Peace

The work by L. Reiners, ‘Der ewige Brunnen’ (‘The Eternal Fountain’) from 1955, which is surely representative of German poetry, contains a remarkable section entitled “Book of Struggle” (p. 515 et seq.), but unfortunately no section on peace. However, there are some poems by prominent and other authors that are close to the spirit of peace. Here is a selection: M. Claudius, ‘On the death of the Empress’: “She made peace! That is my poem”; G. Keller, ‘Spring Faith’: Verse 2: “This is the song of peace among nations and of mankind’s ultimate happiness”; J. W. von Goethe, Hermann, penultimate line:

And if everyone thought like me, power would stand up  
Against power, and we all would enjoy peace.

[‘Hermann and Dorothea’, 1797]

[VI 174]

## 58. Texts of Humanity

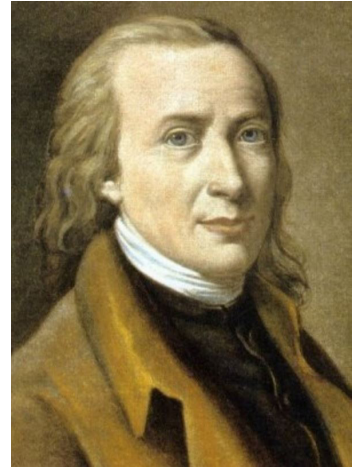
It should be added that in addition to the distinguished world cultural heritage sites, there are also works that are “texts of humanity” in their own way: the Bible, Homer, the Koran, J. S. Bach’s Mass in B minor, Goethe’s Faust, the French Declaration of Human Rights of 1789 and L. van Beethoven’s Ninth Symphony. After all, for music, there is the old, nearly forgotten term “monuments of sound”.

[IX 133]

## 59. Basic Values of Humanity

“Humanity” is constituted by fundamental values such as “world peace, international security and justice” (cf. Art. 2 No. 3 UN Charter of 1945), thus by reason, and by artistic objectivisations such as the Unesco works of art (“world culture” in the sense of Goethe, “world music”, perhaps also Stockhausen’s ‘World Parliament’), but also by economic values such as the “use of outer space for peaceful purposes” (preamble to the Outer Space Treaty of 1967) and the preservation of the “natural heritage” (environment).

[XI 1157]



Matthias Claudius

1740-1815

Date unknown, after a  
painting by Friederike Leisching



Karlheinz Stockhausen

1980

1928-2007



Goethe

Martin G. Klauer  
1780

## 60. National and European Constitutional Law on Culture

This example field is particularly obvious and productive for the cultural science approach. The three cultural freedoms par excellence: freedom of religion, the arts and the sciences are the creative “generators” of everything that man can create in the constitutional state. Goethe tied them together in the wonderful sentence: “Whoever masters science and art, also has religion; those without the former two, surely needs religion”. The “up-right walk” symbolises the transition from nature to culture, culture understood as that which is created by man.

This is why “objects” in which African indigenous peoples believe to be “tree spirits” are “cultural assets” in the sense of national and international cultural heritage protection regulations. Of course, art and nature belong together in the sense of Goethe’s other dictum! “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other ...”. Therefore, the protection of natural and cultural heritage goes hand in hand. The three original freedoms mentioned form, so to speak, the “humus” for all of humanity’s productions, for its culture. Specific manifestations of religion, including its withdrawal throughout Germany, are a part of constitutional culture.

[III 38]

## 61. Cultural Constitutional Law

Here we will only outline the national constitutional law in key words: General cultural state clauses can be distinguished, such as in Bavaria Article 3, para. 1: “Bavaria is a legal, cultural, and social state” (1946); The Swiss constitutional draft Kölz/Müller (1984) should also be mentioned with the beautiful sentence in Article 40 para. 1: “Culture contributes to making people aware of their relationship to their fellow human beings, the environment and history”,<sup>30</sup> more specifically cultural federalism in Switzerland and Germany as well as adult education (Art. 35 Bremen Constitution of 1947, Art. 33 Brandenburg Constitution of 1992). Art. 10 of the Benin Constitution (1990) grants everyone the “right to culture”. In the field of fundamental rights, freedom of religion, art and science may be considered as cultu-

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<sup>30</sup> From the literature, *P. Häberle*, *Verfassungslehre als Kulturwissenschaft*, 2<sup>nd</sup> edition 1998, p. 1106 et seq.



ral freedoms, deeply linked in Goethe's words "Whoever masters science and art, also has religion; those without the former two, surely needs religion". The triad of religion, science and art is the foundation of the open society, constantly generates new resources for the development of the constitutional state and makes the thesis of the constitution as culture understandable from the perspective of people and citizen.

[XVIII 633]

## 62. Cultural Landscapes

“Culture” is that which is created, “cultivated” by humans (African tree spirits, conceived in trees, are “culture” in the sense of cultural heritage protection). As a term originating from Cicero, some classical texts help to further approximate it, such as Goethe's insight: “Whoever masters science and art, also has religion; those without the former two, surely needs religion”. The poem “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other ...” becomes meaningful. “Cultural landscapes” are explicitly protected as such in some new constitutional texts.

[III 4; V 274; XVIII 632]

## 63. Environmental Constitutional Law

The rapidly growing environmental constitutional law is not just an “annex”. Although it is part of “Nature”, that is in tension with culture in many different ways (cf. Goethe's “Nature and art ...”), it presents itself as an environment co-shaped by humans – but also as a piece of culture. The environment is protected for the sake of people (anthropocentric approach).<sup>31</sup>

[V 246 seq.]

## 64. Basic Law Science

Perhaps, as Germans, we humbly are giving something back to the world with our Basic Law science:<sup>32</sup> as compensa-



Sanssouci Park  
in Potsdam

Created: from 1745  
Added to the UNESCO  
World Heritage List as a  
Cultural Landscape in 1990

<sup>31</sup>From the literature: *M. Kloepfer*, *Umweltrecht*, 2<sup>nd</sup> edition 1998; *H. Markl*, *Natur als Kulturaufgabe*, 1986; *W. Berg*, *Über den Umweltstaat*, FS Stern 1997, p. 421 et seq.; *H. Schulze-Fielitz*, in: H. Dreier (ed.), *Grundgesetz-Kommentar*. vol. 2, 1998, Art. 20 a.

<sup>32</sup>The ‘Germany images’ are enlightening in: T. Mayer (ed.), *Deutschland aus internationaler Sicht*, 2009.



tion for the destruction and wars respectively two dictatorships (namely in matters of fundamental rights, federalism, models of constitutional law on religion and constitutional jurisdiction). German idealism was once a contribution to world culture (I. Kant, L. van Beethoven, also F. Schiller and J. W. von Goethe).

[IV 165]

## 65. Legal Education

**O**n the biographical level, it is worth mentioning the long tradition of artists and poets who were also lawyers or had a legal education. In this regard, we may mention Kleist, Kafka and Goethe. These artists raised their concerns about society and justice to the highest level of their expressive abilities.

[I 269]

## 66. Illiterate Lawyers as a “Security Risk”

**P**eter Schneider already makes an affirmation in the foreword [of “... a single people of brothers” – Law and State in Literature (“... ein einzig Volk von Brüdern” – Recht und Staat in der Literatur, Frankfurt, 1987)]: The subject of law and state in literature is not a “leisure activity” for him, but “the subject of jurisprudence” (p. 9). A literarily inexperienced, illiterate lawyer is a “security risk, since a main source of human experience is closed to him” (p. 10) – a thesis that could become a “classic text” and certainly testifies to both the scholarly and the “pedagogical eros” of the author.

His “preliminary considerations” elaborate on the jurisprudential interest in non-legal, “beautiful” or trivial literature in three directions: as an interest in legal history, in the history of institutions and ideas, as an interest in legal psychology and legal education (p. 20). Schneider sees legal and literary interpretation as “strongly coinciding”, which he illustrates with so-called reception research. However, he does not obscure the one remaining contrast: the contrast between legally binding texts and those that are not endowed with “legal force” (p. 25). The interpretations begin with Goethe’s “unholy realm of Reynard the Fox” (p. 35 et seq.). Many direct quotations are used to introduce the “substance” before the “legal situation” is presented (p. 42 et seq.) and the legal and political philosophical concepts required for the interpretation are assigned (cf. for example p. 69 seq.: “Fox and



Franz Kafka, 1923

1883-1924

Lion and the absolute State”, supplemented by a quote from Machiavelli’s ‘The Prince’).

[XV 103]

## 67. European Lawyer

In Europe’s open society, there is a need for European lawyers with personal and professional requirements, such as knowledge of several legal cultures and languages. Goethe’s phrase: “He who does not know foreign languages knows nothing about his own” also applies to legal culture. The exchange between young and older scholars is indispensable in all of this. It helps to develop both the remaining national identity of the European constitutional states and the common European constitutional law.

[I 428; III 294; IV 75; XIII 307; XV 352]

## 68. European State Law Teacher I

Paying tribute to a German, also English, and simultaneously European state law teacher like Werner von Simson on the occasion of his 85<sup>th</sup> birthday in 1993 is both easy and challenging at the same time: easy because we know that the jubilarian is beyond the wisdom and age limits of Goethe, because we see him – once again in contrast to Goethe – amidst all of his family members and friends, and finally because we can experience him here and now – and this is the similarity with Goethe – in his “autumn of the middle ages” restlessly active, creative and hopeful: in all the charisma that characterizes the intellectual man with artistic gifts. I must not look for further similarities with regard to the Weimar classic Goethe: For Goethe’s art of jurisprudence is controversial, that of our jubilarian is not, and moreover: Werner von Simson has certainly been influenced in many ways by “Weimar”, but his creative, maturation phases and effects are linked to the Bonn Basic Law, which, thanks to the gift of German reunification in 1990, has now gained, at least in the capital city issue, a Berlin component: However, a component which deeply influenced the jubilarian from his youth onwards. Thus, a circle may close and open at the same time.

[XV 117]



Werner von Simson

1908-1996



Dimitris Th. Tsatsos, 2002  
1933-2010

## 69. European State Law Teacher II

But what made Dimitris Th. Tsatsos mature into a European state law teacher in just a few years? First of all, the Hagen conference he was originally responsible for: “The Basic Law in the International Context of Constitutions” (in April 1989), held “in the pre-march era of the *annus mirabilis*” in 1989 – participants still remember the exhilarating anticipation of the opening of the border, signalled by the contributions of the Hungarian lawyer Csalótzky in view of the constitutional upheaval in Hungary, and D. Th. Tsatso’s moving account of his father confiding to have used German, the “language of Goethe”, as justice minister of the Greek government in exile in Cairo in 1944 (p. 265, *op. cit.*). Thus, a phase was initiated that led Tsatsos’ son onto the paths of European jurisprudence.

[XV 164]

## 70. Classical Literature in Constitutional Evolution

If we approach the topic of “classical literature in constitutional evolution”<sup>33</sup> it is advisable to make a distinction: on the one hand, the work out legal and political philosophical assertions by primarily non-legal “poets and thinkers”. Examples are the analyses into legal and political thought by Camus<sup>34</sup> or Novalis,<sup>35</sup> but also Erik Wolf’s work ‘On the Essence of Law in German Poetry: Stifter, Hebel, Droste’ (1946). This includes an attempt on ‘Goethe as a lawyer and statesman’<sup>36</sup> and the lecture given to her Berlin Law Society by A. Blomeyer ‘E. T. A. Hoffmann as a lawyer’ (1978)<sup>37</sup> as well as A. Hollerbach’s Freiburg dissertation



E. T. A. Hoffmann  
1776-1822  
Master unknown  
Before 1822

33 Earliest indications in: P. Häberle, *Verfassungsinterpretation als öffentlicher Prozeß – ein Pluralismuskonzept* (1978), in: *idem*, *Verfassung als öffentlicher Prozeß*, 1978, p. 120 (123); *idem*, *Staatslehre als Verfassungsgeschichte* (1977), *ibid.*, p. 348 (351); *idem*, *Recht aus Rezensionen*, in: *idem*, *Kommentierte Verfassungsrechtsprechung*, 1979, p. 1 (50).

34 Cf. G. Stuby, *Recht und Solidarität bei A. Camus*, 1965.

35 On Novalis: Hans Wolfgang Kuhn, *Der Apokalyptiker und die Politik*, *Studien zur Staatsphilosophie des Novalis*, 1961.

36 From R. Weber-Fas, 1974. Cf. also on non-linguistic art Th. Würtenberger, *Albrecht Dürer. Künstler, Recht, Gerechtigkeit*, 1971.

37 On H. v. Kleist: G. Geismann, in: *Der Staat* 17 (1978), p. 20S et seq. – Even L. Thoma already comes close to the classics, cf. FAZ from October 8, 1979,

on Schelling's legal thought (1957).

[VIII 9 seq.]

## 71. Europe I

**O**n Art. 23 new version Basic Law (Europe): From the “fine literature” ... Goethe: “I therefore like to look around at foreign nations and advise everyone to do the same ... The era of world literature is at time” [in conversation with Johann Peter Eckermann on 31<sup>st</sup> January, 1827]; Goethe: “Weimar has spread the fame of a scholarly and artistic education over Germany, indeed across Europe ...” [Supplement to the official letter to Christian Gottlob von Voigt from 19<sup>th</sup> December, 1815]; Goethe: “At the moment when people (in Europe) are busy creating new fatherlands everywhere, for the unbiased thinker, for those who can rise above their time, the fatherland is nowhere and everywhere.” [Letter to Johann Jakob Hottinger from 15<sup>th</sup> March, 1799].

[III 24; XIII 179]

## 72. Europe II

**A**lthough Europe was or became national history, the overarching nature of the Holy Roman Empire (of the German Nation) always remained an element of its entirety, at least to the outside world (in contrast to Islam and Turkey, for example). In modern terms, “common European” was always a dimension, sometimes stronger, sometimes weaker, which only faded in 1789, but remained alive in the German idealism of I. Kant (treatise ‘Perpetual Peace’, Cosmopolitanism) or in Goethe (in the form of the ‘West-Eastern Divan’ respectively “God’s is the Orient! / God’s is the Occident! ...”).<sup>38</sup>

[XI 1067 seq.]

## 73. Dwarfs

**T**he second part focuses on the similarities and differences between the three (if you will) “systems” or legal structures at national, regional and international level. It is about their

p. 24: ‘Das Klassische an Ludwig Thoma’ (television report).

<sup>38</sup> From the vast literature: recently J. A. Schlumberger/P. Segl (eds.), *Europa – aber was ist es?* 1994; *H. Maier*, Art. Europa II, *Staatslexikon* vol. 6, Görres-Gesellschaft (ed.), 7<sup>th</sup> edition 1992, p. 104 seq.; *M. Stolleis*, *Das europäische Haus und seine Verfassung*, *KritV* 1995, p. 275 et seq.; *E. Denninger*, *Das wiedervereinigte Deutschland in Europa*, *ibid.*, p. 263 et seq.



Friedrich Wilhelm  
Schelling

1775-1854

Joseph Karl Stieler  
Oil painting, 1835





### Manuscript

Author unknown, around 1410 southern Germany

The dwarf-giant parable is first attested by Bernard of Chartres around 1120: “Bernhard of Chartres said that we are, as it were, dwarfs sitting on the shoulders of giants in order to be able to see more and more distant things than they do – of course not thanks to our own sharp eyesight or physical size, but because the size of the giants lifts us up.”

John of Salisbury  
'Metalogicon' 3,4,46-50

relationship with each other, without the possibility of presumptuously constructing a “superstructure”, “levels” or a “roof”. This would require a “new school of Salamanca”, a “new (also “green”) Kant” and a Goethe of today. We should feel like dwarfs, but here and there, standing “on the shoulders of giants”, we can see a little further than these giants.

[III 236]

## 74. The Future of Europe

For today’s situation, we would also need new impulses from the Enlightenment, even from Romanticism. Goethe’s realism should be combined with the somewhat naïve and idealistic thinking of F. Schiller. This friendship between Goethe and Schiller in Weimar (the place where the peak of constitutional thinking – the Weimar Constitution of 1919 – was achieved) symbolises this fortunate connection between realism and idealism, which is still very much alive in our German tradition.

[I 272]

## 75. Europe as a third Nature

The EU countries have long since ceased to be “foreign countries” to each other. (This has so far escaped some German state law teachers.) European policy is no longer “foreign policy”. If the polis is a “second nature” according to ancient tradition, doesn’t Europe then represent at least a “third” nature for Europeans? – Bringing nature and culture together in Goethe’s sense?

[V 17]

## 76. Quantum of Utopia for Europe

For the constitutional Europe resembles a “moulded form that develops as it lives” in the sense of Goethe’s respectively H. Heller’s words. The elements of the status quo (e.g. subsidiarity and “national European constitutional law”, e.g. in Article 23 para. 1 Basic Law), as well as the openness of the “general (legal) principles” contain the potential for future developments in itself, and the constitutional Europe of today and tomorrow cannot progress without a “quantum of utopia”.

[V 85]



## 77. Europe as a Cultural Community

**M**y lecture is based on the belief that art and religion precede all other creations, provide them with the “material”<sup>39</sup> and enable people to “walk upright”. To quote Goethe: “Whoever masters science and art, also has religion; those without the former two, surely needs religion”. This is particularly true today for Europe and its cultural public sphere. Europe lives and “develops” as a cultural community. Why this topic here and now? Because it relies on the “public optimism” of I. Kant and P. J. A. von Feuerbach. His demand for “publicity and orality in the administration of justice” (1821), like the sentence “nulla poena sine lege” (around 1800), pre-formulated a part of constitutional public sphere. ... A part of this publicity is also alive in today’s ceremony of the Jenens academic community. I don’t need to mention your cultural aspect. German idealism and Weimar and Jenens classicism are still part of the cultural public sphere today – in Europe.

[V 151]

## 78. Common European Constitutional Law

**C**ommon European constitutional law is more an expression of growth processes than of setting processes, as significant impulses arising from written regulations may be. It is characterised by a specifically dynamic and processual nature respectively culture. In short: “Common European constitutional law” does not resemble a firmly minted coin, but rather the image of the “moulded form that develops as it lives”, in the sense of J. W. Goethe and H. Heller.

[XI 1084]



Weimar on  
21<sup>st</sup> August, 1919

after the swearing-in of the first Reich President Friedrich Ebert; Reich Chancellor Constantin Fehrenbach and the members of the government at a celebration of the Republic in the German National Theatre in Weimar.

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39 My contribution to this approach: Die Freiheit der Kunst im Verfassungsstaat, AöR 110 (1985), p. 577 (590 et seq.); *idem*, Die Freiheit der Kunst in kulturwissenschaftlicher und rechtsvergleichender Sicht, in: Kunst und Recht im In und Ausland, 1994, p. 37 et seq. Notable from the newspaper literature: J. Rüttgers, Kunststück Zukunft. Contrary to H. M. Enzensberger’s opinion, culture is by no means ‘frothy pastry’ for politics. Artists repeatedly paved the way for new ideas., in: Die Zeit no. 12 fom 14<sup>th</sup> March, 1997, p. 62.



Dante Alighieri

1265-1321

Death mask  
Palazzo Vecchio, Florence



Emperor Frederick II

1194-1250

Late 13<sup>th</sup> century

## 79. Weimar Classicism I

Europe's culture thrives not only from its high points and peaks, which enable us to walk upright and create “transcendence”: from Dante to Cervantes, from Michelangelo to Max Ernst, from Shakespeare to the “Weimar Classicism” [Goethe and Schiller], from C. Monteverdi to J. S. Bach and W. A. Mozart, one can certainly speak of a “European house concert” in which the sciences and arts of all nations and regions from Frederick II from Sicily to the Baltic, are involved.

[XI 420]

## 80. Weimar Classicism II

As confusing as the abundance of different types of museums is (think of pinakotheks or glyptothekes, of collectors' museums, of private museums, of university museums, of church museums, of folklore and local history museums as well as of natural history museums – there is a Glinka Museum in Moscow), so it would be intriguing from the perspective of the constitutional state to develop a theory of museums. From the rich sample material, one should remember the “Weimar Classicism” foundation in Weimar, which is considered part of the German museum and archive landscape, especially in times of crisis (see FAZ of October 21, 2010, p. 25).

[IX 147]

## 81. Golden Age in Europe

Art is perhaps the most “reliable” part in which the European public sphere manifests itself. This can be proven not only by the “Golden Ages”, in which almost every European nation gave its best and the “voices of the peoples” became a “European house concert” – even more austere times have produced European classics. ... The “Golden Age” of Spain, which helped shape Europe, was in the 16<sup>th</sup> century; This was followed by the Netherlands (precisely 1600 to 1680)<sup>40</sup>, then France's “Great Age” (Corneille, Racine, Molière, the invention of ballet at the court

<sup>40</sup> On this the volume: Amsterdam 1585-1672, *Morgenröte des bürgerlichen Kapitalismus*, 1993, B. Wilczek (ed.). Consider also the “European 17<sup>th</sup> century” (von Rembrandt über Velasquez, Bernini, Borromini and Pietro da Cortona).

of Louis XIV) to the Weimar Classicism of Goethe and Schiller and German Idealism, which became a European event – a J. J. Winckelmann was once head of Rome’s cultural antiquities (the Golden Age of Danish painting lasted from 1818 to 1848); Hand in hand, all of this with the (European) music of J. S. Bach and W. A. Mozart to the European interconnecting impact of F. Liszt and F. Chopin.

[V 142]

## 82. Globalisation

What is new about globalisation? The term itself isn’t that old, but maybe the concept is? The linguist J. Trabant recently even wrote about “Globalese” [reduced English for international communication] as a language. Let’s consider some classic texts that anticipated almost everything a long time ago. Shakespeare: “All the world is a stage”; Goethe: “World Literature”; Kant: “Cosmopolitan intention”; F. Schiller: “What I thought as a citizen of this world”. So, long before “globalization”, there were already worldviews, world religions, and world considerations, including Europe’s colonization of other continents. Relevant quotes can be found even among the ancient Greeks, for instance in Hellenistic times. However, what is unique and new – the “velociferous” [at devilish speed], a term from Goethe – what is new about the phenomenon of globalisation, which is also brought about by the Internet?

[III 262; IV 223]

## 83. Cultural Identities of Nations

One must also take into account the cultural identities of the various nations: G. Verdi standing for Italy, Kant and Goethe as well as the federalism for Germany, “1789” for France, the Parliament for Great Britain, the differentiated system of regional autonomies for Spain and so on.

[III 269]

## 84. Image of the World

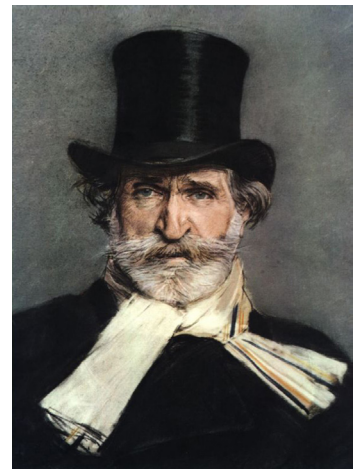
The use of the metaphor “image of the world” can recently be found in an essay by R. Schröder: ‘On the benefits of the measured world, image of the world and attitude to life in the



Johann Joachim  
Winckelmann

1717-1768

Anton von Maron  
Oil painting, 1767



Giuseppe Verdi

1813-1901

Giovanni Boldini  
Pastel, 1886



### Goethe Medal

1<sup>st</sup> version, gold, 32 mm

The Goethe Medal, is a yearly prize (since 1955) given by the Goethe-Institut honoring non-Germans “who have performed outstanding service for the German language and for international cultural relations”.

Baroque: The Gottorf Globe as an expression of the Copernican turnaround’ (FAZ of October 8, 2005, p. 44). Also noteworthy is J. Spinola’s essay regarding Bayreuth and Salzburg: ‘Is it still about art?’ (FAZ of July 25, 2007, p. 1): “Everything that promised to provide a sense to the image of the world was mixed together without regard for compatibility ...” E. Beaukamp gives his obituary to the recently deceased artist J. Immendorff the title ‘Images of Germany’ (FAZ of June 1, 2007, p. 35). Looking at a retrospective of German artists who worked on both sides of the border, especially A. R. Penck, it says: “Penck creates images of the world” (FAZ of June 13, 2007, p. 2). Goethe’s term “World Literature” has made history worldwide to this day (cf. only FAZ of June 28, 2007, p. 37: “France’s poets argue for the “images of the world”).

[VII 98]

## 85. Goethe Medal

**I**n order to underpin the open society of constitutional legislators and constitutional interpreters, there was still a lack of research into the fourth subject area of “monuments”, other memories, which include, in addition to honorary prizes such as the Goethe Medal, the Büchner and Börne Prize, commemorative coins, but also contemporary ones (e.g. F. Liszt), later rediscovered coins such as the Augustalis of Frederick II, and other topics of the cultural memory of a nation, whensoever the protection of cultural property in particular was already elaborated in 1996 from the author’s point of view (in: F. Fechner/T. Oppermann, eds., ‘Prinzipien des Kulturgüterschutzes’ [‘Principles of cultural property protection’], 1996, p. 91 ff.). Particularly in times of globalisation, which is primarily driven by economic factors, there is a need for a scientific awareness of the cultural root network or cultural humus that holds together the type of constitutional state “in its inmost folds” (Goethe).

[IX 5]

## 86. Monuments

**T**hus, it may suffice to recall the essential theses of constitutional doctrine as cultural science (1982/98): constitution as culture, the pluralistic, open concept of culture. Monuments can be found in all three types of culture: high culture (classi-



cal foundations), popular culture (“local history”) and alternative culture (the Beatles in the film, pop culture). That monument topics are often closely linked to the protection of landscape and nature in constitutional texts, should be repeated: in the spirit of Goethe’s famous poem: “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other.”

[IX 151]

## 87. Culture of Remembrance

In this essay on general and special culture of remembrance, of all places, we are reminded – not only ironically – of Goethe’s famous multi-line as a “counter-classic” to all the literature and jurisprudence cited:

America, you’ve got it better  
 You feel not uneasy,  
 In lively time,  
 By useless memory  
 And empty strife.

[X 170]

## 88. Unwritten Cultural Obligation

To distinguish from all of this is the federal government’s cultural mandate in the interests of the state as a whole (“responsibility for safeguarding matters of general national or international importance”), which can relate to cultural fields in both East and West (e.g. for “Youth make music” [“Jugend musiziert”]). However, since certain features that help to shape the image of Germany as a cultural nation worldwide are located exactly in East Germany (Weimar’s classical sites and the “Museum Island in Berlin”,<sup>41</sup> the Bach archive in Leipzig), their promotion is an “unwritten” cultural obligation of the federal government, regardless of the written Unification Treaty by virtue of the nature of matters.

[XI 795 f.]

## 89. Switzerland

The fact that the German and Swabian Friedrich Schiller gifted the Swiss their national epic ‘William Tell’ is a stro-

<sup>41</sup> T. Waigel, FAZ of August 26, 1993, p. 27, also seems to agree: “Irrespective of the expiry of the transitional funding, the federal government has taken over the sponsorship and co-financing of institutions of national importance in the new federal states. These include the Museum Island Berlin Mitte ...”.



### Augustalis

Emperor Frederick II.  
 after 1231  
 Brindisi, 5.22 g.



### Bach Archive Leipzig

Founded in 1950



ke of luck – apropos, Goethe left this subject to F. Schiller.<sup>42</sup>

[IV 74]

## 90. Italy

**A**dmiring Italy as a German is not new: J. W. von Goethe at the latest opened up these paths and left a deep mark on Germany's cultural memory.

[I 37]

## 91. Grand Tour

**F**rom the private side, there are always large exhibitions which constitute Europe public sphere: in March 1997, for example, the “Grand Tour” exhibition in Rome, which shows how every country has sent its travellers or “educated classes” to Italy since the 18<sup>th</sup> century: even England, classically Germany, and not just since Goethe's Italian Journey (1787/88).

[V 143]



Goethe in the Roman Campagna

Johann H. W. Tischbein  
Oil painting, 1786/87

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<sup>42</sup> On this R. Safranski, *Goethe und Schiller – Geschichte einer Freundschaft*, 2009, p. 202 seq., 279 seq.

## 92. Georgia I

**J**oy, honor, and gratitude fill me on this day in Tbilisi [2009]. To receive an honorary doctorate in this challenging time for you goes beyond my own small scholarly existence; it is a bridge between two European communities of scholars: between Germany and Georgia, the “European Georgia”, as I may say in a modification of a famous expression by T. Mann about “European Germany”. If there were a ‘Georgian Journey’ by Goethe – parallel to his unique ‘Italian Journey’ – I would have an easy time with my *Lectio Doctoralis* today.

[IV 167]

## 93. Georgia II

**F**oregrounded there must be clarity about “pre-understanding and methodological choices”, in my case the cultural science constitutional-comparative approach, there must be the indispensable scientific optimism about the success of a “European Georgia”, the realization that a constitution like yours can become the “educational goal” of all citizens, especially in schools and universities, and it should be awareness that rational and emotional sources of consensus are needed, such as the national holiday and the national anthem as well as other state symbols, in order to hold your beautiful country “in its inmost folds” together – to use a word from Goethe –, especially in times of great internal dangers. Constitution as a public process and culture, as a “moulded form that develops as it lives” (Goethe/H. Heller), but also constitution as a limit for the powerful and a guarantee for open collective decision-making processes in which the opposition has its place – all of these are Paradigms that underlie the following keywords but must be unfolded beforehand.

[IV 169]

## 94. Spanish Journey

**G**oethe opened up Italy to us in a unique way. Unfortunately, there is no ‘Spanish Journey’ by him. So every German has to find his own path to Spain and overcome the traditions that, for example, have darkened the image of Philip II (keyword: Inquisition).

[IV 226]



Georgia in Europe

## 95. Spanish Cathedrals



### Cathedral in Córdoba

since 1236, probably the oldest in Spain in terms of construction, a mosque from 784, previously a western Gothic cathedral, a temple in Roman times.

The Spanish constitution also addresses the protection of the environment and culture in two consecutive articles (Art. 45 and 46) – 14 cathedrals are World Heritage Sites. This contextuality is probably rooted in the human condition, which is characterised by “nature and art” (or culture in general), which in turn stand in a context that even many classics are ultimately unable to grasp (cf. Goethe’s “Nature and Art, they go their separate ways ...”) The Unesco Convention of 1972 now elevates it to the global scale of humanity. Human life can only flourish on the basis of national and global cultural and nature protection.

[IX 123]

## 96. Brazil’s Goethe Monument

On the fundamental rights of the [Brazilian] Constitution of 1988: guaranteed in a separate Title II, they are divided into “individual and collective rights”, “social rights” and “citizenship rights”. In the style of the aforementioned Roman volume of images and text (p. 167 et seq. above), they are, with visual support, “illustrated” as follows: ...

– the “freedom of artistic, scientific and communicative activity” (IX) – documented in its creations in the form of music (e.g. H. Villa-Lobos and T. Jobim, including “Samba”), architecture (O. Niemeyer), paintings by I. Nery, L. Segall, C. Portinari, A. Volpi, C. Tozzi, G. De Barros and others in: ‘As Constituições Brasileiras’, Fundação Armando Alvares Penteado, 2007, p. 208 et seq. respectively 282 et seq.) and, last but not least, the legal sciences, especially the highly vital constitutional law doctrine in its many literary genres: from textbooks to commemorative publications (e.g. for P. Bonavides and G. Mendes), from the yearbook (edited by the latter) to the monograph and the commentary; The Goethe monument in Porto Alegre is noteworthy.

[XIII 607]

## 97. Arab Spring

What remains to be considered is that the Arabs themselves are “torn between Islam and secularism, tradition and modernity” – a Syrian philosopher compares them to Hamlet



Goethe Monument  
in Porto Alegre  
1984

<sup>43</sup> The ‘Principle of hope’ (E. Bloch) and the ‘principle of responsibility’ (H. Jonas) become equally relevant.

The constitution-makers must invest a great deal of energy and imagination in environmental protection and the safeguarding of cultural heritage; it is also recommended to integrate universal protection of cultural property into national constitutions, following the example of Ukraine. Effective enforcement mechanisms for supra-regional and universal human rights texts, thanks to independent judiciary, are particularly important. The Brazilian constitutionalism,<sup>44</sup> as a pioneering movement throughout Latin America, can be just as much a model as European solutions. Europe must engage cooperatively in its own interest, as well as for general humanitarian reasons. The UN is called upon as a whole, including in its sub-constitutions and via international law. Rightly, it aims to decide on a “civil Libya mission”<sup>45</sup>.

In all of this, two classical texts may serve as inspiration: Goethe’s “God’s is the Orient! / God’s is the Occident! / Northern and southern lands / Rest in the peace of His hands” and Lessing’s “Ring Parable” on the equal rights of all three world religions. There might also be classical literature in Arab poetry, akin to Confucius’ maxims in China.<sup>46</sup>

[XIII 778 seq.]

## II. TRUTH, JUSTICE AND THE COMMON GOOD

### 98. Gretchen’s Question

**G**retchen’s question [Gretchenfrage] means: The famous question from Gretchen to her lover Faust in ‘Faust I’:

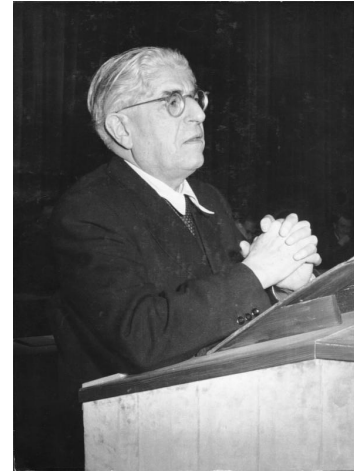
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<sup>43</sup> On this see the interview with Sadiq al Azm: “The Arabs could soon be a little less hamlet-like”, FAZ of August 12, 2011, p. 5.

<sup>44</sup> A partial aspect in *M. A. Maliska*, Die Geschichte des brasilianischen Föderalismus, JöR 58 (2010), p. 617 et seq.; *G. Mendes*, Die 60 Jahre des Bonner Grundgesetzes und sein Einfluss auf die brasilianische Verfassung, JöR 58 (2010), p. 95 et seq.

<sup>45</sup> FAZ from September 14, 2011, p. 9.

<sup>46</sup> Latest literature in Germany: *H. Abdel-Samad*, Krieg oder Frieden. Die arabische Revolution und die Zukunft des Westens, 2011; *M. Lüders*, Tage des Zorns. Die arabische Revolution verändert die Welt, 2011; *V. Perthes*, Der Aufstand. Die arabische Revolution und ihre Folgen, 2011.



Ernst Bloch, 1954

1885-1977



Gotthold Ephraim Lessing

1729-1781

Anna Rosina de Gasc  
Oil painting, 1767/68



John Rawls, 1971  
1921-2002

“Now tell me, what do you think about religion?” And to improvise: Just as it is difficult for theology to answer the question: “What is God?”, it is just as difficult for us lawyers to answer the question: “What is justice – and what is truth?”. This is despite the existence of many classical and modern theories of justice and truth (from Aristotle to J. Rawls, from Averroes to Gadamer).

For the next generation of lawyers, it seems particularly important to me that they learn many languages. J. W. von Goethe wrote the wonderful sentence: “He who does not know foreign languages knows nothing about his own”.

[I 307; IV 9]

## 99. Truth I

J. W. von Goethe, who had already composed a universal *cantus firmus* with his autobiography ‘Poetry and Truth’, sounds somewhat different:

Is there any conversation, we don't to each other lie?  
more or less unseen?  
Such a ragout of truth and lies,  
that is the cooking that tastes best to me.

...

Harmful truth, I prefer it to useful error,  
Truth heals the pain it may cause us.<sup>47</sup>

I [*the Poet*] had nothing and yet enough,  
Pleasure of false impressions and urge for truth.

*‘Faust, Prelude’*

Through the mouth of two witnesses  
The truth is made known to all places.

*‘Faust I’*

... poetic traits they denote  
established indelible truth.

*‘West-Eastern Divan’, Fetwa*

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<sup>47</sup> Cited as per Jacob und Wilhelm Grimm, *Deutsches Wörterbuch*, vol. 13, 1922, column 839 (888).



Goethe ambiguous:

Let us too present such a spectacle! ...  
In colourful images, little clarity find,  
Much error, and a spark of truth behind,  
Thus is brewed the best potion,  
That refreshes and uplifts the creation.

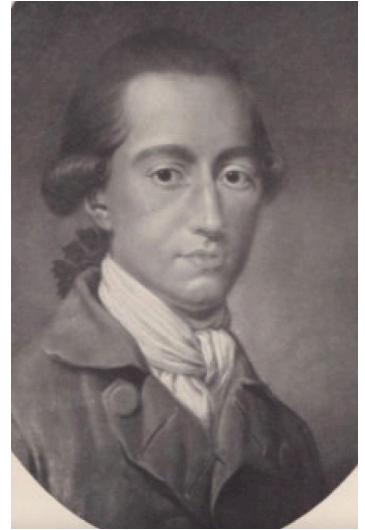
*'Faust, Prelude'*

[II 50 et seq.]

## 100.-132. Truth II

The diversity of truth-related issues is particularly striking in Goethe's works. He explores the polyvalence and ambivalence of "truth" like few others. This becomes evident when one compiles verses, conversation notes, and letters:

1. The misguided replaces with vehemence  
What he lacks in truth and strength.<sup>48</sup>
2. Wisdom is only in the truth.<sup>49</sup>
3. If one led me into the house of truth,  
By God! I would not leave, forsooth.<sup>50</sup>
4. The first and last requirement of genius  
is a love for truth.<sup>51</sup>
5. "... that truth might well be compared to a diamond, whose  
rays do not go in one direction but in many."<sup>52</sup>



Goethe

Georg Oswald May  
1779

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48 Torquato Tasso: Fourth Act, Fourth Appearance, vol.: 3/1, line 2677 seg. Johann Wolfgang von Goethe: Sämtliche Werke nach Epochen seines Schaffens – Münchner Ausgabe, Carl Hanser Verlag München, 1990.

49 Maximen und Reflexionen. From: Über Kunst und Altertum: Third volume first issue 1821. Eigenes und Angeeignetes in Sprüchen, Goethes sämtliche Werke in: C. Hanser Verlag (cf. Nr. 1), 1991, vol. 17, p. 736.

50 Zahme Xenien II, J. W. v. Goethe: Gedenkausgabe der Werke, Briefe und Gespräche, vol. 1, p. 620, 2<sup>nd</sup> edition 1961. Unless otherwise stated, the citation is based on the Artemis-Gedenkausgabe der Werke, Briefe und Gespräche, Zurich and Stuttgart.

51 Maximen und Reflexionen, 1827. From: Über Kunst und Altertum, Sixth volume, first issue, 1827, text numbering no. 382, p. 786, C. Hanser Verlag, 1991, vol. 17.

52 For conversation partners, only the name is given; for letters, the recipient's



Goethe

Friedrich Bury  
Chalk drawing, 1800



Goethe

Ferdinand Jagemann  
Oil painting, 1818

6. For this glorious quality it possesses [the truth], wherever it appears, that it opens our eyes and hearts, encouraging us to look around in the field where we must work in the same way and to draw fresh breath for renewed faith.<sup>53</sup>

7. ... for someone who constantly speaks it [the truth] unwisely, he will suffer persecution ...<sup>54</sup>

8. The plain truth, a simple theme  
Grasped by all, it would seem  
Yet to you, it appears too lean  
Fails to satisfy the wonder's gleam ...<sup>55</sup>

9. Therefore, if great truths emerge from various individuals at the same time, there are disputes and contestations, because no one so easily considers that he has the same relation to the contemporary world as he does to past and future.<sup>56</sup>

10. It is one truth for all, yet each sees it differently,  
That it however remains one, makes the various opinions true.<sup>57</sup>

11. Violence and cunning, men's highest glory,  
is through the truth of this high soul  
Ashamed, and pure childlike trust  
In a noble man will be rewarded.<sup>58</sup>

12. In the end I help myself with truth;  
The worst remedy! The need is great.<sup>59</sup>

13. Is truth like an onion, layers to unpeel?  
What you haven't put in, you can't reveal.<sup>60</sup>

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name was added "To...". Eckermann, March 11, 1828, third part: 1822-1832, vol. 24, p. 681, 3<sup>rd</sup> edition 1976.

53 Letter to Georg Niebuhr, April, 15 1827/ vol. 21, 739, 2<sup>nd</sup> edition 1966.

54 Reineke Fuchs 11<sup>th</sup> canto, verse 251, vol. 3, p. 142, 3<sup>rd</sup> edition 1966.

55 Faust, Paralipomena – To the First Part – Study Room II (Pact Scene) no. 30 from: Goethe, Berliner Ausgabe, vol. 8, Poetische Werke, Aufbauverlag, 4<sup>th</sup> edition 1990, p. 567.

56 Schriften zur Natur- und Wissenschaftslehre, Meteore des literarischen Himmels, Antizipation vol. 16, p. 913, 2<sup>nd</sup> edition 1964.

57 Gedichte aus dem Nachlaß. Aus den Tabulae votivae mit Friedrich Schiller, Wahrheit, vol. 2, p. 534.

58 Iphigenia on Tauris, 2<sup>nd</sup> version, 5<sup>th</sup> act, 6<sup>th</sup> appearance, verse 2142 seq., vol. 6, p. 211, 2<sup>nd</sup> edition 1962.

59 Faust II, Hell erleuchtete Säle / Mephistopheles, Verse 6364 seq., vol. 8, p. 356, Goethe, Berliner Ausgabe vol. 8 – Poetische Werke, 4<sup>th</sup> edition 1990.

60 Gedichte aus dem Nachlaß, Xenien mit Friedrich Schiller No. 56, Analytiker,

14. I accept every truth, even the one that makes me nothing;  
But this I demand – make me nothing before you say it.<sup>61</sup>

15. If I know my relationship to myself and to the outside world,  
then I call it truth. And so everyone can have their own truth, and  
yet it is always the same.<sup>62</sup>

16. It is said that the truth lies between two opposing opinions.  
Not at all! The problem lies in between, the invisible, the eternally  
active life, thought in peace.<sup>63</sup>

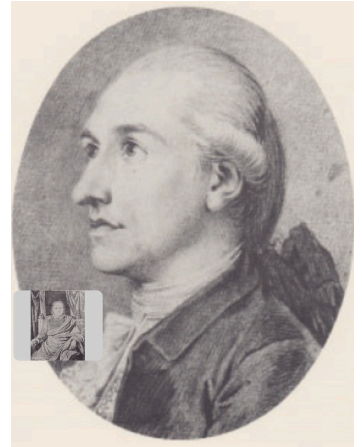
17. If God had been concerned that men should live and act in  
truth, he would have had to organise his setup differently.<sup>64</sup>

18. Truth is never harmful, it punishes – and the mother's  
punishment]  
Forms the wavering child, resisting the flattering maid.<sup>65</sup>

19. Why is truth far and wide?  
And in deepest realms hides?  
No one understands at the right tide!  
If understanding came at the right times,  
Truth would then be close and bright,  
Lovely and gently to all eyes.<sup>66</sup>

20. Is the poet only born? The philosopher is no less,  
All truth is ultimately only formed, seen.<sup>67</sup>

21. A much higher organ is needed to grasp the truth than to defend  
error.<sup>68</sup>



Goethe

Jens Juel  
Chalk drawing, 1779



Goethe

Unknown master  
Around 1765

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vol. 2, p. 450, 2<sup>nd</sup> edition 1962.

61 Gedichte aus dem Nachlaß, unveröffentlicht. Xenien mit Friedrich Schiller  
No.148, Die Bedingung, vol. 2, p. 517, 2<sup>nd</sup> edition 1962.

62 Maxims and Reflections, vol. 9, p. 518, 2<sup>nd</sup> edition 1962.

63 Maxims and Reflections, vol. 9, p. 580, 2<sup>nd</sup> edition 1962.

64 Maxims and Reflections, vol. 9, p. 611, Aus dem Nachlaß, 2<sup>nd</sup> edition 1962.

65 Aus den Tabulae votivae mit Friedrich Schiller, Zucht, vol. 2, p. 531, 2<sup>nd</sup>  
edition 1962.

66 West-Östlicher Divan, Hikmet Nameh, Buch der Sprüche, vol. 3, p. 337 seq.,  
3<sup>rd</sup> edition 1966.

67 Gedichte aus dem Nachlaß, Xenien mit Friedrich Schiller, Wissenschaftli-  
ches Genie, vol. 2, p. 450, 2<sup>nd</sup> edition 1962.

68 Maxims and Reflections, vol. 9, p. 653. Aus dem Nachlaß: Über Natur und  
Naturwissenschaft, 2<sup>nd</sup> edition 1962.



**Goethe**

Johann G. Schadow  
Marble bust, 1816/1823



**Goethe**

Ludwig Sebbers  
Painting on porcelain  
cup, 1826

22. All laws and moral rules can be traced back to one thing: truth.<sup>69</sup>

23. Truth belongs to man, error to time.<sup>70</sup>

24. It is as certain as it is marvellous that truth and error arise from one source; therefore one must often not harm error, because at the same time one harms the truth.<sup>71</sup>

25. Nothing is more harmful to a new truth than an old error.<sup>72</sup>

26. Truth belongs in all free written works, either in relation to the object or in relation to the feeling of the protagonist, and, God willing, in both.<sup>73</sup>

27. Friends, consider carefully to speak the deeper, bolder truth  
Aloud, immediately people will turn it upside down.<sup>74</sup>

28. This is why revealed truths are only silently admitted, gradually spreading until what has been stubbornly denied finally appears as something entirely natural.<sup>75</sup>

29. Steep indeed is the path to truth, and slippery to climb,  
But we still prefer not to lay it upon donkeys.<sup>76</sup>

30. ... the true is simple and requires little effort, the false provides opportunities to splinter time and energy.<sup>77</sup>

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69 Conversation with Friedrich von Müller, No. 1411, March 28, 1819, vol. 23, p. 49, 2<sup>nd</sup> edition 1966.

70 Maxims and Reflections, vol. 9, p. 513. Kunst und Altertum, vol. III, first issue, 1821, Eigenes und Angeeignetes in Sprüchen, 2<sup>nd</sup> edition 1962.

71 Maxims and Reflections, vol. 9, p. 513. Kunst und Altertum, vol. III, first issue, 1821, Eigenes und Angeeignetes in Sprüchen, 2<sup>nd</sup> edition 1962.

72 Maxims and Reflections, vol. 9, p. 595. Wilhelm Meisters Wanderjahren; Aus Makariens Archiv, 1829, 2<sup>nd</sup> edition 1962.

73 Schriften zur Literatur, Bildnisse jetzt lebender Berliner Gelehrten. Deutsche Literatur in: Jenaische Allgemeine Literaturzeitung, Febr. 26, 1806, vol. 14, p. 230, 2<sup>nd</sup> edition 1964.

74 Gedichte aus dem Nachlaß, Xenien mit Friedrich Schiller, Gefährliche Nachfolge, vol. 2, p. 486, 2<sup>nd</sup> edition 1962.

75 Maxims and Reflections, vol. 9, p. 658. Aus dem Nachlaß: Über Natur und Naturwissenschaft, 2<sup>nd</sup> edition 1962.

76 Gedichte aus dem Nachlaß, Xenien mit Friedrich Schiller, Nr. 54 J-b, vol. 2, p. 450, 2<sup>nd</sup> edition 1962.

77 To Karl Friedrich Zelter No. 578, Jan. 2, 1829, vol. 21, p. 825, 2<sup>nd</sup> edition 1965.



31. To fathom the truth,  
Stretch your stupid face all for naught!  
The truth would be easy to unearth;  
Yet for you that's not enough.<sup>78</sup>

32. What is fruitful alone is true ...<sup>79</sup>

[II 52-57]

### 133. Eternal Search for Truth

The “eternal search for truth” is made possible by the three fundamental freedoms of the constitutional state: the freedom to practise religion, art, and science<sup>80</sup> – now updated in Eastern Europe’s constitutional texts through anti-ideology clauses. The ideologically and confessionally neutral state (Decisions of the Federal Constitutional Court (BVerfGE) 18, 385 (386); 19, 206 (216)), which rejects ‘art judging’ and also allows space for the sciences and their self-understanding (cf. Hungary’s new regulation of 1989: Section 70/G para. 2), thereby unleashes the forces of men to embark on their own path in search of truth.<sup>81</sup>

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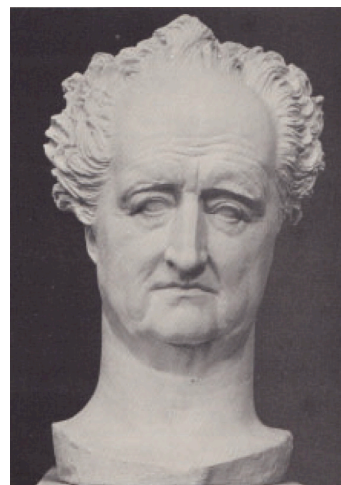
78 Faust Paralipomena – Zum ersten Teil, Auditorium, Nr. 20, Mephistopheles, Goethe, Berliner Ausgabe vol. 8 – Poetische Werke, Aufbau Verlag, 4<sup>th</sup> edition 1990.

79 Vermächtnis, 1829, cited as per J. Hoffmeister (ed.), Wörterbuch der philosophischen Begriffe, 2<sup>nd</sup> edition 1955, p. 653.

80 Thus, the freedom to express truth is one layer of all fundamental freedoms.

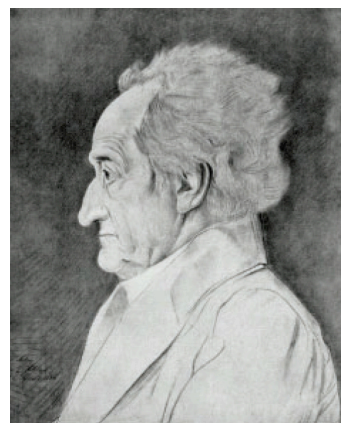
See the classic conception of R. Smend, Das Recht der freien Meinungsäußerung, VVDStRL 4 (1928), p. 44 (50): Freedom of opinion “first of all a piece of morally necessary breath for the individual to be allowed to speak the truth”. – Cf. also K. Jaspers, Wahrheit und Wissenschaft, Basler Universitätsreden, 42/43, 1960, p. 3 (27): “The university has the task of allowing the scientific way of thinking to come into effect and finding the language for the overarching truth.” – For an understanding of artistic freedom from Goethe’s triad see my contribution, ‘Die Freiheit der Kunst in kulturwissenschaftlicher und rechtsvergleichender Sicht’ in: Kunst und Recht, 1994, p. 37 (43 seq., 85 seq.) – See also BVerfGE 35, 79 (113): “... everything that, in terms of content and form, can be viewed as a serious, systematic attempt to determine the truth.” BVerfGE 90, 1 (12): “Constitutive reference to truth”, “judgment about ... truth or falsehood of results can only be made scientifically.”

81 R. Guardini, in: F. Messerschmid (ed.), Wahrheit des Denkens und Wahrheit des Tuns, 1985, p. 12: “The truth of thinking consists in carrying out a thought to its full depth, height and breadth and not shying away from any consequences. The truth of action is different. It consists in looking for the narrow passage of possibility and restraining one’s own strength to the right measure,



Goethe

Jean David d’Angers  
Marble bust, 1829



Goethe

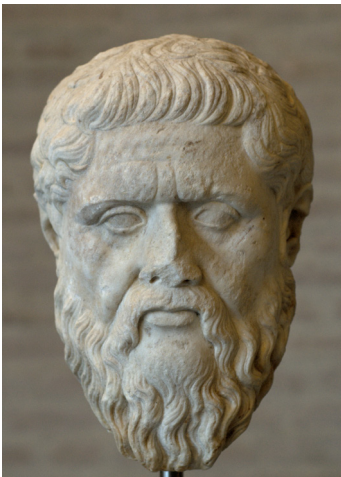
Ludwig Sebbers  
Chalk drawing, 1826





Wolfgang Hoffmann-Riem

\*1940



Plato

428/427 or 424/423-348 BC

Presumably by Silanion, Roman copy of a Greek portrait

“Whoever masters science and art, also has religion; those without the former two, surely needs religion.” The inner connection between these three freedoms has never been seen more clearly than in this words of Goethe, and in a way this connection exists precisely because all three basic freedoms derive their value from the intensive pursuit of truth. In areas of life such as the economy, which, contrary to the economism and materialism so prevalent among us today, has only an instrumental character, the focus is not on truths, but in religion, art and science it certainly is. What is created in the exercise of this triad of “truth rights” “encounters” fellow human beings, and sometimes humanity as a whole (when it comes to “world literature”, for example) as culture. It, e.g. in the form of the “cultural heritage of mankind”, gives them an “object” of their freedoms, creates the basis and reasons for the “conditio humana” of the individual.

[II 82 seq.]

### 134. Truth in Quoting

Some authors are “read more than quoted” and vice versa – to adapt a phrase from W. Hoffmann-Riem. Overall, a lot of modesty is required. Ultimately, the following applies to the scientific intergenerational contract: “All owe themselves to all”. Naturally, humans find it difficult to set aside their own vanity. Particularly, the elder (authors) do not want to be entirely forgotten. The increasingly practiced “conference tourism” today makes its own negative contribution. Only those who are locally present and “seen” are later quoted (often fleetingly enough). We may adopt the phrase “nothing new under the sun” – since Plato – as well as Goethe’s insight that it only matters to express an old thought, often formulated before, in a new way: self-education for the truth in quoting and for responsibility on “reflecting upon” remains a scientific ethical imperative.

[XVII 402]

### 135. Justice

On Article 20 para. 3 GG (principle of the rule of law, especially “law and justice”): ... J. W. v. Goethe: “Laws and

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knowing that the approach taken will be carried forward by the inner logic of life itself.”

rights, a legacy spun, / Like an enduring illness, they're passed on." ['Faust I']; further classic quotes from Goethe: "In interpretation, be lively and bright! / If you don't expound, then set something alight." ['Tame Xenias', 1827] and: "Justice: Attribute and Phantom of the Germans." ['Maxims and Reflections. From the estate. About literature and life'].

(III 22; XIII 178]

### 136. Power

From Victor Hugo we learn: "No army in the world can resist the power of an idea whose time has come." Finally, Rabindranath Tagore: "We can attain power through knowledge, but we achieve perfection only through love" – an allusion probably to the sentence: "Science itself is power" (F. Bacon). Goethe is pessimistic: "If you have power, you are right" ('Faust II', V, Palace), and even F. Schiller's optimism occasionally evaporates: "In life, strength is right" ('Die Weltweise').

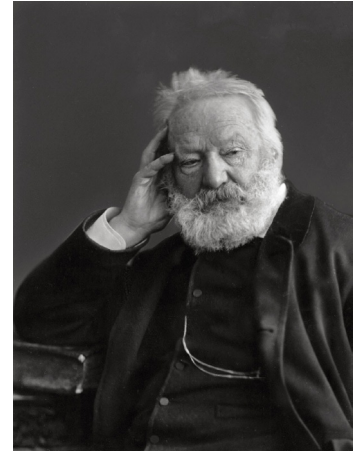
[III 296]

### 137. Criticism

Especially in literature, a highly ambivalent relationship has evolved between producers and critics, i.e. reviewers and reviewed; it is reflected in manifold apt quotations. Consider, for instance, some passages from Goethe's 'Maxims and Reflections', such as: "The Germans, and they are not alone, have the gift of making the sciences inaccessible" or: "Certain books seem to be written, not for one to learn from them, but for one to know that the author knew something." ... The institution of the review or criticism has found its place in many fields ... only rarely, however, will one find in art that fortunate unity ... between creator and critic, which, at least from the creator's perspective, makes it impossible to accuse the critic that he cannot do it any better (it should be noted, however, that the institutional separation of production and criticism in art has the advantage that the critic does not "slam" a work just because he is also a competitor<sup>82</sup>).

[XVI 5 seq.]

82 For example, a best piece of German literary history are the two reviews by *Johann Wolfgang von Goethe* and *Jean Paul* about *Johann Peter Hebel*, which helped his 'Alemannic Poems' achieve a breakthrough, both reprinted in: J. P. Hebel, *Alemannic Poems*, Die bibliophilen Taschen Bücher, 1978, afterword by *Maurenbrecher*, p. 5 et seq., 9 et seq.



Victor Hugo

1802-1885

Around 1884



Francis Bacon

1561-1626

Frans Pourbus the Younger  
Oil painting, 1617



**Hans (1918–1943) and  
Sophie Scholl (1921–1943)**

George J. Wittenstein, 1943



**Hambacher Festival  
1832**

Erhard Joseph Brenzinger  
Partially coloured pen drawing

### 138. Walhalla

**W**alhalla near Regensburg is known far beyond Germany<sup>83</sup> (it contains busts of J. W. von Goethe, L. van Beethoven and K. Adenauer as well as the Scholl siblings – many streets in Germany bear the name of these personalities).

[IX 87]

### 139. Europe’s Public Sphere

**T**he ideal Europe, its vertical dimension, is ultimately also the inspiring “source” for all common European constitutional law. There is a constant need to “visualise” Europe, for example in the form of changing “cultural capitals” (such as Weimar in 1999) or common European festivals (as recently as 1832, Polish and French students took part in Hambach alongside German students!) Thus, Europe’s public sphere updates itself out of culture (see my contribution in: FS Hangartner, 1998, in press).

[XI 1084]

### 140. Double Statue

**M**onuments for great personalities are a distinct theme. The double statue of J. W. von Goethe and F. Schiller in Weimar is well-known, as are those of J. S. Bach in Leipzig, H. Heine, R. Schumann, and G. Gründgens in Düsseldorf, F. Schiller in Stuttgart, and R. Wagner, F. Liszt, J. Paul in Bayreuth.

[IX 90]

## III. METHODOICAL AND MISCELLANEOUS

### 141. Colours

**T**he other topics mentioned can also be explored from a cultural science perspective, e.g. the colours in national flags

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<sup>83</sup> Cf. with regard to the admittance of *H. Heine*: FAZ of July 23, 2010, p. 1; SZ of July 29, 2010, p. 1.

using Goethe's theory of colours (the analysis of Portugal's national flag is particularly fruitful).

[I 23]

## 142. Theory of Colours and Flag Theory

The theory of colours and the theory of flags should begin with a reference to the volume 'Goethe's Thoughts on Music' (1985), which the author unfortunately did not include in his first edition of this publication (his theory of colours was, however, integrated into the theory of flags).<sup>84</sup>

[X 137]

## 143. Goethe's Theory of Colours

It would be presumptuous to present Goethe's Theory of Colours from 1810 here;<sup>85</sup> it would resemble a great amateurism from the pen of a constitutional lawyer. However, Goethe's great concept and the history of its impact on the physics of his time and probably also of today remain relevant.

By his own admission, Goethe was a "man of the eye".

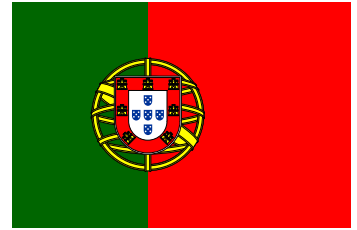
His contemporaries and posterity also characterised him in this way. The most beautiful expression of this privilege is perhaps his unique poem:

Were not the eye itself a Sun  
No Sun for it could ever shine;  
By nothing Godlike could the heart be won  
Were not the heart itself divine.

[Goethe, *Zahme Xenien*, III, 1824]

84 In the volume *Nationalflaggen: Bürgerdemokratische Identitätselemente und internationale Erkennungssymbole*, 2008, p. 156 et seq. On the topicality of Goethe's colour theory, see the exhibition of the same name in Weimar and the report in *SZ* of August 3, 2010, p. 11; *FAZ* of August 23, 2007, p. 32: 'Wie singt man Gedichte eines Olympiers?', the Bad Reichenhall "Liederwerkstatt" and a Salzburg concert deal with Goethe; cf. also 'Goethe und die Ordnung der Farbenwelt': *FAZ* of September 4, 2010, p. Z 3; *FAZ* of July 17, 2010, p. 31. There was also a recent discussion in Hamburg about Goethe's theory of colours after 200 years, *FAZ* of November 3, 2010, p. N 4. Goethe's theory of colours even inspired the educational Bauhaus toys by L. Hirschfeld-Mack, *FAZ* of April 11, 2009, p. 35.

85 Cf. J. W. Goethe, *Die Tafeln zur Farbenlehre und deren Erklärungen*, 1994; Y. Schwarzer (ed.), *Die Farbenlehre Goethes*, 3<sup>rd</sup> edition 2006; P. O. Runge, *Die Farbenkugel*, (1810), 1990; A. Schopenhauer, *Über das Sehn und die Farben*, 1815, now in: *Kleine Schriften* 1986, p. 191 et seq.; A. Kirschmann, *Das umgekehrte Spektrum und seine Komplementärverhältnisse*, 1917.



National flag of Portugal

Columbano Bordalo-Pinheiro

Introduced from 1911



Vignette

Goethe

Goethe's eye appears in the mirror instead of the sun, with a prism and a magnifying glass  
Woodcut, 1791



Michael Stolleis, 2019  
1941-2021

Inspired by this, the human eye can be characterized as a window to the soul and a bridge to science, especially when it comes to national flags and coats of arms. The German language employs the wonderful metaphor of “eyelight” (“Augenlicht”), legal history the “eye of the law” (M. Stolleis), and art speaks of the “inner eye”, S. Ings, ‘Das Auge’ (The Eye), 2008.

Goethe’s poems quoted later in this monograph (under No. 2) also show how consciously and sensitively he knew how to deal with the colour values of nature. No colour theory of constitutional flag science should leave his insights untapped. Certainly, the scientific thesis of Goethe’s colour theory may have been refuted by Newton, the author cannot comment on this. However, the psychological and what Goethe called the “physiological aspect” of colour theory should be taken seriously.

According to information from the Biedermeier Exhibition in Berlin in the summer of 2007, Goethe’s colour theory is not scientifically recognized, but it still shapes a piece of reality today. It has become a fact and gained significance, as in the Biedermeier era, the colours of bourgeois living room wallpapers were assembled and determined based on its principles. This influence persists not only in museums but also in contemporary settings.

Goethe’s stylised colour charts, the attribution of psychological moments to some colours (“subjective colours”) and, above all, the elaboration of the “sensual-moral” role of the individual colours as well as their [“psychological”] effect (keyword: physiological colours) in the form of an influence on feeling, on the soul and on the unity of body and mind are particularly convincing. He also works on “coloured shadows”. According to Goethe, there are beautiful colours, colours that the observer finds pleasant, and those that are harsh on the eyes. He only recognises two pure colours: Blue and yellow (they have been the “first and simplest colours” for him since 1791) and two mixtures of green and (highly valued) purple. According to Goethe, the rest are stages or impure forms of these colours. Colours, in his view, form a polar system. The diversity of colours (shades) derives from a simple primordial polarity. His classic quote: “Weight and counterweight, more and less, action and resistance, doing and suffering, advancing and holding back.” – All of this cannot be taken seriously enough by the constitutional flag theory. On the one hand, this allows the changing colours of a nation or people in history and their effect – above all their power of integration – on the citizens belonging



to them to be explored. On the other hand, it opens the way for an artist, colloquially referred to as a “designer”, commissioned by the relevant authorities today to create new national flags. This artist has the opportunity to design a national flag that is appropriate for their people, nation and constitution. In other words: a national flag created from the spirit of a concrete new constitution, as successfully achieved in Bosnia-Herzegovina a few years ago, in Kosovo in 2008, is currently under consideration for the integration of the flag of Wales in the UK, and is also being discussed in the Parliament in Baghdad, Iraq. The artist, working in the “spirit of the constitution” and designing a national flag, becomes a contributor to constitutional development in a culturally profound sense. To a certain extent, he is an anticipated constitution legislator respectively interpreter of the open society of constitutional legislators and constitutional interpreters.

[XII 156-158]

## 144. Colours in the Mirror of Poems

**J.** W. von Goethe employs the suggestive power of colours in his famous poem ‘Willkommen und Abschied’ (Welcome and Farewell):

A rosy-coloured spring weather  
Enveloped the lovely face ...

...

In his poem ‘Auf dem See’ (On the Lake), he expresses:

Golden dreams, do you come again?  
Away, you dream! As golden as you are ...

...

J. W. Goethe’s poem that begins with ‘Wenn du mir sagst’ (If You Tell Me) concludes with the lines:

Yet, education and colour also lack in the flower of the vine,  
when the berry, ripened, delights humans and gods.

...

Goethe’s wonderful poem ‘Wiederfinden’ (Rediscovery) works at several points with colours and their different values:

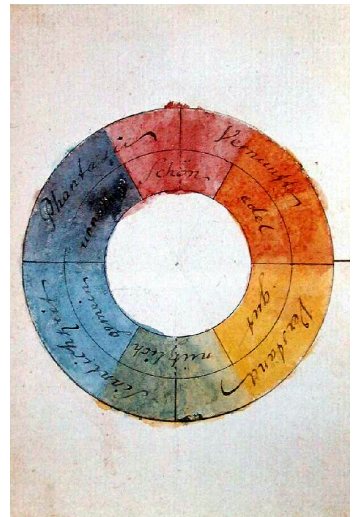


Flag of Kosovo



Union Jack

One suggested redesign of the Union Jack with the red dragon from the flag of Wales added in the centre



Colour circle

Goethe  
symbolizing the human spirit  
and soul life, 1809

Then he created the red sky,  
which took pity on the torment;  
it unfolded for the gloomy  
a resounding play of colours,

as well as

So, with red sky wings,  
it drew me to your mouth ...

Goethe's arguably unmatched poem about Italy, 'Mignon', begins with the immortal words:

Knowest thou the land where citron-apples bloom,  
And oranges like gold in darkened leafy gloom,  
A gentle wind from deep blue heaven blows,  
The myrtle silent, and high the laurel grows?  
Knowest thou it then?

[XII 160, 163 seq., 169]



**Italia und Germania**

Johann Friedrich Overbeck  
1811-1828

## 145. Metamorphosis Thinking

**H**uman culture – meaning that which is created by humans and does not exist naturally – requires extended processes of growth in time and space. The length of the cultural developmental history of constitutional principles such as human dignity, democracy, separation of powers or, in the future regionalism respectively federalism, bears witness to this. Consider the developmental processes that only gradually gave rise to principles of international law, such as the maxim “pacta sunt servanda”, or more recent topics like “humanitarian intervention” respectively “protection of minorities”, which are only just beginning to emerge. Many times and spaces, individuals and groups are involved. The process of written legal regulations is not yet the end of these developments; it rather marks a metamorphosis, a change in the “state of aggregation”, analogies to Goethe’s metamorphosis thinking would not be coincidental! For even what is written in a legal text requires interpretation, creative appropriation, and further development: tangible in the constantly evolving national, regional, and universal human rights texts.

[XI 422]

## 146. Images

The exercise of fundamental rights – understood in terms of results as well<sup>86</sup> – enables the emergence of new “images” of our triad that provides guidance to humans. In terms of their objective “area of protection”, there are in the constitutional state in particular three major fundamental rights that have a specific reference to our cultural anthropological image triad “God, man and world”: The freedom of religion respectively belief<sup>87</sup> under Article 4 para. 1 and 2 Basic Law and the freedom of art and science according to Article 5 para. 3 Basic Law. In religions, sciences and arts our question of images is “negotiated”. Within the gravitational pull of these three fundamental rights, people in the constitutional state work on the three images and their versions. There are dynamic relationships of competition and complementarity between religion, science, and art (cf. the Goethe quote: “Whoever masters science and art, also has religion; those without the former two, surely needs religion.”). The position of individuals in the world and before God, with or without God, their self-concept, their relationship to the state and the people (community) – all of this is thematically covered in the Basic Law by its Articles 4 and 5.

[VII 64]

## 147. Classical

It was only later that the concept of classical was also applied to artistic creations of the modern era. In France, the term is likely used for the first time in 1548 in a poetics: “bons et classiques poètes français” – in Germany, the term became established in the 18<sup>th</sup> century. It is documented for the first time in 1748 by Gottsched; Goethe probably first used it in 1787 in a letter from his Italian journey (cf. on this: Article Klassik und

86 On this *P. Häberle*, Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG, 3<sup>rd</sup> edition 1983, p. 401 et seq., 405 seq.

87 The *Philosophische Wörterbuch* (Philosophical Dictionary), ed. by W. Brugger, 16<sup>th</sup> ed. 1981, notes on “Weltanschauung” (worldview; under the name *de Vries*): “The overall conception of the nature and origin, value and purpose of the world and of human life. Weltanschauung essentially means much more than ‘image of the world’, which is understood as the summarisation of the results of the natural sciences into a scientific overview; this therefore remains purely theoretical and does not pose the ultimate, metaphysical questions about the being and meaning of the world as a whole.”



Johann C. Gottsched

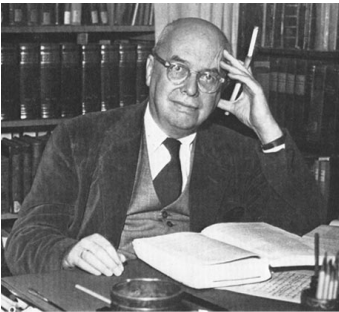
1700-1766

Leonhard Schorer  
Oil on copper, 1744

Klassizismus, in: Der Neue Herder, vol. 13, Die Literatur, 1973, pp. 543-562, especially p. 544).

[VIII 16]

## 148. German Classicism



Ernst Robert Curtius

1886-1956

The term classicism is also used as a collective term for an artistic, especially literary Golden Age. One speaks of the English Classicism referring to the 16<sup>th</sup> century, French Classicism for the 17<sup>th</sup> century, and German Classicism for the 18<sup>th</sup> century. The latter two, which are given the designation “Classicism”, are characterized not least by their thematic orientation towards antiquity, the original “Classicism”. Hence, this nomenclature is explained. See H. O. Burger, editor: ‘Begriffsbestimmung der Klassik und des Klassischen’ (Definition of Classicism and the Classical), Darmstadt 1972; in it the essay by E. R. Curtius: “Klassik”, pp. 17-33, excerpts from Curtius: ‘Europäische Literatur und lateinisches Mittelalter’ (European Literature and Latin Middle Ages), first published in 1948; it is particularly important for the history of the term, see p. 21: What would modern aesthetics have done without the concept of the classic? How could Raphael, Racine, Mozart and Goethe be brought under a common concept? Asked in modern terms: Are there functional equivalents for the concept of the classic?

[VIII 16 seq.]

## 149. Theory Framework I

The work on written legal constitutional material, which has been made available through comparison, encourages the outline of a theoretical framework. Indeed, the typology has already been carved out with the “eyes of theory”, as there is no other way to work (Goethe’s “Were not the eye itself a Sun / ...” [Zahme Xenien (Tame Xenias), III, 1824]); however, some keywords (a total of 9) are now formulated more clearly.

[III 119; XIII 483]

## 150. Theory Framework II

It is the “citizens of the Union” or “European citizens” from whom we need to think. An inventory of written applicable legal texts can provide initial material for the theoretical frame-

work to be developed in the third part. Some classical texts are intended to increase tension and convey initial insights: From Goethe: “One-sided education is no education. You have to start from one point, but go in several directions.” [in conversation with Friedrich Wilhelm Riemer, July 24, 1807]. – “No nation, especially not the modern ones, least of all perhaps the German, has formed itself from within.” [‘Deutsches Eignes. Bildung von außen.’ (German Character. Education from the outside.), 1808] – “The human born to reason still needs great education, which may well be revealed to him gradually through the care of parents and educators, through peaceful example, or through rigorous experience.” [Maximen und Reflexionen, ‘Wilhelm Meister Wanderjahren’, Kunst, Ethisches, Natur, (Maxims and Reflections, Wilhelm Meister’s Journeyman Years, Art, Ethical, Nature), 1829].

[III 163; XIII 367]

## 151. Precursors

The significance of Christopher Marlowe for theater history becomes evident in the fact that some of his dramas can be considered precursors to some of the most significant theatrical creations in modern literary history, which are also of interest in the context of the discussed theme. For instance, ‘The Jew of Malta’ is an important anticipation of Shylock in Shakespeare’s ‘The Merchant of Venice’, and Goethe’s ‘Faust’ has also been influenced by Marlowe’s ‘The Tragical History of Doctor Faustus’, created in 1588.

However, questions of law and justice in the plays mentioned are not problematized from a specifically “legal” perspective. Instead, they arise either from situations and configurations of the protagonists’ – often parabolically depicted – “everyday lives” or are linked to fateful entanglements that test the “moral conduct” and, thus, address the theme of morally (and later also legally) “correct” behaviour and decisions.

[XI 507]

## 152. Reception I

The reception of law is just a partial process in the much more general process of adopting culture. Let us recall the

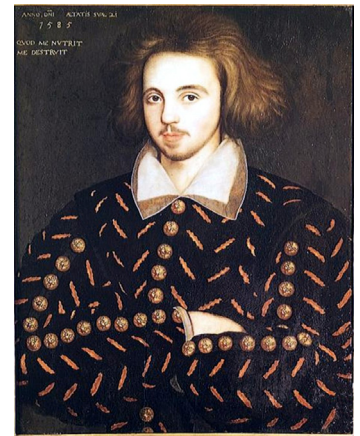


**Friedrich W. Riemer**

1774-1845

Johann J. Schmeller

Chalk drawing, date unknown



**Christopher Marlowe**

1564-1593

(very likely)

Master unknown

Oil painting, 1585





**Michelangelo Buonarroti**

1475-1564

Daniele da Volterra  
Around 1544



**Martin Luther**

1483-1546

Lucas Cranach the Elder  
1528

examples of specific “renaissances” in the history of Europe in general, as well as the reception of works of art from individual artists or entire schools (such as Michelangelo’s or Rembrandt’s), as well as performance practice and “history of interpretation”: for instance, the Mozart opera ‘Don Giovanni’ or the late quartets by Beethoven, Goethe’s ‘Faust’ or the works of Thomas Mann, the philosophy of I. Kant or, in our day, that of J. Rawls. What can be demonstrated in the history of “world culture” and “world literature” in general, proves in the discipline of law to be only a particular application field.

[XI 459; XIV 176]

## 153. Reception II

„**R**eception“, at least linguistically, prima facie suggests that the – creative, active – production is followed by a passive, at best “recreative” process, namely the reception. However, this is not enough for the integrating and assimilating forces of the “receiving” part within the family of constitutional states. They must literally integrate the adopted “foreign” elements into their own legal system, into the overall system of the constitution, to “acquire it in order to achieve it to own”, – to extend a poetic expression [from Goethe in ‘Faust I’].

The mentioned processes do not unfold on their own. It is necessary for the recipients (or better yet, actors) in the reception procedures to be open and sensitive, to “look out” by observing and processing the typical and individual characteristics of the neighbouring constitutional state in a broader or narrower sense – “acquire it in order to achieve it to own”. Through this, “common European constitutional law” emerges or further solidifies, extending to common European/Atlantic constitutional law, partly also just “related” law.

[XI 462 et seq.]

## 154. Leading Culture

**G**oethe is credited with the statement that Luther, through his translation of the Bible, made the Germans into a nation; the same can be said for Dante and Italy. Education through language remains a relevant keyword. The fundamental values expressed in the individual state constitutions (preambles, guarantees of public holidays, anthems and flags, other national sym-

bols) are the same values from which the national education of these nations derives. They justify the term of “constitutional patriotism” (D. Sternberger). A crucial question is: Do civil societies need a “leading culture” as an identity-forming force? Is the Basic Law sufficient in Germany? Can we still dare to “praise German education” (FAZ of October 17, 2005, p. 37)? Many factors today support lifelong processes of citizen education. In any case, it doesn’t end when school ends. However, many indications also point to the diversity of educational ideals depending on the nation and culture.

[III 168; XI 616; XIII 372; XV 270]

### 155. Language

Towards the end, ladies and gentlemen, you will expect a word about the developing private law schools in Germany (such as the “Bucerius Law School”), which no longer teach in the language of Luther, Kant and Goethe; I still need to think about that; currently, I lean more towards criticism.

[III 283]

### 156. Music and Law

The author of this study can only dabble in this field [of music] and identify himself as a practicing music enthusiast. (However, J. W. von Goethe said: “Art gives itself laws and commands the time. Dilettantism follows the inclination of the time.” [‘Ueber den praktischen Dilettantismus oder die praktische Liebhaberey in den Künsten’, (On practical dilettantism or practical hobby in the arts) 1799.]) At a late age like his, this may perhaps be permitted. Of course, the author certainly cannot refer to the many composers who initially started out as lawyers: from *R. Schumann*<sup>88</sup> to *I. Strawinsky* or *P. I. Tschaikowski*, or to those

<sup>88</sup> Detailed evidence and information in *H. Weber*, *Recht, Literatur und Musik – Aspekte eines Themas*, in: idem (ed.), *Literatur, Recht und Musik*, 2007, p. 1 et seq. (p. 2 seq. “Musician lawyers”: especially about *R. Schumann* (p. 3, footnotes 5-9)). – *R. Schumann*, *Schriften über Musik*, Reclam (U-B Nr. 2472), 1982. To begin studying law in Leipzig in 1818 and to continue his legal studies in Heidelberg (with *Thibaut* and *Mittermaier*) 1829. See also *A. Boucourechliev*, *R. Schumann in Selbstzeugnissen und Bilddokumenten*, 1974, p. 24 et seq. On the study of law in Leipzig and Heidelberg and the abandonment of law studies as well as the commencement of music studies in Leipzig in the autumn of 1830, see also: *K. H. Wörner*, *R. Schumann*, Tb.-Ausg. 1987, pp. 29-45.



Igor Strawinsky, 1921

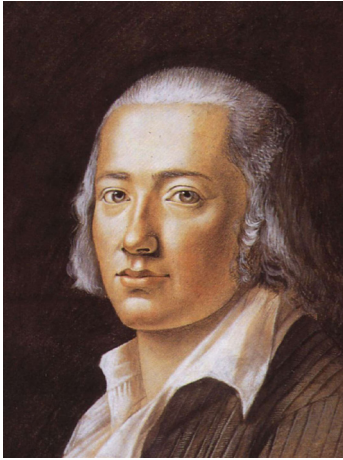
1882-1971



Peter Tschaikowsky

1840-1893

Nikolai Kusnezow  
Oil painting, 1893



Friedrich Hölderlin

1770-1843

Franz Karl Hiemer  
Pastel, 1792

who even ventured a double existence, like *E. T. A. Hoffmann*.<sup>89</sup>,<sup>90, 91</sup> The following lines can only be “naively” carried by the love of music. ...

Music,<sup>92</sup> in all its manifestations, from chorales to “songs”, from string quartets to operas, from oratorios to national anthems, most directly reaches the soul of a person and their emotions. It touches them like no other art (at most the lyric of Goethe – Wanderers Sturmlied (Wanderer’s Storm Song)<sup>93</sup> – or F. Hölderlin (‘Wie wenn am Feiertage’, ‘Friedensfeier’, ‘Patmos’ (As if on Holidays, Peace Party, Patmos)) can touch the soul similarly intensely, and maybe the songs of “Homer”).

[X 65 et seq.; XIII 441 seq., 458]

## 157. Music and Time

**M**usic is characterized by its specific reference to time. It is the only art (along with poetry) that is actually constituted only in time ... One is tempted to draw analogies to the “living constitution”. It also operates along the timeline and processes time accordingly and highly differentiated (from “total revision” to the “subtle” dissenting opinions of constitutional courts). They are also often divided into preambles, comparable in terms of cultural science to the prelude or prologue, and they end in “transitional and concluding provisions” (finale). Time and constitution<sup>94</sup>

89 Began studying law at St Petersburg University in 1902 and graduated in 1905, cf. *V. Scherliess*, I. Strawinsky und seine Zeit, 2002, p. 14.

90 *E. Helm*, Tschaikowskij in Selbstzeugnissen und Bilddokumenten, 1983, p. 22 et seq. (p. 22: Entered the St Petersburg School of Jurisprudence in 1850; May 1859 with the rank of titular councillor, dismissed from the law school and employed as a civil servant of the Ministry of Justice (p. 25); p. 29: entered the St Petersburg Conservatory in 1862 to study music; subsequently retired from public service (1863)). See also: *E. Garden*, Tschaikowskij – Eine Biographie, Insel-Taschenbuch 1998, p. 17 et seq. (in particular p. 21 on his appointment as Administrative Secretary in the Ministry of Justice and p. 24 on his departure from the Ministry of Justice).

91 From more recent literature: *K. Kastner*, E. T. A. Hoffmann – Jurist, Dichter und Musiker, in: *H. Weber* (ed.), Literatur, Recht und Musik, 2007, p. 72-88, and with further references; *H. Weber*, Recht, Literatur und Musik – Aspekte eines Themas, in: idem (ed.), Literatur, Recht und Musik, 2007, p. 2 (especially: footnote 4). See also *H. Steinecke*, Die Kunst der Phantasie, 2004.

92 Soon to be classic: *H. Maier*, Cäcilia, Essays zur Musik, 1998/2005.

93 He published the anthology: Goethes Gedanken über Musik, edited by *H. Walwei-Wiegelmann*, 1985.

94 On this *P. Häberle*, Zeit und Verfassung, ZfP 1974, p. 111 et seq.

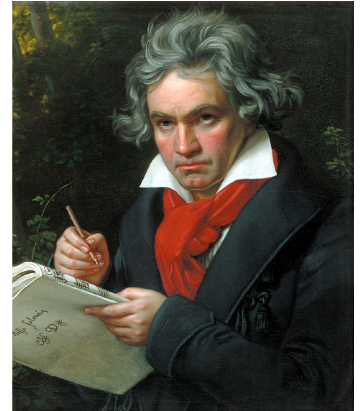
is a constitutional theme that can be verified via cultural science. Goethe's image of architecture as "solidified music"<sup>95</sup> is connected to this subject.

[X 71]

## 158. Musical Jacobin

The developmental history of the constitutional state cannot be written without the history of music, which partly accompanied it. In an examination of the treatment and processing of political, Enlightenment-inspired, revolutionary-republican, (state) philosophical ideas, and the associated – admittedly only labelled as such in modern diction – issues of state or constitutional law in music, the "musical Jacobin" Ludwig van Beethoven (1770-1827) dominates the centre of music history. Especially in works such as his 3<sup>rd</sup> Symphony (1804/1805 – 'Eroica'), the music for Goethe's 'Egmont' (1810), the 9<sup>th</sup> Symphony (1824; with Friedrich Schiller's 'Ode to Joy' as the final chorus, which originally was said to celebrate "freedom"), and especially in his only opera 'Fidelio' (3<sup>rd</sup> versions 1805/06, 1814; text by Sonnleithner and Treitschke after N. J. Bouilly), he took a stand against abuse of power and arbitrary rule, summoning a humanistic ethos of freedom and liberation, deeply influenced by the (late) Enlightenment spirit of the post-revolutionary era following the French Revolution.<sup>96</sup>

[X 76; XI 512; XIII 448; XV 108]



Ludwig van Beethoven

1770-1827

Joseph Karl Stieler  
Oil painting, around 1820

95 In a conversation with Eckermann on March 23, 1829; "muted art of music" in *Maxims and Reflections*, 1827; already mentioned in the *Italian Journey*, 1787: "silent music".

96 On *Beethoven's* political influence through "Josephinism" and the reformist ideas of the Enlightenment *S. Kross*, *Beethoven und die rheinisch-katholische Aufklärung*, in: idem (ed.), *Beethoven – Mensch seiner Zeit*, 1980, p. 9-36; on the effect: *D. B. Dennis*, *Beethoven in German Politics, 1870-1989*, 1996; on the 'Eroica': *M. Geck/P. Schleuning*, „Geschrieben auf Bonaparte“ – Beethovens ‚Eroica‘: Revolution, Reaktion, Rezeption, 1989; *P. Schleuning*, *Frieden durch Krieg – Beethovens ‚Sinfonia eroica‘*, in: H. Lück/D. Senghaas (eds.), *Vom hörbaren Frieden*, 2005; on the 'Ode an die Freude' (Ode to joy): *D. Hildebrandt*, *Die Neunte – Schiller, Beethoven und die Geschichte eines musikalischen Welterfolgs*, 2005; on 'Fidelio': *E. Poettgen*, *Fidelio und die Menschenrechte. Eine sehr persönliche Annäherung an ein zentrales Werk der Musikgeschichte*, in: P. Csobádi et al. (eds.), *Fidelio/Leonore – Vorträge und Materialien des Salzburger Symposions*, 1996, 1998, p. 257 et seq.; on Josephs-Kantate: *K. Küster*, *Beethoven*, 1994, p. 29 et seq.; *B. Weck*, in: *Verfassung im Diskurs der Welt, Liber amicorum Peter Häberle*, 2004, p. 856 seq. with further evidence.



## 159. Fugue

In an overall assessment of the creation and reception processes of the Western democracies in the years from 1776/1789 to 1997 when it comes to constitutional texts, it can “already” be said that all nations are gradually making their specific textual contributions to the stage development of the constitutional state as a type.<sup>97</sup> Perhaps we may recall Goethe’s dictum: “The history of science is a great fugue in which the voices of the peoples gradually emerge” [conversation with Riemer on October 21, 1807] – now applied to the type “constitutional state” and the “voices” respectively “musical texts” of the individual example countries!

[XI 362]

## 160. Letter Form

In the realm of literature, the epistolary form has produced great classics, as exemplified by Goethe’s ‘Werther’; in world literature, there are numerous examples highlighting the fertility of correspondence between authors and their friends as a medium of communication. For instance, consider Ortega y Gasset’s ‘Letter to a German’ (1932) and the anthology ‘Briefe zur Weltgeschichte’ (Letters on World History’, from Cicero to Roosevelt, edited by K. H. Peter in 1964). The exchange of letters has been a fruitful source of expression, as evidenced by the publication of Stefan Zweig’s letters in 2005. Epistolary friendships were stylized forms, even among scholars (as seen in the correspondence between E. Levy and W. Kunkel from 1923 to 1968, published by D. Mußgnug in 2005).

[IV 2]



José Ortega y Gasset, 1948

1883-1955

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97 To put it briefly: the USA contributed constitutional texts on fundamental rights, separation of powers and federalism (since 1776), France on popular sovereignty, separation of powers, democracy, fundamental rights (in the stages: 1789/1791/1793/1848). Belgium on fundamental rights (1831), Germany on fundamental rights (1848/1919/1949), federalism (since 1848), constitutional jurisdiction (1949) and (following the example of Art. 148 Weimar Imperial Constitution (WRV)) in the countries after 1945 on educational goals, Italy on basic social rights (1947), Switzerland to referendum democracy (1874 and following.). Great Britain on parliamentary democracy (mostly unwritten), the Iberian countries Portugal and Spain (since 1976 respectively 1978) on economic and cultural constitutional law, preamble culture and pluralism articles, the Netherlands on government tasks (1983); other countries such as Sweden or Austria made contributions to the text development of the constitutional state type in more specific fields (such as the “ombudsman” and the People’s Advocacy), Greece to the constitutional amendment (Article I 10 para. 2 to 6 of the 1975 Constitution, quoted in JöR 32 (1983), p. 360 et seq.).



## 161. Open Society of Constitutional Interpreters

Openness alone cannot hold a vibrant constitutional state together “in its inmost folds” – to paraphrase Goethe. It needs the diversity of culture as a unifying bond, the cultural grounding of an open society.

[III 209]

## 162. Science as a Way of Life

Certainly, what Goethe interconnects in his splendid saying: “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other”, cannot be achieved by an individual researcher in solitude and freedom, neither at his desk, in the experimental room, nor in a seminar. However, if he should dedicate himself to science as a way of life, he can experience individually – an ivory tower, the academic chair –, corporately the university as a whole, his own faculty, the unity of research and teaching – all in the spirit of W. von Humboldt. One may consider Goethe’s other dictum as a guide: “Whoever masters science and art / also has religion; / those without the former two / surely needs religion.” One should not shy away from the accusation of idealism, of the “religion of art” or the “religion of science” – even if all of this may appear as a “farewell” or be such. In brackets, a word on the distinction between art and science: Art cannot be falsified, art is holistic, sometimes “totalitarian” in a way (at least in the case of R. Wagner), while science can only provide provisional partial truths. Art does not err; science, on the other hand, is a process in the sense of Popper’s “trial and error.” Despite the talk of the “open work of art”: science is specifically open. It has to be uncompromising in a way and it has to dig itself as such into the “cultural memory of Europe”.

[III 276 seq.]

## 163. Festschriften (Commemorative Volumes)

Endless commemorative volumes! The reviewer is, of course, delighted for and with every state law teacher honoured with a well-crafted Festschrift. However, critical questions persist: In 2011 alone, at least five German colleagues were ce-



Wilhelm von Humboldt

1767-1835

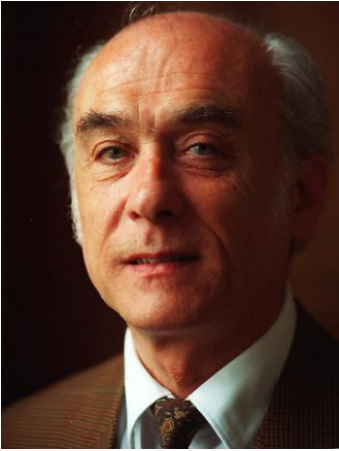
Gottlieb Schick  
Oil painting, 1808/1809



Richard Wagner

1813-1883

Ernst Benedikt Kietz  
Drawing, 1842



Walter Schmitt Glaeser

\*1933



Josef Isensee

\*1937

lebrated with Festschriften. How should all of this be “processed” by science, especially in the face of the overwhelming flood of competing anthologies, huge commentaries and handbooks? Once again, the following alternatives should be considered: themed Festschriften instead of numerous heterogeneous contributions, international Festschriften, or even the option to forgo a Festschrift in favour of colloquia (notable examples being E. Friesenhahn and K. Hesse), and lastly, small contribution from friends following the (Tübingen) model for O. Bachof (1984) and W. Schmitt Glaeser (2003). Of course, the basic literary genre remains the monograph (although it demands deep drilling, perseverance and a lot of self-discipline). It would be worthwhile to investigate, after a longer period of time, which contributions from Festschriften have been received in science, when and by whom. The results for heterogeneous Festschriften would likely be disheartening. ...

J. Isensee opens the third section on the “Freiheitlicher Staat des Grundgesetzes” (Liberal State of the Basic Law) with the eternal question “What does freedom mean?” It is no coincidence that this beautiful birthday tribute begins with a Goethe quote and ends with a Schiller quote, as in fundamental legal questions, non-legal classics provide the best guidance for the indispensable legal individual dogmatics!

[XX 306 seq.]

## 164. Generational Protection

This “natural science” respectively cultural science understanding of generations should be briefly explained. One can ask (and likely affirm) whether nature can endure without humans or their generations; However, it is certain that humans can only exist as part of the living and non-living nature and that they are “human” through the culture they have created in generations of endeavour, both nationally and globally. In this sense, J.-J. Rousseau’s “Back to Nature” has to be connected with A. Gehlen’s contradicting idea of “Back to Culture”.<sup>98</sup> Two texts from “counter-classics” are brought together here for synthesis. Expressed in terms of the distinctions between the scientific disciplines: Today, the natural sciences and cultural sciences are com-

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<sup>98</sup> On the programme of a “constitutional doctrine as cultural science”, see my study of the same name from 1982 (pre-edition).

mitted to the same goal in protecting generations. Goethe’s *Dic-tum*: “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other” poetically formulates a wisdom that the constitutional state can and must now confirm. Moreover, the overarching unity of man, culture and nature can only be justified on a global scale. Just as a “world community of cultural states” is emerging in the national and international cultural property protection,<sup>99</sup> there already exists a community of solidarity among all people and states when it comes to the protection of nature, even if it may still be fragile in reality.

[XI 608; XIII 511]

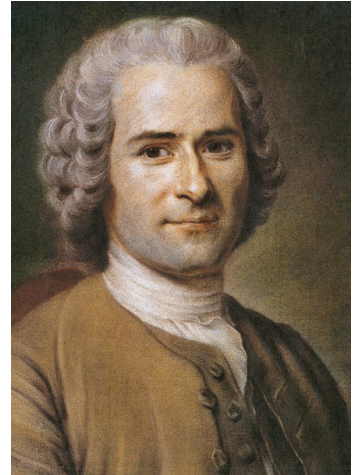
### 165. Succession of Generations I

The highly complex concept of “constitutional culture”<sup>100</sup> is thus designed from the outset to be intergenerational and cross-generational, or rather it is “lived” in this way: in the sense of Goethe’s respectively Heller’s metaphor of the “moulded form that develops as it lives”. In other words: “Time and constitutional culture” is another way of describing the generational correlation (and generational difference) of a nation. Its citizens, as so-called “holders of fundamental rights”, constitute the people for a relatively short-lived, punctual and current manner (only) in the present. However, the people permanently contained in a constitutional state are those that have become such and have “matured”, sometimes endangered, through the succession of generations by renewing itself. In order for it to develop along the timeline, the mentioned processes and instruments that organise and divide time and allow constitutional culture to grow are required.

[XI 613 seq.; XIII 516; XV 268]

### 166. Succession of Generations II

Freedom(s) and bond(s) are distributed to the people in the timeline at the macro level, namely the generations, hence it is justified to speak about justice or solidarity, “fairness” and



Jean-Jacques Rousseau

1712-1778

Maurice Quentin de La Tour  
Pastel, 1753

<sup>99</sup> On this my contribution *Kulturgüterschutz*, in: F. Fechner/T. Oppermann (eds.), *Prinzipien des Kulturgüterschutzes*, 1996, p. 106 et seq.

<sup>100</sup> On this the volume: *Kommentierte Verfassungsrechtsprechung*, 1979, p. 449, as well as the contribution *P. Häberle, Zeit und Verfassungskultur*, in: Peisl/A. Mohler (eds.), *Die Zeit*, 1<sup>st</sup> edition 1983 (3<sup>rd</sup> edition 1992), p. 325. Cf. fourth part III.

responsibility among generations. The fact that on the micro level the “family” is seen in the succession of generations (“parent generation”) makes it easier to locate the constitutionally constituted people in the “infinite chain of existence” (Goethe). Indeed, many classical texts, dating back to ancient times, have repeatedly drawn analogies between these two entities.<sup>101</sup> The inclusion of the whole humanity is still pending.

[XIII 515; XV 267, 300]

## 167. Youth and Late Works

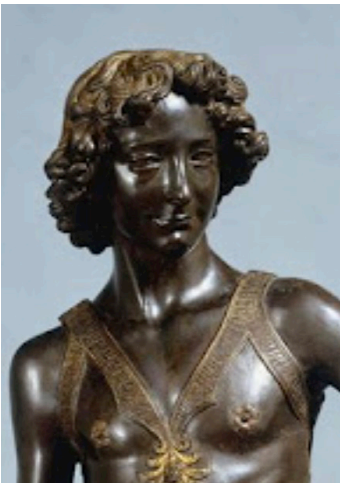
It is not uncommon for an author to start with significant contributions or a major debut (such as D. Göldner’s ‘Verfassungsprinzip und Privatrechtsnorm in der verfassungskonformen Auslegung und Rechtsfortbildung’, 1969 (Constitutional principle and private law norm in constitutional interpretation and development of the law)), only to gradually become less prolific over time. Conversely, there are examples of authors who begin with works on planning and road law but later delve into the depths of constitutional history. Parallels to artists are obvious: they do not always succeed in producing major late works such as Leonardo da Vinci or J. W. von Goethe as well as L. van Beethoven, and major youth works such as W. A. Mozart at the same time.

[IV 66]

## 168. Age(ing) as a Constitutional Problem I

Finding meaning in life in old age is a universally human problem that a constitutional state, built on human dignity and organized as a democracy with “active citizens”, cannot ignore. Merely pointing to the creative peak achievements that great poets and thinkers have produced in old age is not enough. Individuals like J. W. von Goethe and T. Fontane are and remain exceptions.<sup>102</sup> The constitutional state must be based on the normality of the average person and citizen, not to the genius of individuals.

[XI 1021]



David

Andrea del Verrocchio  
around 1466-69  
the most likely depiction of  
Leonardo da Vinci as a 15-year-old  
model for his teacher,  
the few other depictions  
are controversial.

<sup>101</sup> Evidence in: *P. Häberle, Verfassungsschutz der Familie ...*, 1984, p. 9 et seq.

<sup>102</sup> On self-portraits of old painters, such as Leonardo, Rembrandt, Tintoretto: *S. de Beauvoir, Das Alter*, 1972, p. 255 seq.; on Michelangelo *ibidem* p. 439 et seq.; on Verdi: *ibidem* p. 443 et seq.

## 169. Age(ing) as a Constitutional Problem II

A cultural history of aging cannot be conveyed here. However, some non-legal texts can be cited to express the human problems associated with aging and old age. Just as it is legitimate to ask poets what makes Sundays special and unique<sup>103</sup>, a cultural science approach of aging as a constitutional problem may also inquire among non-lawyers. Major literature can be found in Cicero's 'De Senectute',<sup>104</sup> and Shakespeare's 'King Lear' is noteworthy literature on the subject of aging.<sup>105</sup> Goethe builds upon this when he begins a poem with the words: "An old man is always a King Lear!" F. Hölderlin said: "In younger days I was joyful in the morning, I wept in the evening; now that I am older, I begin my day doubtfully, but holy and serene is its end to me."

The idea of a community of young and old is echoed in P. Heyse's quatrain:

Shall the brief human life's endeavour,  
yield you fruit that's sweet forever,  
you must, when young, to elders listen,  
and as you age, to youth glisten.



Paul Heyse

1830-1914

Adolph Menzel  
Pastel, 1853

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<sup>103</sup> Cf. P. Häberle, *Der Sonntag als Verfassungsprinzip*, 1988, p. 58 seq.; are now consequently also printed in the Essen discussions on the subject of state and church, *Der Schutz der Sonn- und Feiertage*, 24 (1990), p. 222 et seq. „Poems for Sunday”. Cf. above no. 11 b.

<sup>104</sup> Cf. M. T. Ciceronis Cato Major De senectute, cited as per Tusculum Bücherei, 1980, with classic insights such as “In Praise of Philosophy: Those devoted to it can spend every stage of life without sorrow” (p. 9), “everyone wishes to attain it (scilicet an old age); once they have attained it, they complain about it” (p. 11), “for indeed, whoever is unpretentious, affable and friendly in old age can endure it quite well” (p. 15), “The best weapons against the complaints of old age ... are the sciences and the practical realization of moral values.” (p. 17). – The thesis of Terenz (150 BC) “Senectus ipsa morbus” (Old age itself is a disease) is now considered false (cf. H. Kaiser, *Biologie des Alters*, in: H. und H. Reimann, (eds.), *Das Alter, Soziale Probleme 1*, 1974, p. 159 (162)). – Cf. U. Lehr, *Psychologische Aspekte*, in: H. und H. Reimann, (eds.), *Das Alter*, loco citato, p. 103 (118): “Any form of assistance for the elderly should never promote passivity on the part of the elderly, but should rather be an aid to self-activity.” – In the tradition of Ciceros now N. Bobbio, *De senectute*, 1996.

<sup>105</sup> On Shakespeare respectively his 'King Lear': S. de Beauvoir, *Das Alter*, 1972, p. 141 seq.: “Old age is not considered a borderline case of human existence but rather as its truth: from it, one can comprehend the human and their earthly adventure.”



Hope shines through for the elderly in Goethe's dictum:

Man experiences, no matter who he may be,  
a final joy and a final day to see.

[XI 1034 seq.]

## 170. Wissenschaftskolleg (Institute for Advanced Study) in Berlin (1992/93)

As a humanities scholar, one was initially perplexed in discussions or colloquia regarding the presentation of findings by chaos researchers. The “productive uncertainty” expected by J. Nettelbeck, the “Secretary-General” who had been serving adeptly since 1980, for the research year in Berlin, led to a form of almost depressive state in the early weeks of autumn 1992, due to the self-realization of one's own incompetence and ignorance. However, there was a secret hope in Goethe's “Nature and Art, they go their separate ways, / It seems; yet all at once they find each other”. There was also a budding hope for correspondences between the laws of nature and those of human aesthetics (tangible in F. Schubert's ‘Winter-Reise’ (Winter Journey) song ‘Frühlingstraum’ (Spring Dream): “You may laugh at the dreamer who saw flowers in the window”). The confrontation of all cultural sciences with the natural sciences dramatically highlighted the limitations of each discipline and the fragmentary nature of one's own education. It was recurrently Goethe, whose wisdom facilitated the encounter of the “two cultures” – natural and human sciences. This was particularly evident in a lecture by the “permanent fellow” R. Wehner (Zurich). He was able to prove that a certain species of ants in the desert of Yemen orients itself in its locomotion by having developed a precise “map of the sky” in its brain or eye over millions of years of its development. Who could not recall Goethe's line: “Were not the eye itself a Sun / No Sun for it could ever shine”? Such experiences reached their peaks in the Berlin year of 1992/93 – the lawyer in particular learned to be amazed in a new way.

[III 286]



**Franz Schubert**

1797-1828

Wilhelm August Rieder  
Watercolour, 1825

## 171. University Ideal

Humanism and Enlightenment are just as present in the art of F. Schiller and J. W. von Goethe as they are in the

works of European artists such as Leonardo da Vinci and Dürer. In conjunction with the successful democracy of the Basic Law, the associated legal doctrine of state and the jurisprudence of the Federal Constitutional Court, an updated classical German university ideal is taking shape, radiating its influence across Europe and the world. Why should all of this succumb to the fleeting zeitgeist of economic utility maximization, unitarization, and quantification?

[III 308]

## 172. Libraries as Significant Assets

Moreover, the actuality of the topic [federalism] can hardly be greater, as the bottomless economism of the contemporary zeitgeist leads to the overestimation of the economy and distorts almost everything into a “location issue”. If one were to engage in the rampant location ideology, one might have to say: the location of a people is its culture, although “culture” as a spirit that “blows where it wills” is not fixed to “places”.<sup>106</sup> Culture is not merely a “functional element of an economic location”.<sup>107</sup> Perhaps, one should be again reminded of the words of P. Melancthon: “Whoever founds schools and cultivates the sciences does better for his people and all posterity than if he found new veins of silver and gold.” We should also recall the words of Goethe regarding the silent interests of a library.

On the other hand, almost everything is currently labelled as culture, and the word is used in an inflationary manner: from the

<sup>106</sup> Therefore, some theories regarding the “assessment and perspectives of foreign cultural policy” from the Ministry of Foreign Affairs in the spring of 1997 miss the mark, such as Thesis 7: “State and economy must collaborate more closely together in foreign cultural policy in the interest of active location security.” Here, the intellectual cultural space shrinks to an economic location. As *W. Hennis* aptly puts it, Deutschland ist mehr als ein Standort “Germany is more than just a location”, *Die Zeit*, December 5, 1997, p. 6.

<sup>107</sup> *W. Hennis*, Leserbrief: Im Bundestag ein Ausschuß für Kulturpolitik, *FAZ* January 29, 1998, p. 9 From the general literature: *P. Hacks*, *Schöne Wirtschaft*, 1997; *G. Krieger*, *Ökonomie und Kunst, Wechselseitige Beziehungen und regionale Aspekte*, 1996; (for Switzerland): *J. Jung*, *Das imaginäre Museum, Privates Kunstengagement und staatliche Kulturpolitik in der Schweiz*, 1998. The Bavarian-Saxon Future Commission states in its report from 1997 that in the “entrepreneurial knowledge society”, the care of art and culture is not merely a decorative element but an indispensable investment in the development of a society (cited as per *FAZ* from November 28, 1997, p. 16).



**Albrecht Dürer**

1471-1528

Self-portrait  
Oil painting, 1500



**Philipp Melancthon**

1497-1560

Lucas Cranach the Elder  
Oil painting, 1543



Werner Weidenfeld

\* 1947

new “corporate culture” and “culture of entrepreneurship” to “risk culture” and the “Euro as a cultural event” (W. Weidenfeld) and cooking. Thus, our topic poses particular challenges, which the lawyer can only modestly fulfil. Nevertheless, he can and must speak out in interdisciplinary discussions where necessary, especially today, even though in matters of culture, historically, the artists often have the “final word” and speak the first – something that day-to-day politics often forgets. “What remains” is brought about by culture, for which the work on the constitutional state certainly provides the framework and opens up many forums.

[XIX 551 seq.]

### 173. World Overview I

**I**n summary about Latin America: Without claiming completeness of all relevant constitutional text quotations (one would need the “world overview” of a Goethe), the following observations can be stated for Latin America: In various contexts and constellations, peace-related texts appear in many older and more recent constitutions of Latin America. They are found partly in preambles, partly in state and educational goals, partly in the form of declination of wars, partly in connection with the freedoms of association, assembly and demonstration, and once as a reason for asylum: moreover, they are used as a predicate for a state element respectively the state’s territory: Zone of Peace. This rich collection can be utilized later in the theoretical section. As is so often the case, it should be critically noted that the term “peace” is frequently placed linearly in a series with core values such as solidarity, cooperation, democracy and human rights without clarifying its potential priority. It is not apparent whether peace is ultimately and primarily the foundation of the entire legal order or whether, conversely, the legal system creates peace (peace through law and the rule of law, or social justice).

[VI 90]

### 174. World Overview II

**T**his small study can only succeed in a fragmentary manner, as the topic is too vast for a single researcher – he lacks the “world overview” in the sense of Goethe. The focus was on peace-related texts in national constitutions, as these have not been typologically analysed in connection with history and

the present, in space and time, in all facets in a scientific manner; the same applies to the extraordinarily rich jurisprudence of the Federal Constitutional Court, as heterogeneous as the references are in volumes 1 to 142. As brief as the theoretical part must be: In conjunction with the commentaries on the text stages, each organized by continents or nations, it may reveal the contours of the “Culture of Peace” in the constitutional state, whereby the presence and interactions of international law and European law should be considered.

[VI 189]

### 175. World, World Culture and World Literature

Goethe’s texts on “world”, “world culture” and “world literature” have long since made an epoch (including his confession (1792/1822) that the “world-historical present” was taking over his spirit). Let’s recall some of his thoughts: He reports his observation that “the world always remains the same” (1825) and he expresses his scepticism about “bringing reason into the universe” (1826). In 1827 he spoke about the idea that youth as an individual has repeatedly to “go through the epochs of world culture.” In 1824, there is mention of the “course of world culture” and in 1827, once again, of “world literature”.

[XI 1156]

### 176. World Literature

Also, the ever-precarious relationship between intellect and power, as well as culture and economy, seems to be part of our “birth certificate”. Even someone like G. Grass cannot change this with his call to the intellectuals who have become “uncommunicative” to interfere in the internal affairs of politics.<sup>108</sup> Despite all the controversies, it should not be forgotten that culture is the most precious “possession” of humanity. It gives him the ability to “walk upright”, provides meaning – especially in democracy – and creates or recalls an overarching generational context. In the case of “world literature” in the sense of Goethe or the “world cultural heritage” of the UNESCO, to which Germany has contributed significantly in its cultural history (from the old



Günter Grass, 2006

1927-2015

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<sup>108</sup> Cited as per Nordbayerischer Kurier (NBK) from December 30, 1997, p. 22.

town of Bamberg to Quedlinburg, from the Aachen and Speyer Cathedral to the old town centre of Lübeck), the perspective even extends to the entire world. It stands in a fertile field of tension with the “province”, the “intellectual province”, as we experience it here in Seeon, and as Germany, as a multi-layered, sometimes small-state cultural nation, sometimes a culture-federalist constitutional state, has been distinguished and even ennobled at times.

[XIX 582]

## 177. History of the World

The science of history has repeatedly ventured to write a “world history”. A. Heuß, for instance, sought to focus only on those high cultures that exhibited a distinct “worldliness”, exerting a lasting influence on the world over an extended period of time. Such “worldliness” could be attributed to Chinese, Indian, Arab-Muslim and, above all, European high cultures. It is this influence that, today, shapes humanity in international and constitutional law, for instance, in matters of human rights, democracy, and the social market economy, despite growing resistance from the Islamic “world”. Thus, one might, with Hans Freyer, write the history of the 20<sup>th</sup> century as a “world history of Europe”,<sup>109</sup> but it is not cynical to observe that the first wars designated as “world wars” originated from this very Europe. Certainly, in the (fine) arts, one would find, for instance in the Middle Ages and after 1492, rich sources for their “worldview”.

And J. W. von Goethe has anticipated his contribution in the verses:

God’s is the Orient!  
 God’s is the Occident!  
 Northern and southern lands  
 Rest in the peace of His hands.

[XI 1134; XIII 353]



Goethe

Master unknown  
 Copy after Georg O. May  
 Oil painting, 1779

## 178. Orient und Occident

This draft is more than preliminary; it remains a selective “workshop report”. The attempt was made to draw ins-

<sup>109</sup> 1954, 3<sup>rd</sup> edition 1969; A. Heuß, *Zur Theorie der Weltgeschichte*, 1968. From the most recent literature: E. Hobsbawm, *Das Zeitalter der Extreme, Weltgeschichte des 20. Jahrhunderts*, 1995.



piration from classical texts ranging from Aristotle to Kant and Rawls, including H. Jonas, from Goethe (“World Literature”, 1827) to Brecht. However, this is only clean workshop work if the legal craftsmanship rules are observed, such as sensitive systematization and the indispensable disclosure of “preunderstanding and choice of methods”. There is certainly more “legal world literature” than the one I have cited. Constitution as culture, cosmopolitanism out of culture, Goethe’s “Orient and Occident”, his “Northern and southern lands” gives us an orientational framework, as well as courage. Certainly, constitutional legislation has a theological dimension: we think of Lycurgus in Sparta and Empedocles in Agrigentum. Today, we have nothing more or less than the task of creating a national, regional and universal constitutional law of human dignity. Constitutional states are, so to speak, our “fatherland”, culture is our “motherland”. Not the “homo economicus” should be our ideal, but the “upright”, educated, trained human being: “back to culture” in the sense of A. Gehlen, not “back to nature” in the sense of Rousseau.

[III 243]

### 179. No Schiller without Goethe

**F.** Schiller wrote a classic piece – similar to “Birth Certificates” – to many European nations: the English ‘Maria Stuart’, the Swiss ‘Wilhelm Tell’, the French ‘Maid of Orleans’, the Spanish ‘Don Carlos’ and – significantly unfinished – the Russian ‘Demetrius’. In this manner and (sit venia verbo) “altitude” the European-Atlantic constitutional state would have to be designed by a F. Schiller of the constitutional doctrine, capturing its multifaceted origins and contemporary contours. However, no Schiller without Goethe: The “West-Eastern Divan” and the line “God’s is the Orient! / God’s is the Occident! / Northern and southern lands / Rest in the peace of His hands”, remains relevant for us lawyers here and now, especially in the context of Korea.

[XIII 713]

### 180. Humanity out of Culture

**A** constitutional doctrine based on cultural science can contribute to the necessary reduction of fixation on prosperity thinking and materialism, as well as a departure from the eco-



Goethe-Schiller  
Monument, 1856

in front of the German  
National Theatre in Weimar  
Ernst Rietschel

nomization of our current political thought and actions: republics are not based on “markets”. The constitutional state is not an “economic profit game”, and this is especially valid also for “Europe”. Such constitutional doctrine also provides the basis for criticising a merely quantitative and exaggerated understanding of the welfare state. In this regard, it presents an opportunity for a more profound justification of the constitutional state in Germany, even in times of crisis. In particular, the national and international protection of cultural property demonstrates that “humanity” is constituted out of culture. Classical texts from Weimar and German Idealism validly point to the “world”.

*[XI 1164]*



## Goethe

Joseph K. Stieler  
Oil painting, 1828



PART TWO

Peter Häberle

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on

Art, Culture and Law



## Peter Häberle in Montpellier 2013

International Symposium on the 80<sup>th</sup> Birthday



Above: With Alexandre Viala and participants  
of the colloquium; Below: With G. Cámara, D. Rousseau,  
F. Balaguer Callejón, E. Guillén López and S. Pinon

On this *Peter Häberle*, Closing keynote in Montpellier (2013), in: *Vergleichende Verfassungstheorie und Verfassungspraxis. Letzte Schriften und Gespräche*, Berlin 2016, p. 413-421.

# Poetry and Constitution

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– including Scripts from Films\*

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### I. Preliminary remark

When it comes to “Poetry and the Constitution”, the free selection of texts and books as a basis for a topic related to literature and law is inspiring. I myself have already dealt with the topic of “literature and law” in my book ‘Das Grundgesetz der Literaten. Der Verfassungsstaat im (Zerr-)Spiegel der Schönen Literatur’ (The Basic Law of Writers. The constitutional state in the (distorted) mirror of fine literature).<sup>1</sup> From the perspective of ‘Constitutional Theory as Cultural Science’<sup>2</sup> this was probab-

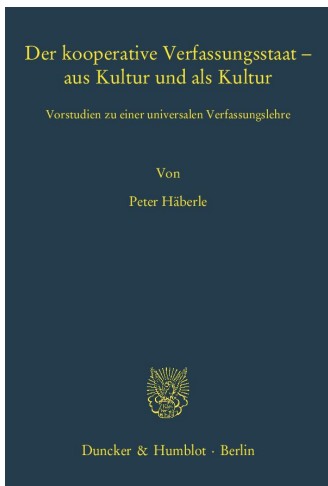
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\* Closing lecture given by the author at an international symposium dedicated to him, organized by the University of Montpellier (May 13/14, 2016). Printed in: JöR 65 (2017), p. 247-261 and in: Rivista di diritti comparati, N. 1/2018, p. 68-89; French translation in: Revue Droit Littérature, no. 2, 2018, p. 197-209.

1 P. Häberle, Das Grundgesetz der Literaten. Der Verfassungsstaat im (Zerr-)Spiegel der Schönen Literatur, 1983.

2 P. Häberle, Verfassungslehre als Kulturwissenschaft, 1982; 2<sup>nd</sup> edition 1998.

ly consistent. At that time, many impulses regarding “Law and Literature” came from the Anglo-American sphere. I have continued to explore some aspects in a sporadic manner: for example, in the essay ‘Utopias as a Literary Genre of the Constitutional State’<sup>3</sup> (even the constitutional state of J. Locke was once a concrete utopia) – today we think of the provocative “negative utopia” by M. Houellebecq<sup>4</sup> –, also in the contribution ‘On the Freedom of Art in a Cultural and Comparative Legal Perspective’<sup>5</sup>, in the ‘Conversation: Poetry and Constitutional Law’ with H. Lopez Bofill,<sup>6</sup> and in a Festschrift for an Italian colleague in St. Gallen on the topic of ‘Language Articles and Language Problems in Western Constitutional States’.<sup>7</sup> Most recently, I worked on ‘National Anthems as Cultural Identity Elements of the Constitutional State’.<sup>8</sup> Even the booklet ‘National Flags, Elements of Citizen Democratic Identity, and International Symbols of Recognition’<sup>9</sup> as well as ‘The Culture of Remembrance in the Constitutional State’<sup>10</sup> belong here.



This series of topics forms a tetralogy on the overall theme: ‘The Cooperative Constitutional State from and as Culture – Preliminary Studies for a Universal Constitutional Doctrine’.<sup>11</sup> Finally, the Roman lecture on ‘Music and Law’<sup>12</sup> should – quite immodestly – be mentioned, and also included in the scope of our subject matter is the old inaugural lecture in Bayreuth on the topic of ‘Preambles in the Text and Context of Constitutions’.<sup>13</sup> Because preambles employ a language of solemnity and celebration while also striving to be clo-

3 P. Häberle, Utopien als Literaturgattung des Verfassungsstaates in: P. Selmer (ed.), Gedächtnisschrift für Wolfgang Martens, 1987, p. 73–84.

4 M. Houellebecq, Soumission, 2015.

5 P. Häberle, Die Freiheit der Kunst in kulturwissenschaftlicher und rechtsvergleichender Sicht, in: P. Lerche (ed.), Kunst und Recht im In- und Ausland, 1994, p. 37–87.

6 P. Häberle/H. López Bofill, Poesía y derecho constitucional, in: D. Valadès (ed.), Conversaciones académicas con Peter Häberle, 2006, p. 187–201; newly edited in Peru.

7 P. Häberle, Sprachen-Artikel und Sprachenprobleme in westlichen Verfassungsstaaten, in: E. Brem et. al. (eds.), Festschrift zum 65. Geburtstag von Mario M. Pedrazzini, 1990, p. 105–128.

8 P. Häberle, Nationalhymnen als kulturelle Identitätselemente des Verfassungsstaates, 2007 (2. Aufl. 2013, spanische Übersetzung 2012); *idem*, Der Sonntag als Verfassungsprinzip, 2. Aufl. 2006.

9 P. Häberle, Nationalflaggen, Bürgerdemokratische Identitätselemente und internationale Erkennungssymbole, 2008.

10 P. Häberle, Die Erinnerungskultur im Verfassungsstaat, 2011.

11 P. Häberle, Der kooperative Verfassungsstaat – aus Kultur und als Kultur: Vorstudien zu einer universalen Verfassungslehre, 2013.

12 P. Häberle, Musik und Recht, JöR 60 (2012), p. 205–224.

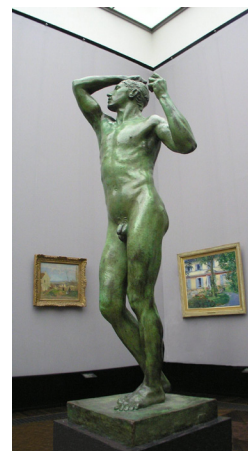
13 P. Häberle, Präambeln im Text und Kontext von Verfassungen, in: J. Listl (ed.), Demokratie in Anfechtung und Bewährung. Festschrift für Johannes Broermann, 1982, p. 211–249.

se to the citizens – the same applies to the Universal Declaration of 1789. Preambles are a treasure trove for the foundational values of a constitution and for classic texts, for the past and future as a narrative, and they represent the great French tradition of mottos (often adopted in Africa) such as “Liberty, Equality and Fraternity”. It is no coincidence that the most beautiful passage of the preamble of the new Federal Constitution of Switzerland (1999) comes from the poet A. Muschg: “[...], that the strength of the people is measured by the well-being of the weak.” Once again, it becomes evident that literature and writers are essential for the conditions of existence of any constitutional state.

In Germany, lawyers and politicians still praise the Basic Law as the “best constitution that ever existed on German soil”. And yet, especially in the 60s and 70s, the word about the unloved republic was in circulation. People have also repeatedly asked whether the Basic Law of 1949 remained just the “big offer”. In the following reflections, I start from the thesis of W. Jens, who says there is not a single area, no matter how scholarly, that could not be illuminated with the help of poetry – illuminated and transcended, because fine literature leads the way for scholarly science like a torch.

From my perspective, literary works can be understood as constitutional texts in a broader sense. Because “constitution” extends far beyond the legal text and its lived practice. It encompasses cultural processes and contents of production and reception within a political community, including artistic creation in literature, film, and music, as well as the visual arts, theater, and television. Literary texts and other “cultural crystallizations” can become constitutional texts “in a broader sense”; In retrospect, they have often advanced the establishment and development of the constitutional state. I recall classical texts by Lessing on tolerance in ‘Nathan the Wise’, which remains an eternal critical text for every constitutional state, by F. Schiller in ‘Don Carlos’ on freedom of thought, and today, quotes from E. Bloch and B. Brecht on human dignity and democracy.

Brecht dared to pose the provocative question: “All state power emanates from the people, but where does it go?” Equally provocative and ingenious is his dictum: “The people have forfeited the confidence of the government. Wouldn’t it be simpler, in that case, for the government to dissolve the people and elect another?” (A rogue who thinks today of the German Chancellor’s handling of the refugee crisis). In the visual arts, we should remember “monuments”, such as the Rodin statue “The Age of Bronze” (a reference to J.-J. Rousseau, 1875/1876) and “The Burgheers of Calais” (1884), or statues like the Statue of Liberty in New York (1886), a gift from Fran-



**Rodin**

The Age of Bronze  
1875/76



ce to the USA, or the horror painting “Guernica” by P. Picasso, as a reminder of the horrors of the Spanish Civil War (1937). We owe a lot to the German graphic artist, caricaturist, and lawyer K. Staeck in his fields, especially in the early 1970s.<sup>14</sup>

## II. The Script of the French Film ‘Section spéciale’

In a few keywords, I’d like to initially refrain from referring to books and literary works, but rather focus on screenplays of films. They too are “literature” and can be fruitful for the topic at hand. I’m not capable of listing all the brilliant films that great French directors have gifted us. I’m only thinking of ‘Fahrenheit 451’<sup>15</sup> by F. Truffaut, where books burn, or the numerous legal dramas like ‘We Are All Murderers’<sup>16</sup> by A. Cayatte, and ‘The Truth’<sup>17</sup> von *H.-G. Clouzot*. For Germany we think of ‘Captain von Köpenick’<sup>18</sup> or the play of the same name by C. Zuckmayer<sup>19</sup> and the novel ‘The Reader’<sup>20</sup> by B. Schlink, a German state law teacher, and for the USA we think of the film ‘The Judgment of Nuremberg’<sup>21</sup> with Marlene Dietrich and in this context to Hannah Arendt and the documentary ‘The Radical Evil’.<sup>22</sup> You all know Charlie Chaplin’s masterpiece: ‘The Great Dictator’.<sup>23</sup>



The relatively young art medium of film - film was only generally recognized as such in the late 1960s - took up topics from the area of law and the social relevance

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14 ‘Die Reichen müssen noch reicher werden. Politische Plakate’ (1973), ‘Die Kunst findet nicht im Saale statt. Politische Plakate’ (1976), ‘Brennpunkt 2. Die Siebziger Jahre, Entwürfe, Joseph Beuys zum 70. Geburtstag’, 1970–1991 (1991), latest *K. Staeck*, ‘Das Jahr 1966. Kunst für alle’, FAZ from January 2, 2016, p. 6.

15 *Fahrenheit 451*. Dir.: François Truffaut. Script: Jean-Louis Richard, François Truffaut. GB: 1966.

16 *Wir sind alle Mörder*. Dir.: André Cayatte. Script: Charles Spaak, André Cayatte. F, I: 1952.

17 *Die Wahrheit*. Dir.: Henri-Georges Clouzot. Script: Jerome Geromini, Michèle Perrein, Véra Clouzot, Simone Drieu, Henri-Georges Clouzot. F: 1960.

18 *Der Hauptmann von Köpenick*. Dir.: Helmut Käutner. Script: Carl Zuckmayer, Helmut Käutner. D: 1956.

19 *C. Zuckmayer*, *Der Hauptmann von Köpenick*, 1931. Much attention has been and still is given to the works of *F. X. Kroetz*, such as ‘Heimarbeit’ (1971), ‘Ich bin das Volk: volkstümliche Szenen aus dem neuen Deutschland’ (1994) – an all-round blow against the alleged racism in all German classes.

20 *B. Schlink*, *Der Vorleser*, 1995, later adapted into film as well.

21 *Das Urteil von Nürnberg*. Dir.: Stanley Kramer. Script: Abby Mann. USA: 1961.

22 *Das radikal Böse*. Dir.: Stefan Ruzowitzky. D, Ö: 2013

23 *Der große Diktator*. Dir.: Charles Chaplin. Script: Charles Chaplin. USA: 1940.

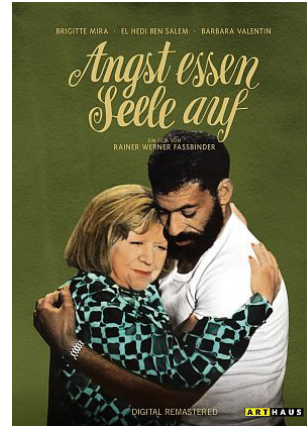


of legal rules at an early stage. However, a large number of directors and (screenplay) writers “used” film art primarily as a “forum” to point out social grievances<sup>24</sup> and questionable aspects of political life. In works of this kind, one can also perceive postulates or appeals to society and the state to create or reform law and legal rules, taking into account social circumstances, and thereby improve the contested living conditions.

Movies like ‘Who Killed Salvatore G.’<sup>25</sup> or ‘No Smoke Without Fire’<sup>26</sup> are examples where legal themes are at least indirectly and tangentially addressed, and criticism of the entanglement between politics and justice at the expense of justice is portrayed. Already in the first half of the 1950s, former lawyer (attorney) A. Cayatte had directed a judicial trilogy that dealt intensively with questions of guilt and punishment in crimes. The fate of guest workers is movingly portrayed in R. W. Fassbinder’s film ‘Fear Eats the Soul’<sup>27</sup> as well as in ‘Germany in Autumn’<sup>28</sup>.

An outstanding example of addressing specific legal issues directly is the fierce struggle against the imposition and execution of the death penalty, which directors repeatedly engage in using the tools of their art.<sup>29</sup> The dubiousness of the search for truth through a court – as a parable for the dubiousness of any search for truth – was brought to the center of Akira Kurosawa’s highly renowned film ‘Rashomon’<sup>30</sup>. Nevertheless, “truth problems in the constitutional state” arise, and there are hopeful attempts to find them in new procedures: the “truth commissions”, most recently in Tunisia.

All these screenplays offer ample opportunity to discuss fundamental questions of legal philosophy: such as the search for truth, the actions of justice as the third branch of government, and war crimes. In the following, only one “scenario” (screenplay) will be highlighted: that of the French-Italian film ‘Section spéciale’ by Costa-Gavras,<sup>31</sup> which was broadcast on the very deserving German-French channel “Arte” under the title “Special Tribunal” on February 8, 2016.



24 E.g. *Die Vergessenen*. [Los Olvidados]. Dir.: Luis Buñuel. Script: Luis Buñuel, Luis Alcoriza. Mex.: 1950, is a “classic” of this genre.

25 *Wer erschoss Salvatore G.?* Dir.: Francesco Rosi. Script: Suso Cecchi D’Amico, Enzo Provenzale, Francesco Rosi, Franco Solinas. I: 1961.

26 *Kein Rauch ohne Feuer*. Dir.: André Cayatte. Script: André Cayatte, Pierre Dumayet. F: 1973.

27 *Angst essen Seele auf*. Dir.: Rainer Werner Fassbinder. Script: Rainer Werner Fassbinder. D: 1974.

28 *Deutschland im Herbst*. Dir.: Rainer Werner Fassbinder et al. Script: Heinrich Böll et al. D: 1978.

29 E.g. *Ein zum Tode Verurteilter ist geflohen*. Dir.: Robert Bresson. Script: Robert Bresson, André Devigny. F: 1956 und *Tod durch Erhängen*. Dir.: Nagisa Oshima. Script: Nagisa Oshima et. al. J: 1967.

30 *Rashomon*. Dir.: Akira Kurosawa. Script: Shinobu Hashimoto, Akira Kurosawa. J: 1950.

31 *Section spéciale*. Dir.: Costa-Gavras. Script: Costa-Gavras, Jorge Semprún, Hervé Villeré. F: 1975.

The plot, based on a true story, is as follows: In August 1941, a young French communist shoots a German occupation officer in Paris. The Vichy government decides that six French citizens (communists and Jews) should be sentenced to death in advance as retaliation. An exceptional court is installed through a decree of the Council



of Ministers under P. Pétain. It also includes the legal professor J. Barthélemy (1874–1945), Minister of Justice in Vichy. This exceptional law was to take effect retroactively in order to allow the executions of the selected individuals to proceed quickly. The law was published in the ‘Journal officiel’. Barthélemy initially resists in the deliberations but then follows the orders of Marshal Pé-

tain, who fears German reprisals. I remember that when advising the exceptional court in the film or script, there is explicit reference to the prohibition of the retroactivity of laws (*nulla poena sine lege*) or to the great Montesquieu and his separation of powers. The German occupying power spoke of the execution of six French people who were guilty of terrorist acts. In reality, there were only minor crimes committed by people who had already been legally convicted. The executions took place without anyone being held accountable later.<sup>32</sup> This film is one of the most impressive and frightening things the author has seen on television in over 40 years.

### III. Theses on the Relationship between Poetry and Constitution

#### 1. Stocktaking from the perspective of the 1980s in Germany

Just in bullet points, let’s recall the inventory listed in my booklet on the ‘Basic Law of Writers’.<sup>33</sup> Many German writers suffered from the division of Germany since 1949. But also heavily criticized was the alleged large gap between the constitution and constitutional reality in the western part of our country. The reality of democracy and the rule of law in the existing “system” was also repeatedly criticized by writers,<sup>34</sup> soon as a kind of “negative constitutional practice” with reference to the Of-

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32 Details in: [https://fr.wikipedia.org/wiki/Section\\_sp%C3%A9ciale\\_%28film%29](https://fr.wikipedia.org/wiki/Section_sp%C3%A9ciale_%28film%29), zuletzt aufgerufen am 10.2.2016.

33 P. Häberle (quote 1).

34 Quote R. Hochhuth: “It is a fairy tale that the Federal Republic is a constitutional state”, 1971; He wrote the controversial play ‘The Deputy’ (1963).

Office for the Protection of the Constitution<sup>35</sup>, soon in view of the so-called “Radicals Decree”, which affected applicants for public service. Indeed, there was talk of the Federal Republic as a “CDU state” (a fighting term) and of its alleged path to an authoritarian state. Often, criminal law as a whole was criticized, or individual norms and court decisions (“judicial methods”, with the keyword being the so-called “death shot” against terrorists). Writers were particularly outraged about the emergency constitution (1968).

Many statements are directed against lawyers per se; often against the judiciary and the police (the classic critic of the judiciary and lawyers in the Weimar Republic was K. Tucholsky). In the opinion of the critics, freedom of expression was not considered to have been fully realized (“Expropriate Springer!”). The existing ownership and ownership structures in the Federal Republic of Germany also faced a lot of criticism. There was rarely undivided approval of the reality of the Basic Law constitution from well-known authors. At times, however, the realities of the GDR were called out critically, especially by expatriates like W. Biermann (also R. Kunze or Sarah Kirsch). Direct quotes from G. Grass and R. Hochhuth are often astonishing in retrospect.<sup>36</sup> Especially in hindsight from today’s happily reunited Germany, the sharp criticism by many authors at the time is surprising.



### Extra-Parliamentary Opposition (APO)

Leftists and liberals blow up a storm in 1968 against Springer-Verlag, photo: Ludwig Binder

I already dare to consider Germany and France in comparison here. The very German inclination towards exaggeration, towards extreme positions (as was already the case with Lessing’s friend and publisher Friedrich Nicolai), or to retreat into inwardness might be a reason why many writers at that time didn’t know what to make of the Basic Law as a constitution of measure and the moderation of freedom as normality. However, it is rightly stated that Germany lacks a “political culture of the writing guild”, in contrast to France and its “cultural nationalism”. The Marseillaise of the French is a literary and musical text that continually renews the basic consensus and is a part of the French Republic and identity.

France can provide positive instructional examples up to the threshold of our days. Despite all criticism of political conditions and events in particular, from V. Hugo to

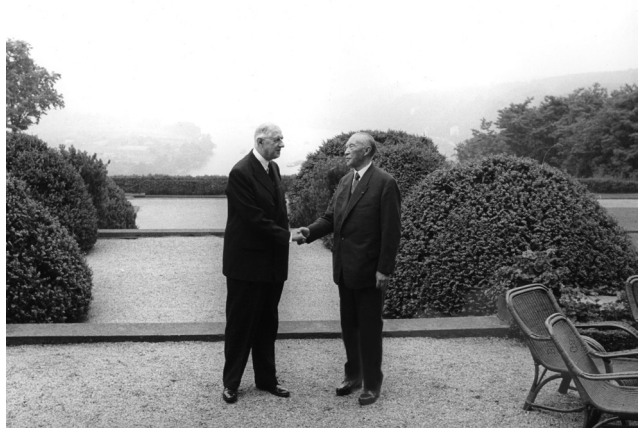
35 Quote *E. Fried*: “The Office for the Protection of the Constitution is burying democracy.”

36 Proven in the volume above.

J.-P. Sartre, “literature” has held a significant place in co-founding the Republic here. This was expressed not least in de Gaulle’s famous statement about Sartre: “You don’t arrest a Voltaire.” Certainly, such a “constitutional (sub)culture” cannot be established overnight, nor can it be simply “copied”. In France, literature has always been and continues to be more “political” than in Germany. However, the connection between the constitutional state and literature is evident: it must be able to grow. It should also be mentioned that in France, great statesmen often became writers of distinction, at least in their memoirs. This probably applies to Charles De Gaulle and F. Mitterrand, a little less so to K. Adenauer. What about the French elite in today’s France?

It would be intriguing, in our present times, to reflect on the statements of writers about the current situation in Germany. Such an inventory cannot be provided here, but keywords must suffice. Consider the economic crisis (the banking system), the Euro crisis concerning Greece, and currently the refugee crisis, in which later

“fine literature” will likely praise the humanitarian impetus of the German Chancellor, as mentioned by the writer R. Klüger in the German Bundestag on January 26, 2016. One also thinks of the recently awarded film by G. Rosi, ‘Fuocoammare – Sea Fire’<sup>37</sup>. But perhaps in our decade there are fewer mentions of “fine literature” than in the highly politicized period of 1968. Just one eloquent voice should be quoted: G. Grass, “Shame of Europe”<sup>38</sup>:



**Chancellor Konrad Adenauer (right) and the French President Charles de Gaulle**

in the garden of the French residence  
Ambassador in Bonn, Ernich Castle on July 5, 1963

Close to chaos, because the market is not just,  
you’re far away from the country which was your cradle.  
What was searched and found with one’s soul,  
is now considered to be as worthless as scrap metal.  
As a debtor put naked on the pillory, a country about  
which you used to say you were grateful, suffers.

37 *Seefeuier*. [Fuocoammare]. Dir.: Gianfranco Rosi. Script: Gianfranco Rosi. I: 2016.

38 G. Grass, *Europas Schande*, 2012.

Poverty doomed country whose maintained wealth  
 adorns museums of the loot you kept.  
 Those who hit the country, blessed with islands, with the force of arms  
 wore both uniforms and Holderlin in their knapsacks.  
 Barely tolerated country whose colonels were  
 once tolerated by you as an alliance partner.  
 Country which lost its rights, whose belt is tightened and  
 tightened again by the cocksurely powerful.  
 Antigone defying you wearing black and all over the country,  
 the people whose guest you have been wear mourning clothes.  
 However, outside the country, the Croesus resembling followers  
 have hoarded all what glitters like gold in your vaults.  
 Booze at last, drink! Commissioners' cheerleaders shout.  
 However, Socrates gives you back the cup full to the brim.  
 Curse you as a chorus, which is characteristic of you, will the gods,  
 whose Mount Olympus you want to steal.  
 You'll waste away mindlessly without the country,  
 whose mind invented you, Europe.

What a powerful text by the same G. Grass, the Nobel Prize winner for literature (1999), who criticized the rapid German reunification in 1990 and unfortunately once referred the GDR as a “comfortable dictatorship”.

In the history of the German-speaking constitutional state there are great examples of poetic or dramatic capture of the constitution of a people. This is what G. Büchner says<sup>39</sup>:

The form of state must be a transparent garment that fits closely to the body of the people. Every swelling of the veins, every tensing of the muscles, every twitch of the tendons must imprint itself upon it.

A classic text of both jurisprudence and poetry is Gottfried Keller's text from 1864, which is less revolutionary than democratic and under the spell of 1789. It captures the essence of Switzerland and its evolved constitution in the sentence:

To us, the most beautiful constitutions seem to be those in which, regardless of style and symmetry, one concretum, one won right, lies next to the other, like the hard, shiny grains in granite and which are at the same time the clearest history of themselves.



**Georg Büchner**

August Hoffmann  
 Around 1835  
 Pencil drawing

39 G. Büchner, *Dantons Tod*, 1835, Act 1, Scene 1.



This quote is at the same time a beautiful testimony to cultural-scientific and cultural-historical constitutional thinking. It is no coincidence that to this day it has been received more in Switzerland than in Germany.

## 2. The Common Republican Responsibility of Jurists and Writers in the Constitutional State

If one sees the legal constitution, its science and art together from the outset as an “other” form of human culture, if one expands the “purely legal” consideration to include the cultural science outlined above, this results in “republican responsibility” on the whole: optimal target demands to the constitutional state, its guarantees and services for art and science as well as minimal expectations towards art and science. Both will be briefly outlined below.

### a) Constitutional State as a Cultural State, especially with regard to Literature

As limited as legal instruments and institutions may remain in their impact on art, especially literature, they are indispensable. The constitutional state must negatively delineate cultural freedom (status negativus by G. Jellinek) while simultaneously seeking to effectively enhance it through various contributions. Openness of cultural processes, a maximum of tolerance towards artists and art, for example in criminal law, performance-based aspects such as “state prizes”, but also information about art, for example in schools, expansion of art universities, other forms of promoting artistic creation, e.g. the establishment of town clerks, including draftsmen – “without conditions” – all of this is to be demanded of the constitutional state for its own sake. As the constitutional state develops its cultural constitution law under the sign of an “open cultural concept”, it gains a piece of its own future. This future is determined less by legal work than by the production of other sciences and the arts.

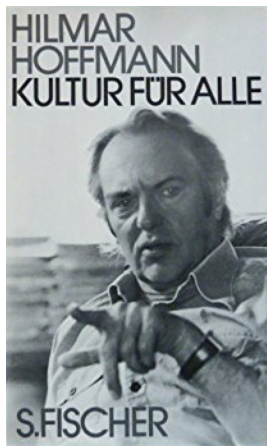
In any case, the communication of orientation values within society, which are only possible on the basis of the Basic Law, remains an indispensable task. A cultural science approach in constitutional state thinking also proves effective in that it recognizes and develops the issue addressed here.



Georg Jellinek

Ed. Schultze, after 1890

Constitutional texts that aim to “make the insights and achievements of science and art accessible to all” (such as Article 24 of the Constitution of the Canton of Unterwalden/Switzerland, 1968) ultimately make art and science the “intellectual property” of everyone in the long run. These increasingly common constitutional mandates are part of the context of the postulate “culture for all” (Hilmar Hoffmann). In our context, this means “literature for all”. When considering the purpose of such constitutional texts, it is less about any form of “democratization” – in terms of “no art privileges!” – and more about fundamental rights, anthropological contexts. Individual freedom is culturally fulfilled freedom! Objectifications of art and science are, from the perspective of the creator, a part of their individual sense-making process. However, they can also become objective opportunities for creating meaning for others (citizens): thus, they become a part of culture in the tension between production and reception.



This view corresponds to a cultural science approach that seeks to complement the traditional legal one. Individual freedom does not “become” in a vacuum, it is not “natural freedom”, it is a cultural concept. The individual requires, for their own personal development and identity formation in the sense of the human dignity guarantee of Article 1 paragraph 1 of the Basic Law, cultural contributions from many generations and no fewer creative individuals. The anthropological structure of needs is oriented towards culture. Elementary school and popular or adult education were, respectively are, a first achievement on the path to “generalized” constitutional culture. The mandate of making culture accessible to everyone is today the current stage of text on this path. The constitutional state should only make “offers” in this regard. Whether and how individuals embrace the art and science accessible to them lies within their fundamental rights-based freedom. Cultural universality and cultural freedom are two sides of the same coin.

Why these demands for the expansion of cultural constitutional law at every level of state action? Because the constitutional state relies on art and literature as a product of freedom, as “cultural crystallization”. Literary works, including films, act as a “ferment”, they are the “material” from which law and lawyers in an open society can gain much stimulation and “material” as well as (guiding) “values” in the short, medium, and long term. The growth processes of the constitutional state rely on non-legal literature: on so-called (often provocative) “political, committed literature” as well as as well as on what appears to be highly “private” such as the majority of poetry. Because just as the private sphere is a condition of life for a constitution of pluralism, what is created from this privacy becomes a moment of the constitutional state. The entire spectrum of literature is to be seen positively in this sense. The in-

novative power of literature can shine through even in vehement “system criticism”: insofar as it develops momentum from piecemeal reforms.

The constitution of pluralism must also be able to bear the “system critic”: as long as its “limit of tolerance”, especially Articles 18 and 21 of the Basic Law, is not exceeded.<sup>40</sup>

Thus, the democracy deficits highlighted by the “left-wing scene”, especially the 68 scene, can serve as a reminder of the need to strengthen direct democracy (exemplified by citizen participation at the municipal level in Bavaria). Similarly, polemics against the so-called “professional bans” may prompt questions about whether the former “standard inquiries” for public service applicants withstand a cost-benefit calculation. The sting present in the literary scene of the “other left-wing part” of our former republic, which pricked some of us – think of books like W. Jens’ ‘Republican Speeches’<sup>41</sup> or the ‘Letters in Defense of the Republic’<sup>42</sup> –, belongs here as well as G. Grass’ insistence on the unity of Germany as a cultural nation (1979). The turning point to the social-liberal awakening in 1969 and the first government declaration by W. Brandt should be remembered. This departure was supported with hope by many writers. It was only in the early 1980s that the German constitutional law doctrine rediscovered the rich variety of the term “republic”.

Indeed, the science of state law would do well to take seriously the “layman’s” pre-formulation of desires and needs for reform, of people’s new needs and difficulties, of hopes and wishes in art and, in this respect, to approach literature and writers: not just on holidays and not just “ornamental”. Almost every classic quote of today was once a critical quote of yesterday: Many of today’s critical statements can become classic statements of tomorrow! In Germany, there have been recurring deficits in the relationship between politicians and writers. One might think of a famously notorious “Pipsqueak quote” by L. Erhard (against R. Hochhuth). Perhaps constitutional state law scholars do not pay enough attention to the statements of “fine literature” on constitutional issues. This deficit is all the more regrettable as constitutional law can



### Federal Chancellor Willy Brandt

in his government statement on October 28, 1969 in front of the German Bundestag with the program: “We want to dare to be more democratic.”

Photo: Egon Steiner

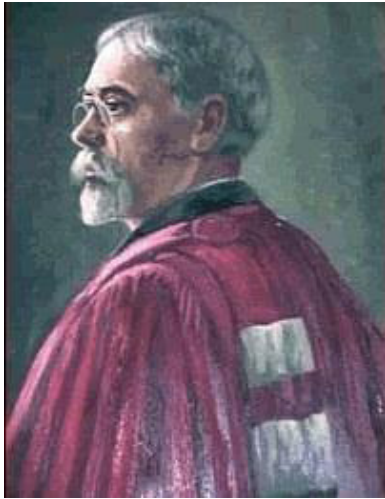
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40 Cf. BVerfGE 2, 1 (10 et seq.) – SRP-Urteil [1952]; see also the KPD ruling, which was much criticized by writers, E 5, 85 [1956].

41 W. Jens, *Republikanische Reden*, 1979.

42 F. Duve/H. Böll/K. Staack, *Briefe zur Verteidigung der Republik*, 1977.

also be a piece of “literature”, and where it is, additional opportunities for reception are opened up. Great stylists like O. Mayer or G. Jellinek surely always knew about



**Maurice Hauriou**

Master and date unknown  
Photograph of a painting

this. In civil law doctrine, the same applies to figures like F. C. von Savigny in Goethe’s time or to a Martin Wolff in the Weimar period, and probably also to Ernst Rabel: their legal literature was scientific prose of high rank and in this way they helped to establish legal culture in some areas. For France, I might perhaps mention Maurice Hauriou, whose work I have already engaged with in my dissertation on the guarantee of the essential content of fundamental rights<sup>43</sup> – thus, a small circle closes to Montpellier.

The relevance of writers as non-lawyers is a consequence of the concept of the “open society of constitutional interpreters” advocated here. The expression of non-lawyers on constitutional matters also contributes to the “concert” of the whole in the processes of “invention” of guiding values,

as well as the determination of the content of the basic concepts of the constitutional state. The constitution, as part of the cultural condition of a people, is more than just a legal framework. Whether and how it endures is not solely the concern of lawyers, nor is it solely the concern of all citizens in general, but also of artists and writers, those who by profession – if you want “officially” – handle with words.

Additionally, especially in times of emergency and crisis, which we may be facing even more intensely, the legal constitution is only effective to a limited extent if it is not supported and “held” by cultural structures (including emotional content). Responsibility frameworks are only partially and very fragmentarily established by (constitutional) law. Cultural traditions, content, and guiding values are therefore all the more necessary as grounding elements.

The critical function often emphasized in freedom of expression and freedom of the press is a distinctive characteristic of artistic freedom as well (alongside freedom of religion and freedom of science, the most important freedom): as recognized in Goethe’s dictum:

Whoever masters science and art,  
also has religion;  
those without the former two,  
surely needs religion.

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43 P. Häberle, Die Wesensgehaltsgarantie des Art. 19 Abs. 2 Grundgesetz, 1962; 3<sup>rd</sup> ed. 1983.



Goethe

Joseph Darbes, 1785

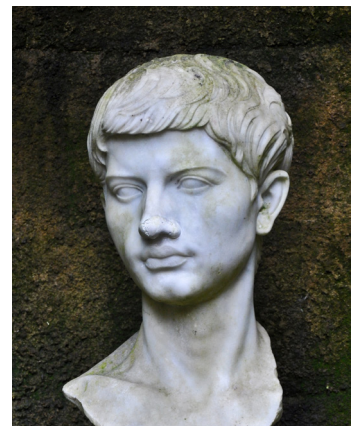
Exaggeration is a legitimate stylistic and artistic device – think of political cartoons, including cabaret. In this sense, art is a part of the “field of tension” (D. Göldner) that characterizes pluralism. (Fine) literature, to a large extent, thrives precisely on criticism of the “status quo”. Since it is most strongly “anchored” by law and constitution, they are its “natural” counterpart.

Critical literature serves as a catalyst in the fermenting processes of society or the public sphere; it also contributes to formulating the self-understanding of a pluralistically composed populace (the self-understanding of the artist is also legally relevant for the interpretation of Article 5(3) of the Basic Law). It should not be surprising if a poet were to dare to say one day: “The constitutional state is too important to be left solely to the lawyers.” Certainly, a bit of self-restraint on the part of the lawyer and the scholar is necessary. They can only complete a partial task. Put another way: We all are guardians of the constitution.

The relationship sought here between literature and the political community is not some form of “state poetry” or “state art” or “positive art”. It has often benefited the state little and rather harmed the author. Virgil in ancient Rome may be an exception. Rightly so, the Russian writer L. Kopelew remarked in his Frankfurt speech upon receiving the Peace Prize of the German Book Trade in 1981:

The true intellectual life in all countries, especially those ruled by authoritarian or even totalitarian controlled regimes, develops independently of state power. State political traditions, administrative routines, and ideological legacies either remain foreign or are directly hostile to the intellectual and moral traditions, the legacies of national culture.

This passage, strongly influenced by the idea of national culture and cultural nation, is certainly under the impression of the totalitarian USSR (Could this sentence also be written in today’s Russia under Vladimir Putin?) However, this sentence is likely to be applicable to a limited extent to liberal consti-



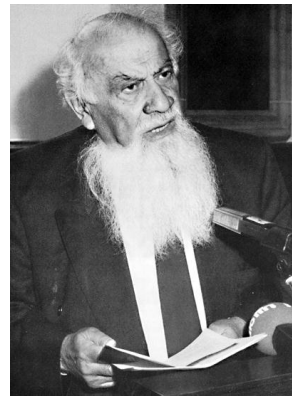
Virgil

Master unknown  
1<sup>st</sup> century AD



tutions as well. In any case, it can foster skepticism toward any kind of “Constantinian proximity”.

Historically there have always been difficulties, misunderstandings and opposition between literature and the (constitutional) legal order. Position was (and is) opposition. Today the opposition naturally turns more strongly against the supra-personal, “objective” legal order, and in older times against the ruler, the regent or another authority, which in turn embodied the social order. One reason for the disparity may also lie in the fact that writers tends to engage more critically with “negative phenomena”, while panegyrics of existing institutions and legal conditions often appear rather dull and unattractive, hardly stimulating creative imagination. Good literature is hardly affirmative. Apparently, she requires dissent in society.



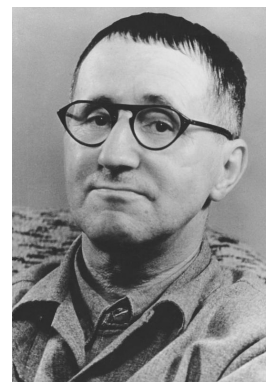
**Lew Kopelew**

Date unknown

### b) Minimal Expectations for Art and Literature

As much as the constitutional state should take into account the realm of culture and the individuals who create it, all expectations of the constitutional state must remain minimal. There is no automatic correlation between “input” and “output” here. Nothing should be enforced, and the principle of “plurality instead of conformity” applies here but also the imperative that the freedom must remain, from which “critical sympathy” towards the constitutional state can arise. The constitutional state does not seek to simply “incorporate” or otherwise absorb its writers as citizens. It is part of its openness that the constitutional state “tolerates” critics of various degrees of severity. The tension thus conveyed is by no means inherently harmful. It can stimulate new solutions and be conducive to development. The relationship between literature and the constitutional state becomes questionable only when lack of information leads to blatant errors in judgment or when an almost continuous literary “resistance front” is established. Much suggests that this was the case in our German Republic after 1968.

We lawyers must therefore remind literature and writers of their indispensability, we must offer them information about the Basic Law and should carry out public relations work for our constitution. This work is necessary in order to avoid B. Brecht’s impression: “The law is a pig in a poke.” We can also expect artists, in turn, to inform themselves “objectively” and dismantle their prejudices – all of this would



**Bertolt Brecht**

Photo: Jörg Kolbe, 1954

be a lot, indeed enough. However, any further imposition could easily turn into ‘tutelage’, even at the mere appearance of it. It would only deepen the alienation and gap between legal art and literature, between constitutional law doctrine and intellectuals. The relationship of the writer and poet to the political and legal sphere will probably always be precarious; However, in the context of an open society, it should not be “subversive” and should only be characterized by misunderstandings. However, it must not be overlooked that “fine literature” often matures in resistance against the adversary, that the literary figure often has something anarchistic and must have it, that personally, at times, they may want to remain entirely in the private sphere, and that poetic radicalism and intensification can be “professionally necessary” for independent creative achievements to occur.

What could sometimes *prima facie* appear to be a “refusal front” is therefore more complicated. Comradely pats on the back, ingratiating or other forms of “inclusion” of the literary figure from the “cultural state”, its law and its politicians, including constitutional law teachers, would be out of place. But that does not take away the fundamental justification of the present attempt to hold up a constitutional-theoretical mirror to “fine literature” (including film art).

Perhaps, specifically, constitutional law scholars can remember that they themselves are a part of literature, and the teacher of the state is an author. While this certainly increases the demands on the quality of our texts and the care with which we lawyers formulate our language, it could serve as a vehicle for a deeper understanding between the constitutional state and literature. It is sorely necessary. Thus, our political community should not only be a “republic of scholars” but, thanks to the republic of scholars, it could also become a republic of writers in the double sense of the word. Ultimately, our republic is, of course, entrusted to everyone: responsibility falls upon all citizens. If this responsibility is assumed collectively and through division of labour, the Basic Law can truly become the best – lived – constitution ever to exist on German soil!

### III. Appendix: Utopian Theses of a Comparative Constitutional Doctrine

The “utopian theses” of a comparative constitutional doctrine as a legal and cultural science text are as follows:

#### 1.

Utopias constitute an indispensable literary genre and form of science or art for both legitimizing and critically reassessing oneself. They incorporate both human experiences and hopes, thus being anthropologically grounded.

## 2.

As history teaches us, particularly the democratic constitutional state has become a “cultural achievement” not least thanks to utopias, fantasies, visions, and dreams of its classics. Therefore, in the future, there must be openness to new or transformed classical utopias as catalysts or ferments. Consider Martin Luther King’s “dream” of racial integration in the USA, which in many respects has yet to become a reality and legally and culturally took on special constitutional form there in the shape of a new holiday in 1986. In this sense, the thesis of an exhaustion of utopian energies, if true, points to a crisis symptom that cannot leave the democratic constitutional state indifferent. Every constitutional state requires an indispensable “quantum of utopia”.



### Martin Luther King

“I have a dream!” speech during  
Protest march on Washington on August 28, 1963

## 3.

This does not exclude the possibility that constitutional doctrine consciously evaluates and distinguishes between “positive” and “negative utopias” (e.g. “historical-philosophical” or “totalitarian”). To date, the most beautiful example of a “positive” utopia, which has so far only been realized selectively, is I. Kant’s philosophical draft ‘For Eternal Peace’<sup>44</sup>, while the “negative” one is Orwell’s ‘1984’<sup>45</sup> or the film ‘Fahrenheit 451’<sup>46</sup>.

## 4.

Constitutional doctrine should differentiate between the indispensable critical function of utopias and their warning function and boldly name the dangers of classical as well as newer utopias: for example, Marxism/Leninism or anarchism, and today, closed “Islamic states” (Iran, Afghanistan).

## 5.

This nuanced classification of utopias implies a correction to Popper’s thinking to the extent that his “critical rationalism” requires supplementation with cultural science methods. Utopias can create anticipatory and highly creative “speculative knowledge” that, when implemented through “piecemeal reform”, enriches the developmental processes of the constitutional state. Even utopias of a “closed society”

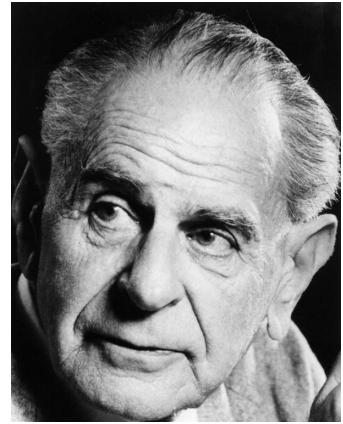
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44 I. Kant, *Zum ewigen Frieden*, 1795.

45 G. Orwell, 1984, 1949.

46 *Fahrenheit 451* (cf. quote 15).

such as those of Plato or Marxism can have positive effects as countertypes to the constitutional state model. However, this differentiated classification builds on Popper insofar as it, like him, believes in the “openness of the course of history” and the possibility of individual meaning-making, thus standing against Marxism or deterministic systems. Of course, all of this is based on the “mutedly optimistic view of humanity” and the “scientific optimism” that should characterize constitutional theory in individual questions (e.g. educational goals or resocializing criminal law) and as a whole.



6.

Constitutional doctrine or the type of “constitutional state” must provide space for a “quantum of utopia” for people: not only in the form of exclusion and promotion of cultural freedoms (including religions!) but even more intensively by norming hopes in constitutional texts (e.g., earlier hopes for the unity of Germany or – today – Ireland) that are at least concrete “utopian desires”. The “principle of hope” and the “principle of responsibility”, for example in environmental protection, stimulate fruitful constitutional developments because humans need hope as much as they need to breathe, and the community thrives on responsible freedom. While constitutional texts in their juridical dimension are fundamentally removed from utopias and must remain so according to their nature, in certain areas, they can still embody utopian ideals – even the principle of the welfare state was initially a piece of utopia during the time of H. Heller<sup>47</sup> and then in 1949 under the Basic Law!

Karl Popper

Around 1980

7.

Art and artists often anticipate what political reality later puts on the “agenda”: Think of ‘Star Wars’ as a film in the 1970s and as a defense (or dangerous?) concept of global political action in the 1980s, or the Czech truth philosophy of Václav Havel with regard to the year 1989.



Václav Havel

in front of the European Parliament, 2009

8.

To the extent that constitutional doctrine as a science should “listen” to art and artists as a whole in order to gain sensitivity to new problems, it must give declared high priority to utopia within its framework, but also draw certain boundaries: they

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<sup>47</sup> H. Heller, *Rechtsstaat oder Diktatur?*, 1930.

lie primarily there, where violence and lack of freedom become the means of forced ideal conditions that are promised “for later”. Popper's postulate of “piecemeal reform” remains a constitutional-political maxim. With this guideline, utopian texts can be “classic texts” and become constitutional texts in a “broader sense”.

### 9.

In this view, utopias are a part of the “cultural heritage” of the constitutional state as a type, even where they have preceded it to this day or where they have been written against it: It gains contours from them, sometimes being “provoked” by them, and sometimes it must prove itself against them, for example, in its dealings with other states in international law, as in Kant’s ‘Perpetual Peace’: as a “cooperative constitutional state”.

### 10.

Utopias may, indeed should “worry” people, and the same applies to the constitutional state. However, they can also “reassure” him: because and to the extent that utopias have been repeatedly redeemed by him and confirm his freedom of thought. Consider the once “utopian” commandment of human dignity and its centuries-long cultural history, or its current ideality and reality in the successful constitutional state.





**The beginning of Article 1 of the Basic Law**  
on the façade of the district court in Frankfurt am Main:  
“Human dignity shall be inviolable.”

## II. POETRY AND CONSTITUTIONAL LAW

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PETER HÄBERLE

IN CONVERSATION WITH

HÈCTOR LÓPEZ BOFILL

**P**eter Häberle, one of the great European state law scholars, developed his theory of the constitution as a cultural science, incorporating literature and poetry as central elements for understanding constitutional texts as well as factors contributing to integration and stability in the political community. This conversation between Peter Häberle and his student Héctor López Bofill, himself a state law scholar and Catalan poet of high degree, took place accompanied by Meritxell Batet on June 23, 2003, in Munich. The conversation unfolds from literature to constitutionalism, addressing the significant challenges posed by the future, particularly the European Constitution, and the importance of culture in the political reshaping of the continent.\*

H. L. BOFILL: “What’s eternal, however, is established by the poets.” I wanted to start with this famous line from F. Hölderlin to reflect on the role of poetry and its influence on political order and on classical texts in the constitutional state.

P. HÄBERLE: For almost my entire later academic career, I have attempted to explain the influence of poetry and classical works of literature on the “constitution as a cultural science”. There are numerous examples for this: For a start, we can quote F. Schiller, who established a direct relationship between poetry and politics in his: ‘Briefe[n] über die ästhetische Erziehung des Menschen‘ (Letters on the Aesthetic Education of Man). We should also mention J.-J. Rousseau, who, alongside his well-

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\* First published in: *Punto de Vista*, no. 17, Barcelona 2004, p. 7-29; *Conversaciones Académicas con Peter Häberle*, Diego Valadés (ed.), Mexico City, <sup>1</sup>2006, <sup>2</sup>2017; Lima 2015; Portuguese translation Brasilia, 2008; First published in German: *Peter Häberle, Vergleichende Verfassungstheorie und Verfassungspraxis. Letzte Schriften und Gespräche*, Berlin 2016, p. 264-272.

known philosophical texts, wrote poems – isn't his concept of the "general will" also a poetic term? The term "classical texts" also refers to great musical compositions. In this sense, Beethoven's 'Ode to Joy' is also a "classical text" for Europe. This is evident not least in the work of the Convention on the Draft of an European Constitution. „Klassikertexte“ spielen eine doppelte Rolle: On the one hand, they often articulate a vehement critique of the constitutional state or of its individual principles, such as democracy or the rule of law. My example is Bertolt Brecht's dictum: "All



**Friedrich Schiller**

Anton Graff, 1786/1791  
Oil painting

state power emanates from the people, but where does it go?" On the other hand, "classical texts" can also serve as a source of legitimation. An example of both is provided by F. Schiller's 'Don Carlos' concerning the tension between original freedom and granted freedom, as well as his demand: "Sire, grant freedom of thought!" All of these are central questions for the theory of fundamental rights, as they can be linked to the rights of freedom of expression, art, and science, as well as the additional rights of Article 5 of the Basic Law.

H. L. BOFILL: In your works, you have extensively explained the relationship between literary or musical texts and legal texts. Interestingly, your theory of the "textual stage paradigm" from 1989 confirms the following: There is an interaction between the concepts derived from literary art and formulated in "classical

texts", and the consolidation of their preservation through their reception in constitutional law.

P. HÄBERLE: There are themes in constitutional law that are particularly sensitive to the creative activity of poets. Preambles in constitutions provide a good example, as do certain statements in bills of rights. Poets have the ability to contribute the necessary dose of utopia that can help shape the meaning of constitutional reality. I mention the example of the Swiss Federal Constitution of 1999. Its preamble was shaped by the ideas of the poet A. Muschg. His line reads: "... that the strength of the people is measured by the well-being of the weak." The values that can be derived from certain constitutional principles and state goals, such as tolerance or democratic education and training, are influenced by both the linguistic formulation and the substantive content of the poetic statement, such as Lessing's Ring Parable for tolerance. Regarding fundamental rights, one must mention the Declaration of the Rights of Man and of the Citizen of 1789. Their universal success was partly fueled by the strong, impressive, concise, and suggestive nature of their linguistic style. The influence of the Declaration can be linked to the literary genius of individual members of the French National Assembly, I mention here only Mirabeau.

H. L. BOFILL: If poetry is regarded as a source of numerous constitutional principles, one could also assume that poetry is suitable as a means of interpreting these constitutional concepts. The interpretation is then derived from the systematics of the various parts of the constitution (for example, preamble, content of fundamental rights, or state goals) in relation to the poetic word that underlies them.

P. HÄBERLE: We should neither underestimate nor overestimate the functions and possibilities of poetry in the development of jurisprudence. Poetry, as an art form, is protected by the guarantee of artistic freedom under Article 5 Paragraph 3 of the Basic Law or Article 20.1 b of the Spanish Constitution. Therefore, it is impossible to advance an interpretation of the concept of artistic freedom that is independent of the provisions of art and artistic freedom that poets and artists themselves have created. I mean here the relevance of the artists' self-understanding in the interpretation of "their" fundamental right. This example also applies to academic freedom. Its content and limitations are determined by the scientific and academic community. In my opinion, artistic freedom, alongside religious and academic freedom, is one of the most important freedoms in the system of fundamental rights protection. Therefore, it is not sufficient to normatively regulate a historical reference to the right to freedom of expression (as in some constitutions). In Germany, there was an early provision for artistic freedom in the Weimar Constitution of 1919. Artistic freedom thus deserves special protection, alongside the separate, specific provision for freedom of expression and the press. Only this specificity corresponds to the autonomy of art and the artist.

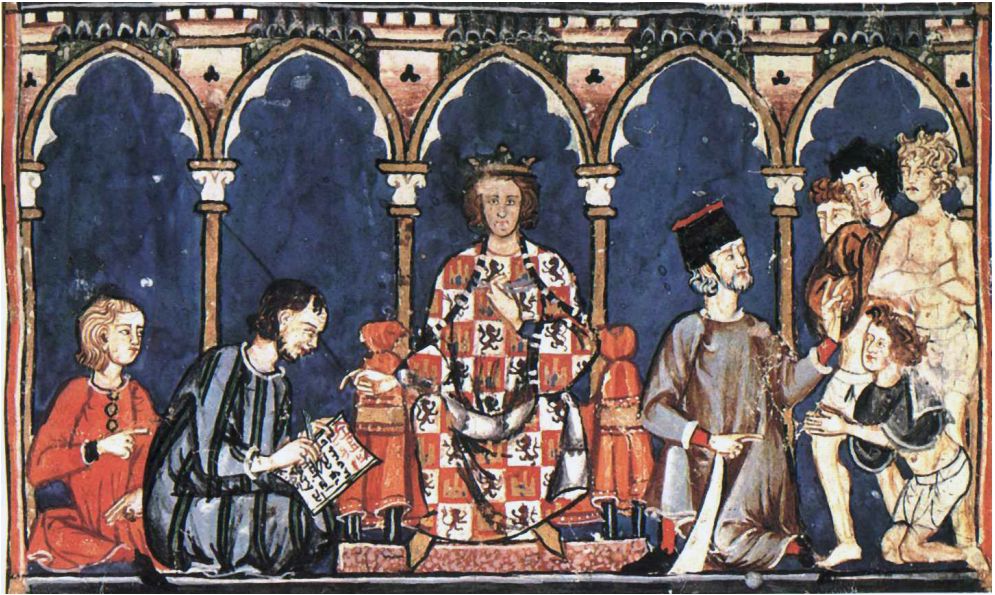
H. L. BOFILL: The relationship between literature and law extends back to the origins of jurisprudence. It is no coincidence – as mentioned by A. López Pina and I. Gutiérrez Gutiérrez in their 'Elementos de Derecho Publico' (Elements of Public Law) – that the founder of legal science, Appius Claudius the Blind, published the first procedural law forms and was also the founder of Latin literature at the same time. Similarly, López Pina and Gutiérrez Gutiérrez emphasize that the origin of Spanish literature and legal science is linked to the figure of King Alfonso X the Wise. The first of the "lawyers of resistance" in 18<sup>th</sup> and 19<sup>th</sup> century Germany, E.T.A. Hoffmann, was also a writer. Perhaps one should emphasize the difference between poetry and law: in poetry, indeterminacy and the convergence of multiple meanings are virtues and evidence of textual richness. In law – and thus also in constitutional law – it is different: Precision is valued, the successful application of the rule to the



Honoré de Mirabeau

Joseph Boze, 1789  
Pastel





Alfonso X of Castile

Illustration from the 'Libro de los juegos', 1251-1282

case. In constitutional law, the contradiction between poetic interpretation and the purposes of legal interpretation is particularly evident. Because in the indeterminacy of constitutional terms, one finds the keys to the openness of the constitution and the entire society, as well as its role as a source of emotions and cohesion.

P. HÄBERLE: Precision is a quality that jurisprudence and dogmatics must offer through definitions. In contrast, poetry is based on indeterminacy and openness, which allow for a change of meaning. Therefore, it is a peculiarity of constitutional law that it works with fewer definitions than civil or criminal law. The latter is dominated by the principle of legality. In the constitution, one encounters many mutable terms such as “dignity”, “family”, or “art”, as well as “science”, which are almost as indefinite as poetic ones. This analogy between constitutional law and poetry also explains the particularity of the interpretation methods that constitutional law has developed, such as the use of topics and constitutional interpretation in the “open society of constitutional interpreters”. Here, too, poetic language may find its place.

H. L. BOFILL: Poetry is more of a source of understanding than a source of determination.

P. HÄBERLE: Hermeneutics sees poetry as a framework for understanding legal concepts. In the thinking from Schleiermacher to Gadamer, hermeneutics involves the interpretation of oral or written texts: in this sense, poetry would provide a framework of “pre-understandings” in the art of legal interpretation. One could say that our “pre-understanding” of concepts like “human dignity” or “art” under Article 5 (3) of



the Basic Law is significantly dependent on the history of culture – which is transmitted by poets.

H. L. BOFILL: In general, it could be said for literature that poetry is connected with constitutional law, while narrative is linked to other legal disciplines. In this sense, the legal narrative – Law and Literature – was developed by American authors such as Dworkin or Posner. For the interpretation of constitutional concepts, it might be more fruitful to refer to a poetic paradigm rather than a narrative paradigm. The poetic word also emerges as an agglutinating symbol to stabilize the constitutional system of the constitution-maker. It would then correspond to an emotional and integrative factor that allows maintaining consensus on the basic structures of the state.

P. HÄBERLE: This undoubtedly represents the main concern of R. Smend, the teacher of K. Hesse – and Konrad Hesse was in turn my teacher. In his famous book “Verfassung und Verfassungsrecht” (Constitution and Constitutional Law), which was published almost at the end of the Weimar Republic in 1928, Smend emphasizes the importance of the principle of integration. Even today, we still use his idea about emotional factors as a source of consensus that constitutional law should provide. We have already mentioned the preambles as well as the political, social, economic, and cultural goals. Also to be mentioned are the emotional elements of a political community, which, like national anthems, serve the cohesion of a nation, for example, the music of J. Haydn in the case of Germany. However, one can certainly raise an objection against the poetic influence in the constitutional state and against the aristocratic and even anarchistic character of the artist in light of social necessities and the regular functioning of institutions. But while totalitarian regimes, such as National Socialism or communism in the Soviet Union, attempted to abolish the egocentric, egomaniacal tendencies of the artist, it is an obligation of the liberal constitutional state to live fruitfully alongside such tendencies.

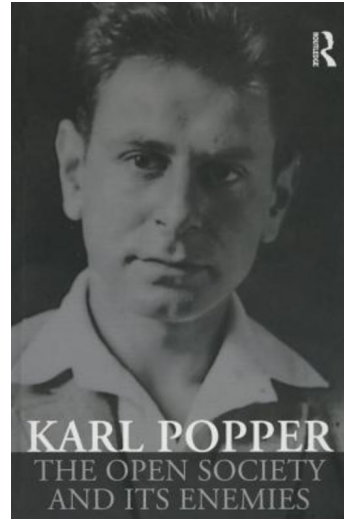


Joseph Haydn

Ludwig Guttenbrunn,  
Around 1770, painting

H. L. BOFILL: In the constitutional state, we also encounter a paradox: a sufficiently wide margin remains so that the artist can unfold their talent and individualistic inclinations. However, there are still too many dependencies that foster the artist’s subservience to politics. Under these conditions, it is difficult to find a moderation of artistic discourse while preserving its cathartic effectiveness. The constitutional state must remain open to artistic and literary impulses. Without the price of this opening there would be an indirect intervention in the artist’s activity.

P. HÄBERLE: This is a topic I have often pondered. During the seventies and eighties, I developed the concept of the “Constitution of Pluralism” (1980) and the aforementioned “open society of constitutional interpreters” (1975), inspired by K. Popper’s idea of the open society. We can relate the concept of publicness to the cultural dimension of the open society and pluralism. The constitutional state, in turn, must avoid any dirigisme and the enforcement of aesthetic criteria. It must remain open to the tendencies present in society and provide a forum for discussing the ever-changing quality and excellence of the various contributions. In Austria, honors, awards, and prize ceremonies received by artists are decided upon by pluralistic bodies from across society, comprising artists from various disciplines, schools, and directions. The aim is to preserve the autonomy of art while preventing the cultural monopolization by the state.



H. L. BOFILL: In minority disciplines that cannot successfully integrate into the logic of the cultural industry or market competition, indirect dirigisme by the state through subsidies and artificial support appears to be inevitable.

P. HÄBERLE: The balance between promoting culture and supporting the freedom and autonomy of the artist by the constitutional state is difficult to determine. A good example of this would be the pluralistically composed committees in Austria and other countries.

H. L. BOFILL: Culture can indeed be considered as the common language of a people and thus serves as a meeting place where political tensions dissolve.

P. HÄBERLE: The constitutional state as a cultural state possesses in its language one of its most important legacies and potentials. The open society is only possible thanks to a cultural development led by language. It is not only about the connection among members of a linguistic community but also – and this point is crucial in the case of Europe – between linguistic majority and minority communities. Therefore, I admire the cultural diversity in Spain, as established in the Constitution of 1978. Likewise, the linguistic diversity that coexists within the same constitutional state: Some of them, as in the case of Catalonia, have a powerful literary tradition, to which you belong.

H. L. BOFILL: In reality, there is always a tension between artistic activity and jurisprudence. The Faustian goal of poetry is the realization – and sometimes the enforcement – of one’s own personality. However, quite different is the realization of the common good sought through political order and law. We have just mentioned

the hardly reconcilable duality between the aristocracy of the poet and the democratic and egalitarian character of the constitutional state. I do not know if we can reconcile both currents and impulses.

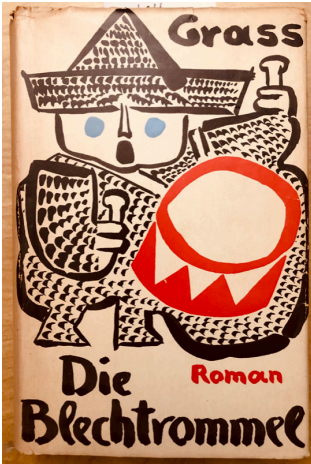
P. HÄBERLE: The distance between the poet and the constitutional state in which he lives is enormous. The poet is allowed almost everything; he often ventures beyond common sense to the border of order. The lawyer, on the other hand, is a serving mediator between the citizens. His horizon must correspond to the feelings and thoughts of the common man. His actions must be motivated by the idea of tolerance and understanding for the dignity of others. The poet, however, shows no concern for his neighbor; often, he is only concerned with himself. The lawyer is committed to the common good, democracy as the organizational form of society, and the law as the structure of order in coexistence. While the artist may behave anarchically, the lawyer must above all be a democrat. In this regard, I would like to ask how you can reconcile this dual existence as an anarchic poet and as a democratic lawyer and educator.

H. L. BOFILL: I suspect that we all must bear our contradictions within ourselves. Furthermore, there is always a bridge between the profile of the poet and that of the constitutional teacher. I couldn't write some of my poems about power and the relationships between people without my education as a lawyer. On the other hand: A virtue of artists is their ability to anticipate their time. In art, we find the origin of values and behaviors that may currently be minority, but will predominantly gain recognition in later decades or centuries. Often, art speaks first, and only later does the wheel of social bodies begin to move.

P. HÄBERLE: I believe that in an open society, the artist fulfills this function in the social change of society. An example: Environmental protection was already present in the sensitivity of romantic poets. However, they did not initially convey it to the common people. One could say that artists, because of their keen sensitivity and experiences, have a special insight into the future. No one except Shakespeare or Goethe could depict the characters and concerns of their contemporaries as they did. In this prophetic calling, some artists also have a pessimistic side: the ability to anticipate a scary future. Kafka and Orwell nightmarishly described a terrible world that later became sad reality, as seen in the DDR in East Germany, for example. They predicted how a constitutional order could degenerate into tyranny. The counter-image is seen in writers who offer optimistic forecasts about the possibilities of human organization and a liberal future. I have often pondered the indispensable quantum of utopia that the constitutional state requires. We



George Orwell, ca. 1940  
1903-1950



owe this to some poets as well. Some of these utopias announced early on by artists of their time later became reality in the constitutional state. Think of social justice. There are also unfortunate examples: Günter Grass's late novel about the German reunification: 'Ein weites Feld' (Too Far Afield). Despite the undeniable talent that this writer showed in 'Die Blechtrommel' (The Tin Drum), in my opinion, his vision of recent events in reunited Germany in 'Too Far Afield' is very pessimistic and a perversion of the indispensable quantum of utopia. Also forgotten is the principle of hope that our happily reunited Germany needs today. Grass even indulged in the cynicism of describing the GDR as a "commode (i.e. comfortable) dictatorship". To this day, I cannot understand how a young "classic" like Grass could arrive at such a distorted perception of historical events in Germany.

H. L. BOFILL: It often happens that great artists and intellectuals treat difficult political questions in an undifferentiated manner by oversimplification.

P. HÄBERLE: This was already evident in 1848/49, when the Constitution of St. Paul's Church (Frankfurt), one of the most important documents in German constitutional history, was heavily criticized by certain intellectual circles, despite the fact that the texts of German constitutional law at the time were successfully exported abroad. However, artists also do not possess a monopoly on truth. They do, however, have a special talent for understanding the concerns of citizens and humanity. Once again, we must mention F. Schiller, that is, his reflections on the dignity and freedom of humanity, which have influenced many constitutional texts. Regarding Schiller's thoughts on law and the state, we can recommend the book by P. Schneider. On a biographical level, one should mention the long tradition of artists and poets who were also lawyers or had legal training. In this regard, we can mention Kleist, Kafka, and Goethe. These artists elevated their concerns about society and justice to the highest level of their expressive capabilities. According to W. von Humboldt, science is the "eternal search for truth" and therefore is often subject to errors. It is different with artists, who are never wrong. Their works can be based on external appearances, semblance, immanence, even manipulation: from such a strict perspective, art is "never wrong".



**Heinrich von Kleist**

Reproduction of an illustration by Peter Friedel from 1801  
Chalk drawing



H. L. BOFILL: Indeed, art itself is “never wrong” as long as it remains an object of contemplation and sensory pleasure in its own right. However, its consequences can be disastrous if certain artistic demands seek to subjugate the “life-world”. No one knew how to profit from the attraction of aesthetic power like totalitarian regimes did.

P. HÄBERLE: Yes, but this negative experience (art as propaganda) cannot question the great ability of art to offer alternatives and enrich pluralistic society. This idea lies behind the work of the artist J. Beuys, who is also prominent for us lawyers. He relentlessly sought to expand the concept of art across many dimensions and to extend it to fringe and subcultures. Therefore, we can say with Beuys that “every person is an artist”. However, I ironically add that not “every person is a Beuys”.

H. L. BOFILL: This thought is not without troubling consequences. While Beuys’ statement, “every person is an artist”, leads us towards the democratization of art and culture, it also signals the end of hierarchical boundaries defining where art begins and ends. If we assume that all contributions and representations have the same value, the concept of the “classic” is ultimately threatened. On the other hand, profit and economic benefit driven by large corporate and media conglomerates endanger the tradition, sensitivity, and critique of artistic value; everything is reduced to a commercial product and a mass spectacle.

P. HÄBERLE: I share your concern regarding whether poetry and art can survive in the age of consumption and media. In my opinion, cultural erosion also jeopardizes the constitutional state. This is a consequence of the perpetually precarious existence of cultural intermediaries such as education and training, the reduction of academic content at universities, and the decline of capable literary criticism. Art, which increasingly distances itself from an indifferent audience, all of this poses a threat. I am convinced that we must never depart from the horizon of the “classics” and the concepts of our Greek and Latin tradition. Under “classics”, we understand not only poets, philosophers, or composers, but also some jurists, as the works of F. C. v. Savigny or G. Radbruch in the German history of legal philosophy demonstrate. In my opinion, the term “classic” encompasses a dual meaning: it is a term of value, referring to the quality of new contributions, and it is a term of consensus, referring to the approval of a particular community. Some of these concepts have been successfully incorporated into constitutions, such as human dignity. What specifically constitutes a “classic” depends on the respective tradition. However, Cervantes or Goethe belong to the level of universal cultural tradition of humanity. The poet Hölderlin, whom you beautifully quoted at the beginning of this conversation, perhaps only has an influence on the German cultural tradition. We should therefore distinguish bet-





ween the “classics” at the universal level, at the national level and even at the local and regional level, such as dialect poets in Bavaria or Baden.

H. L. BOFILL: Perhaps it is time to focus on the European tradition: on the role of poetry in European constitutional law. The same considerations that we express for the constitutional state also apply to Europe.

P. HÄBERLE: Europe is certainly the best of all utopias to which we could allude and which we should “finalize”. Think of the community of peace. From the perspective of the cultural framework in which the constitutional state unfolds, Europe is already a shared reality. Perhaps one should remember the United States of America here. It should not be forgotten that the American Revolution and the Federal Constitution of 1787, along with the “classic texts” of the ‘Federalist Papers’, were the first steps towards building the constitutional state as a type – to which the French Revolution of 1789 should be added. At the current historical turning point, where European integration stands, shared culture serves as an integration point among the different nation-states. This includes the common “constitutional culture”, a term I coined in 1982, and the consolidation of the constitutional structures of individual member countries – such as federal techniques as a clever form of organizing power. The EU is not yet a federal state, but it is no longer simply an association of states in the sense of international law.

Constitutional and international law scholars argue over the correct term to define the character of the EU. For some time now, I have been proposing the term “constitutional community” for the current phase of integration. It goes beyond the “cooperative constitutional state” in international law. Within this term, cultural, symbolic, and emotional elements thrive, playing a leading role as a source of consensus-building. As a symbolic element, we have already mentioned the ‘Ode to Joy’. Additionally, the EU flag should be added.

Among the elements of constitutional culture that can contribute to consensus, we can mention the fundamental rights already found in the EU Charter. The Charter is now integrated into the EU Constitutional Treaty. There is no doubt that both supporters and critics of EU integration need the intervention of artists and intellectuals!



Don Quixote, 1605

Title page

In this role of legitimization and participation, artists must engage in deepening the representation of the common EU space. In the French poet V. Hugo, we can find a visionary. As critics, writers should always be vigilant in denouncing abuses of power and any irregularities against the principles of the constitutional state. For example, criticism should focus on the growing bureaucracy and the increasing distance between governments, EU bodies, and the European people, the community of Union citizens. Meanwhile, lawyers should not overestimate the irony and clarity of the role of artists in European integration. They can conceive a common vision of European culture and also help understand some political developments within the EU. Today, however,



Victor Hugo

Jean Alaux, 1822

we need a dose of thoughtful scientific optimism to tackle the challenges of European integration. We cannot remain mired in the pessimism of some poets. There are plenty of reasons to approach the European constitutional state as citizens and scholars with the principle of hope. Democracy and fundamental rights enable us to trust in the establishment of a common constitutional framework. Certainly, for a thorough improvement, we would need a new “Montesquieu” who revises the original theory of the separation of powers in the European reality of today. I am thinking, for example, of the election of representatives and periodic election cycles as aspects of the theory of power organization. For today’s situation, we also need new impulses from the Enlightenment, even from Romanticism. Goethe’s realism should merge with the somewhat naive and idealistic thinking of F. Schiller. The friendship between Goethe and Schiller in Weimar (the place where the pinnacle of constitutional thought – the Weimar Constitution of 1919 – was achieved) symbolizes this happy connection between realism and idealism, which is still very much alive in our German tradition.

H. L. BOFILL: In my opinion, the European project will only be successful if the Union sees itself as founded on culture. Without culture, the unity of the continent will be much more difficult to achieve. This is not a pessimistic comment, quite the opposite. I am simply trying to highlight the cultural similarities between European peoples to prove that consolidating a sense of togetherness is possible. I feel closer to Attic tragedy, even closer than Catalan or Spanish literature.

P. HÄBERLE: Your remarks could indeed make for a good conclusion to our conversation. It’s important not to forget that the European Community had its origins in the European Economic Community. However, Jean Monnet, a key architect of the European Economic Community, later suggested that if given the opportunity

to start the European integration process again, one should begin with culture. There was no article specifically addressing culture in the old European founding treaties. It wasn't until the EU Treaty of 1992 and the Amsterdam Treaty of 1997 that such provisions were established. I hope that the European Constitution draft presented in Thessaloniki also includes differentiated clauses in the field of culture. The EU Charter of Fundamental Rights should fundamentally guarantee artistic freedom at the European level. At the same time, the new constitutional text must appropriately distribute and limit the respective cultural powers between the EU and the nation-states to preserve their respective national identities rooted in culture. However, it is also important to create a common corpus to define Europe as a cultural community beyond the cultural identities of the 25 member states and some nationalities within these states.



**Jean Monnet**

1888-1979

H. L. BOFILL: The European Community, it must be said in conclusion, began with economics and will have to reach its final stage of integration in culture.

P. HÄBERLE: I sincerely hope that the diversity and unity of Europe's culture will rebuild the continent anew. Thank you very much.



# EUROPEAN UNION



# III. CULTURE AND CONSTITUTIONAL LAW

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PETER HÄBERLE

IN CONVERSATION WITH

RAÚL GUSTAVO FERREYRA

The conversation took place on April 21, 2009, at the Faculty of Law of the University of Buenos Aires, on the eve of the University's awarding of an honorary doctorate to Peter Häberle by Dean Atilio A. Alterini.\*

R. G. FERREYRA: The basic categories of constitutional law – such as democracy, republic, separation of powers, federalism, parliamentarism, charter of fundamental rights – are European inventions; mainly, as in many other aspects, contemporary civilization is heir to the 18th century Enlightenment. However, the oldest constitutional model is the Constitution of the USA of 1787, a process that adopted European production and, so to speak, only added the presidential system. The written, formalized, permanent, effective constitutional law is more than 200 years old, on the condition that one justifiably considers the USA of 1787 as the starting point. If one observes the development in Latin America, without intending to make a comparison, it can be said that the text of the Argentine Constitution of 1853-1860 is one of the oldest, and that constitutional law in Europe definitely spread widely after the end of World War II, mainly with the German Basic Law of 1949.

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\* First publication: *Cultura y derecho constitucional. Entrevista a Peter Häberle*, in: *Boletín Mexicano de Derecho Comparado*, N°. 126, 2009, p. 1621-1645; at the same time in: *Academia: revista sobre enseñanza del derecho de Buenos Aires*, Año 7, Número 13, 2009, p. 215-238; likewise in: *Estudios constitucionales: Revista del Centro de Estudios Constitucionales*, Año 8, N°. 1, 2010, p. 379-398; likewise in: D. Valadés (ed.), *Conversaciones Académicas con Peter Häberle*, Mexico City, 2017, p. 205-230; German first publication in: *Peter Häberle, Vergleichende Verfassungstheorie und Verfassungspraxis. Letzte Schriften und Gespräche*, Berlin 2016, p. 273-288.





### Faculty of Law of the University of Buenos Aires

in the imposing neoclassical building (1949), the faculty was founded in 1821.

The three mentioned methods of constitution – according to your theory – configure the essential organization of the state and society.

Assuming that these three models are a result of human production, meaning that both the constitutional law of the USA and the German or Argentine constitutional law are fruits of human activity, their rules are entities that exist in the world. One can conclude that, concretely, constitutional law is an invention of modern humans and it is an instrument that establishes community self-determination.

All right, what ontological status do you think constitutional law has? Better said, in the context of the eternal philosophical debate between idealism and realism: Are the rules of constitutional texts real or ideal entities?

P. HÄBERLE: Answering the first question is particularly difficult. You ask about the “ontological status” of constitutional law. I may approach this issue from two perspectives. First, from a formal perspective: in the hierarchy of legal systems according to Kelsen, the constitution is the set of norms of the highest validity. We speak of the primacy of the constitution. Of course, there is also an additional hierarchy inherent in the constitution itself. The so-called eternity clauses even withdraw certain ultimate values from the constitutional reviser, who may amend or possibly establish the constitution. Examples can be found in the famous eternity clause of Article 79(3) of the German Basic Law (Grundgesetz), as well as in Portugal (1976), and in Article 28 of your Argentine Constitution. A first example is indeed found in the Constitution of Norway from 1814. In terms of content, the constitution is composed of many different legal concepts and principles. Some of them reach into an ideal sphere, while others are highly reality-based. They respond to concrete historical experiences – for example, Article 5 of the German Basic Law (Grundgesetz) regulates among other things freedom of information, which was absent during the Third Reich – or the constitution processes historical catastrophes – an example is the Chernobyl article in the Constitution of Ukraine.

The dignity of human beings is the highest value, reaching into the highest idealistic zone, at least when interpreted through the lens of Immanuel Kant. In contrast, there are also very reality-based requirements of the constitution. One might think of the pluralism postulate, which the Federal Constitutional Court (BVerfG) has elaborated on in its many television judgments – keywords being the internal pluralism of public broadcasting and the external pluralism of competing private channels. Thus, we have in the constitutional texts partly real, partly ideal references. German doctrine knows the beautiful concept of constitutional reality, which often stands in tension with constitutional law. There is a very concrete conflict between the freedom of the member of parliament and their loyalty to their political party. In Germany, we speak of the tension between Art. 38 and Art. 21 Basic Law.



**Immanuel Kant**

Gottlieb Doebler, 1791  
Oil painting

R. G. FERREYRA: For 50 years, you have dedicated yourself exclusively to research and scientific development; unity and excellence in scientific work are paradigms of your actions. Naturally, your primary concern has been and continues to be the world, the things that constitute it, and the problems affecting these objects. To study reality, observation and argumentation have been tested – in many cases, an empiricism that despises rationalism and vice versa.

Without addressing the discussion between rationalists and empiricists, whose consequences can certainly be observed in legal studies, and considering that you are the only jurist who has extensively engaged with Popper's ideas, an excellent moderate or critical rationalist – according to your own definition: What is the most appropriate method for studying the legal constitutional reality? The experimental method, rationalism, or a combination of both?

P. HÄBERLE: Indeed, for exactly 50 years – when I started working on my dissertation – I have been engaged in the science of constitutional law. One of my classic guides is K. Popper with his critical rationalism. However, he cannot fully fathom the entire reality of the constitutional state because his open society requires cultural grounding from the outset, in other words, the cultural science approach. The Critical Theory of the Frankfurt School is also helpful. Think of the criticism of the media and consumerism as well as the world of goods. Beyond Popper, we are allowed to assimilate the knowledge of the ancient classics, such as Aristotle's elaboration of the connection between equality and justice – we speak of the prohibition of arbitrariness – or his teaching on natural law. Indispensable for constitutional thinking are the the-

ories of contract, ranging from Hobbes through Locke to Rousseau and Kant. Today, we understand the constitution as an ever-new agreement and endurance of all citizens. As early as 1978, I ventured the theory that constitutional courts are involved in the continuation of the lived social contract. We are also looking for a European social contract that can succeed in the progress of European integration in the form of various treaties, fully in line with the piecemeal reform – from the Treaty of Rome of 1957 to Maastricht and Amsterdam in the 1990s, as well as the failed draft constitution of 2004 and the so-called EU Reform Treaty (Lisbon) of 2007, which is currently under review by the Federal Constitutional Court.

Federalism is also a particularly successful form of experimentation. For a decade now, I have been speaking about the “Swiss workshop” or the experimenting federal state. In the completely revised cantonal constitutions of Switzerland, many experiments can be found, which have then been adopted or corrected at the higher level by the Swiss Federal Constitution of 1999.

Popper’s rationalism is also insufficient for another reason: Man is not only a “rational animal”, but also lives through emotions. The constitutional state provides space for such “emotional consensus sources” when it creates national anthems and flags – as discussed in my recent books – or when it inaugurates national holidays. Here, we should bear in mind the rational-emotional human image of the constitutional state. Even the market cannot be understood solely through the fictional character of homo economicus. Man does not only live as a rational utility maximiser, but also acts in the market based on irrational motives. A classic in economics, Rüstow, understood this better than many contemporary market ideologists.

R. G. FERREYRA: Especially since 1982, you have elaborated and defended the idea that the theory of constitutional law is a cultural product. Karl Popper divided the secular reality into a physical, a sensory, and a cultural world. The third world – or cultural world – is an objective reality that primarily concerns human knowledge. Is constitutional law and your theory part of this third world of Popper?

P. HÄBERLE: You’re asking about Popper’s three-world doctrine. I’m not sure if it helps us as constitutional lawyers. Mathematics could be both a natural science and a cultural science. To my knowledge, even mathematicians have not resolved this question. Moreover, I cannot separate World 3, that is, the world of intellectual and cultural content, from World 2, that is, the world of individual perception. It is disputed, for example, whether great works of art by Michelangelo or Gothic cathedrals are art,



Aristotle

Roman copy after the lost original by Lysippos, 1<sup>st</sup> or 2<sup>nd</sup> century.

that is, beautiful, independently of the viewer. As is well known, in ancient Greece there was already a distinction between three worlds: Logos, Psyche, and Physis; the Romans distinguished Ratio, Intellectus, and Materia. As constitutional lawyers, we must assume the autonomy of the “world of the constitutional state” and its science, but at the same time, we must always be aware of the limits of our knowledge and remain humble. Philosophy can speculate, associate, even to the point of arbitrariness, but constitutional science must prove itself in concrete situations of responsibility, such as when a constitutional court reviews a parliamentary law against the standards of the constitution, or when a civil or criminal judge in the first instance essentially holds themselves accountable before the individual case at the forefront.

As a small addition, a word on the concept of the third world: Since at least 1982, I have developed the doctrine of the constitution as culture or the cultural-science approach. K. Popper was guiding for me only in his concept of the open society, i.e., the rejection of all totalitarian systems such as Nazism, fascism, and Marxism-Leninism. I do not share his criticism of Plato because, famously, according to a quip by Whitehead, all thought is a footnote to Plato. Unlike Popper, I attempt to ground the open society through the cultural-science approach. To my knowledge, Popper does not achieve this. Without culture, despite all openness, humanity would plunge into the abyss.

Incidentally, in my view there are no three worlds today. There is only one world, admittedly a world with great cultural diversity. I also reject the terms first world, second world and third world. Because they could suggest an assessment that is not correct. The first world, i.e. the so-called old Europe can also learn a lot from the third world today. This applies especially to constitutional law. Consider the culture of the ombudsman in Latin America, to which Mexico contributed significantly.



Alfred North Whitehead

1861–1947

R. G. FERREYRA: In the early 1960s, you presented a new theoretical paradigm to the academic community of constitutional law, focusing on the explanation and treatment of a provision in the German Constitution of 1949. Article 19(2) of the Basic Law (Grundgesetz) is prominently arranged: “In no case may a fundamental right be affected in its essence”. This provision of the German Constitution represents a paradigm for the understanding and development of fundamental rights, which fortunately has been accepted and imitated. In your dissertation, you particularly addressed the two dimensions of fundamental rights: the subjective or plurisubjective dimension and the institutional dimension. 60 years after the enactment of fundamental rights legislation and almost 50 years after the first publication of your dissertation: What



assessment do you make of the application of this rule in German constitutional law? In your opinion, what are the predictions for the 21st century for countries like Argentina, for example, whose constitution since 1994 has elevated the most important international human rights instruments to the highest level of the norm hierarchy and made them directly applicable?

P. HÄBERLE: It was a stroke of luck in my life that in 1957 I was able to propose to my academic teacher K. Hesse in Freiburg that I would choose the famous guarantee of the essential content of fundamental rights of Art. 19 II Basic Law as my dissertation. I answer your complex question in three steps: The substantive guarantee was based on preliminary work of legal doctrine in the Weimar era. The Basic Law codified it with the intention of thereby drawing a final boundary for all open and hidden erosions of fundamental rights. Regarding constitutional comparison: On many continents and in many national constitutions, recently even in the EU Charter of Fundamental Rights, text variants of Art. 19 II Basic Law can be found. Swiss cantonal constitutions speak of core content guarantees. Some Eastern European constitutions such as Poland and Estonia protect the essential content. Even in Spain's 1978 Constitution, the influence of Art. 19 II Basic Law can be recognized. Finally, we find successor articles in the Constitution of South Africa and its provinces. In other words, the guarantee of the essential content of fundamental rights may have become the most successful export of the Basic Law.

In Germany, three theories are advocated: the absolute essential content guarantee theory, according to which a final core of fundamental rights is inviolably protected even against the legislator, then the relative essential content theory, which works with differentiated balancing of interests, and finally a combined solution that I proposed in 1962 and which even my great teacher K. Hesse adopted in its 'Basic features' (*Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*) in 1967. I am pleased that your Argentine Constitution of 1994 has placed human rights at the highest level in the hierarchy of norms, making them directly applicable.

R. G. FERREYRA: Your thesis on the open society of constitutional interpreters was inaugurated in 1975.<sup>1</sup> There, you propose the extension of constitutional interpretation to all citizens, as opposed to a restriction solely for the operators, i.e., judges and constitutional lawyers. Your "open society of constitutional interpreters" is a shining community when compared to the community that restricts the interpretation of the



Konrad Hesse, 1988

1919-2005

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<sup>1</sup> P. Häberle, Die offene Gesellschaft der Verfassungsinterpreten, in: JZ 1975, p. 297-305.



constitution. The thesis of the open society of constitutional interpreters was announced at the same time as the world witnessed a profound technological change, especially in communication.

In concrete terms, information and communication in 1975 were by no means what they are today; the possibilities offered by communication media nowadays have grown significantly in the last 40 years. Consequently, considering that humans always have to confront the gnoseological difficulty of the unknown: Do you think that the radical change in communications makes the open society of constitutional interpreters easier? In other words: Do you find it appropriate to update your thesis, taking into account the globalization of information while also acknowledging the impossibility of knowing everything?

P. HÄBERLE: I developed the paradigm of the open society of constitutional interpreters in 1975. It was only 20 years later that I became aware that – from a cultural-historical perspective – behind it could lie Martin Luther’s Protestant thesis of the priesthood of all believers. Let’s look back: In ancient Rome, knowledge of the law was reserved for the priestly caste. The Twelve Tables legislation created public access to the law for the citizens of Rome; famously, it was created by a group of Roman lawyers and politicians during a trip to Athens, inspired by the legislative work of Solon. Even today, it is characteristic of the constitutional state that laws must be published. The novelty of the paradigm of the open society of constitutional interpreters is that it is no longer just about the public knowledge of enacted law, but that all citizens should have access to the interpretation process. The Brazilian Supreme Court, under its president Mendes, has theoretically supported its application of the *amicus curiae* concept with the concept of the open society of constitutional interpreters. The German Federal Constitutional Court (BVerfG) takes a pragmatic approach and has long allowed pluralistic groups such as labour unions, employers’ associations, churches, and other religious societies to have their say in some major cases through public hearings. In 1975, I did not foresee the rapid developments, especially in the technical field, that could challenge or perhaps question my paradigm.

Already in the first edition of my *European Constitutional Law* from 2000/2001, as well as in the 6th edition in 2008, I projected the open society of constitutional interpreters onto the EU. There are already approaches to an open society of constitutional interpreters in Europe. This is tangible in the participation via the internet, which some citizens dared to undertake during the drafting of the Constitution of 2004. Had this European constitution come into force, we could speak of an open



**Solon**

Roman bust, replica from the 1<sup>st</sup> century based on an older Greek model

society of constitution-makers in Europe. By the way, Switzerland is known for its consultation procedures: citizens and pluralistic groups can comment on drafts of laws and constitutional revisions. From a global perspective, we must speak of an ensemble of partial constitutions. There is still no complete world constitutional law, and it is probably not even desirable. There are only partial constitutions such as the UN Charter, the International Convention on the Law of the Sea, or the Statute of the International Criminal Court, drafted in Rome and practiced in The Hague.

My ideal concept of the open society of constitutional interpreters is threatened both on a small and large scale: on one hand, by processes of power concentration, and on the other hand, by lamentable processes of economization. However, we also see positive developments: non-governmental organizations are involved in global information processes, such as in environmental law or human rights.

R. G. FERREYRA: At the end of the 1970s, you presented a new paradigm: the constitution as a public process. I understand that your thesis is particularly a development of your postulate of the open society of constitutional interpreters. Unfortunately, your contribution on the constitution as a public process has not yet been translated into Spanish. Could you mention the main ideas of your theoretical construction on the constitution as a public process?

P. HÄBERLE: My paradigm of the constitution as a public process is based on the scholarly work of Rudolf Smend (“Zum Problem des Öffentlichen” [On the Problem of the Public], 1955) as well as J. Habermas (“Zum Strukturwandel der Öffentlichkeit”, [The Structural Transformation of the Public Sphere], 1962). Initially, it was important for me to connect with the ancient tradition, particularly that of Cicero: *Salus publica, res publica, res populi*. In more recent constitutional texts, the public dimension is reflected in constitutional norms of the French and Spanish traditions,



### International Criminal Court in The Hague

the large, glazed building complex with over 54,000 square meters offers space for 1,200 employees and was completed in 2015

which speak of public freedom. I like to distinguish between what is known as the Republican Trias: the constitutionally protected highly personal private sphere, such as marriage, family, personal privacy, protection of personal speech even in criminal law, protection of information technology systems – such as online searches – and protection of informational self-determination.

The second area is the socially-public area. This encompasses the public status of political parties and representatives, the public activities of associations such as trade unions (the right to strike), and even the so-called publicity claim of churches, as developed by Rudolf Smend in the 1950s.

The third field is the state-public area, meaning the public nature of the parliament, the public nature of the court of auditors, and public hearings before a constitutional court.

The procedural aspect is important to me because of the principle of democracy. Democracy thrives on procedures, which ultimately should often end in compromises. Since the constitution as a “framework order” only provides partial substantive legal provisions, the rest must be worked out over time through the fair design of a variety of procedures. An example is my idea: *Salus publica ex processu* (1970). However, procedures require a graduated protection of minorities. Think about the constitutional rights of the opposition in parliament. The openness of the constitution is one aspect of my idea of the constitution as a public process (1969). However, this openness is not unlimited, as there are ultimate, non-negotiable fundamental values that precede the constitution as a public process: I think primarily of human dignity as a cultural anthropological premise of the constitutional state, human dignity understood in the sense of Immanuel Kant. By the way, the procedural aspect is particularly well-known in Anglo-American law (fair, due process). Yes, it was even partially recognized in Roman law (*Audiatur et altera pars*). One could also think of Popper’s concept of trial and error. I even add a classical text by F. A. von Hayek: the market as a discovery procedure. This is despite the fact that the market only has instrumental significance for me and I do not represent the liberal market ideology, especially today.

R. G. FERREYRA: The constitutional doctrine of the 21st century in Latin America has received a significant boost through the publication of your book ‘*El Estado constitucional*’ (The constitutional State), first in Mexico and then in Argentina.<sup>2</sup> You



Jürgen Habermas, 2007

\*1929

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<sup>2</sup> *El Estado Constitucional*, Serie Doctrina Jurídica, Núm. 47, Mexiko 2001; New edition Lima 2003; French translation: *L’Etat Constitutionnel*, Paris 2004, Mexiko <sup>2</sup>2003, <sup>3</sup>2016, Argentine edition, Buenos Aires 2007.

describe and elaborate the existence of a new type of state, the constitutional state. This state allows for both a presidential and a parliamentary system of government. In Europe, the presidential system is practically unknown. The same thing is not happening in Latin America, where the unknown is parliamentarism. Parliamentarism fundamentally requires cooperation between political parties, whereas presidentialism requires confrontation.

For 15 years, our friend Eugenio Raúl Zaffaroni has insisted that the absence of coups d'état in Latin America does not signify weakness in governance; on the contrary, constitutional governments in Latin America fail due to their own weight and their presidential roots, which prevent the participation of all criticism in the political arena. Zaffaroni suggests, particularly in Argentina, constitutional reform and the adoption of parliamentary systems. Our mutual friend Diego Valadés, from Mexico, suggests in his latest work the “parliamentarization of presidentialism”.

Appropriately, Otto Bachof noted that no inventions guarantee the functioning of a specific system of government; I personally believe that constitutional change in Argentina is urgently needed, as well as an urgent and orderly exit from hyper-presidentialism. Without delving into the doctrinal debate between parliamentarism and presidentialism, and considering you are a theorist of constitutional law and its formal changes: What are the bright sides and what are the dark sides of 60 years of parliamentarism in Germany?

P. HÄBERLE: I'm somewhat familiar with the discussion in Latin America in the form of the concepts put forward by your eminent jurist Zaffaroni and the significant Mexican author Valadés. I'm aware that there is much debate in Latin America about the relationship between presidentialism and parliamentarism. I believe it's possible that young countries in difficult phases, especially so-called emerging economies like Brazil, should have a head of state with significant but limited powers. Crucial here is precisely the limitation of the term to 4 or 5 years and the restriction of re-election to two terms. A catastrophic counterexample would be Venezuela under Chavez today.

Presidential systems in young countries require a counterbalance through strong constitutional courts, as we can currently observe with pleasure in Brazil thanks to the Supreme Court under G. Mendes. Parliamentary systems have the great



**Otto Bachof**

1914-2006



**Diego Valadés and Peter Häberle**

Bayreuth 2002



advantage of being a pluralistic reflection of open societies. However, this can also lead to a weakening of decision-making processes.

Allow for a comparative view of France. You're aware that De Gaulle tailored the constitution of the Fifth Republic in 1958 to himself and basically despised the parliamentary party system. Today, in France, the homeland of human rights, we see tendencies toward a monarchical republic (State President Sarkozy-Bruni). Spain may call itself a republican monarchy. In both cases, the parliament lives on, albeit with varying degrees of vitality and strength.

The theory and practice of parliamentarism in our democracy, which has been so successful and prosperous over 60 years according to the Basic Law (GG), has more light than shadow. I'll mention some shadows upfront: Party democracy sometimes dominates the parliament and the representatives, who too rarely can make themselves heard spontaneously and independently. This is an expression of the oligarchy of political parties, a concept already coined during the Weimar Republic. However, there are still great moments of parliamentarism today. They are mostly due to individual speakers respectively members of parliament. Some speeches by crown lawyer of the SPD, Adolf Arndt, as well as the speech by the recently deceased parliamentarian Ernst Benda regarding the exempt from the statute of limitations for capital crimes, are unforgettable.

The parliamentarism of our Basic Law (GG) repeatedly attempts parliamentary reforms to revitalize the plenum (e.g., current question sessions). The German parliament is considered a hard-working parliament, meaning that the main work is done in the committees. Currently, there is discussion about establishing a dedicated parliamentary television channel. By constitutional law, the German Federal President is limited to representative tasks. He can only dissolve the parliament in very few exceptional cases. This is an antithesis to the Weimar Republic. It should be noted that since K. Adenauer, there has been talk of a chancellor democracy. I do not conceal the fact that, contrary to the prevailing opinion, I believe that the motions of no confidence submitted by Chancellor H. Kohl and Chancellor G. Schröder, which were subsequently successful, were forms of constitutional abuse. Unfortunately, the Federal Constitutional Court did not oppose this abuse of forms. Because both chancellors actually had the confidence of the majority of their political parties, but wanted to "forcefully" obtain a new mandate from the German people.



**Gerhard Schröder and Helmut Kohl**  
at the handover of office in 1998

R. G. FERREYRA: One of the discussions in constitutional law could be presented as follows: A group of theorists allows and defends the idea that the constitution repre-



sents a value system regulated by the constituent power at the moment of its founding; another group believes that the constitution does not represent a value system, but fundamentally ensures that those who have achieved the majority according to the procedure set out in the constitution govern.

Schematically, the first group of opinions can be characterized as “defenders of the value system”, and the second group as “formalists”. Therefore, between formalists and non-formalists: In what sense does one group or the other defend the truth, particularly following your thesis of constitutional text and context?

P. HÄBERLE: In my view, the constitution expresses a plurality of fundamental values: starting with human dignity, through individual rights, to democracy as an organizational consequence of human dignity. Additionally, there is the ingenious idea of Montesquieu regarding the separation of powers. We understand this horizontally in terms of the three branches of government. We understand this vertically in the form of federalism, autonomous territorial entities in Spain, and municipal self-government. In addition, there are state tasks: from the welfare state to the cultural state to the environmental state. The constitution is a “framework order” in varying degrees of density. Some principles are immutable, while others can be changed with a two-thirds majority. My doctrine of textual stages always includes contexts. By this, I mean interpreting by adding thoughts, although there are limits. The paradigm of textual stages means: Often, a later constitutional legislator condenses into a text what a constitutional court has previously adjudicated or constitutional reality has practiced.

R. G. FERREYRA: The constitutional jurisdiction, meaning the invention that establishes a hierarchical order where the constitution stands at the top, and consequently, all laws contradicting it can be deemed inapplicable, has turned 200 years old. The famous legal ruling “Marbury vs. Madison” of 1803 inaugurated constitutional jurisdiction.

In 2009, one of the most developed constitutional jurisdictions in the world, the German one, turned 60 years old, and in 2 years, one of the most famous legal polemics will turn 80 years old: “Hans Kelsen vs. Carl Schmitt”: Who should be the guardian of the constitution?

You have objectively and seriously noted that the days of remembrance are important for reshaping and elaborate the emotional foundation of community consensus.



Hans Kelsen

1881-1973

From this perspective, and without overlooking the objective differences in the realm of constitutional jurisdiction – between jurisdictions adopting the diffuse model and the jurisdiction that adopts the concentrated model –: What is the inventory regarding constitutional jurisdiction in our time? In other words, what progress can be observed in the control of unconstitutional laws, and what challenges lie ahead in the 21st century?

P. HÄBERLE: Every constitutional state should decide for itself whether it chooses a diffuse constitutional jurisdiction or a concentrated one. The effectiveness of the diffuse model is evidenced by *Marbury vs. Madison* in the USA. The effectiveness of an independent constitutional jurisdiction is demonstrated by the Corte Costituzionale in Rome (established in 1947), the German Basic Law (1949), the Federal Constitutional Court (which began in 1951), and notably, also the Constitutional Courts in Lisbon and in Spain. The arsenal of constitutional jurisdiction in our time has greatly refined. Here are just a few keywords: considering the consequences of a judicial decision, advocating for constitutional comparison as a fifth method of interpretation, first proposed by me in 1989, explicitly acknowledged by the Constitutional Court in Liechtenstein in the 1990s citing me, and increasingly practiced in the jurisprudence of European constitutional courts. Unfortunately, it is precisely here that the US Supreme Court, to which we owe so much, is particularly backward. Only Justice Ginsburg recently demanded in an interview with an American daily newspaper that more legal comparison should be pursued in the US Supreme Court, and national constitutional courts should strive to see themselves as instruments in a global system. Please note that the European Court of First Instance in Luxembourg now also imposes rule-of-law requirements on the UN Security Council. The German concept



United States Supreme Court Building

it was built between 1932 and 1935 in the neoclassical style

of the constitutional state and the Rule of Law in Anglo-Saxon countries, coupled with universal human rights protection, are on the rise. Finally, among the tools of constitutional jurisdiction is also the possibility of dissenting opinions by judges, invented in the USA, practiced at the Federal Constitutional Court (not yet in Italy), and opened at the constitutional level in the Constitution of Spain. There are examples where today's dissenting opinion becomes tomorrow's majority opinion – thanks to the public dimension in the time dimension. For me, this is evidence of the “constitution as a public process”.

R. G. FERREYRA: In Latin America, democratic mechanisms such as elections and the separation of powers are often compromised by individual interests or segments of society. Currently, an important trend of judicial activism is emerging, in the form of an increasing reaction that can explicitly establish rules in the event of weaknesses in other branches of government. Do you believe that this promotes the consolidation of institutions or does it signify a regression of the republican system?

P. HÄBERLE: I am aware, thanks to invitations to Mexico, Brazil, and now fortunately to Argentina, that the separation of powers in Latin America is often endangered by real political interests. As a participating observer, I am pleased that constitutional courts practice judicial activism and compel other branches of government to act. From a comparative perspective, we can learn that in constitutional states, there is an interplay of judicial activism and judicial restraint. We find this in the history of the US Supreme Court. The German Federal Constitutional Court also experiences different phases of activity. Presumably, only the Weltgeist (world spirit) can discern when activity and when passivity is required. What is certain is that Hungary's Con-



### The Federal Constitutional Court

at a verdict announcement in front of the eagle relief, photo: Hans Kindermann

stitutional Court was well advised after the transition of 1989/1990 to dare much activism, as the other branches of government could not yet operate in accordance with the constitution. To my knowledge, today the Constitutional Court in Budapest is more restrained. This deserves approval since the constitutional state of Hungary has been established. This was referred to as an invisible constitution invented or practiced by the Constitutional Court. In my opinion, the following applies to Argentina: The judicial activism of your Supreme Court is currently consolidating the institutional order. The republican system is not weakened by temporary judicial activism, but rather strengthened. In a transitional or mature phase, the other branches of government should and can learn from the Supreme Court in Buenos Aires.

R. G. FERREYRA: What suggestions would you have for concretizing the open society of legal interpreters in “young” democracies like Argentina?

P. HÄBERLE: The paradigm of the open society of constitutional interpreters should already become the subject of pedagogy. In other words: Human rights should be taught as educational goals in schools, as already suggested early on by the constitutions of Guatemala and Peru. In Argentina, youth should be encouraged early on to participate in the process of creating and interpreting law through petitions and discussions. Maybe this is still utopian. Universities, at the latest, are called upon to take action here. In a lecture in Berlin in 1974, I ventured the thesis: It depends on the schools which constitutional theory we can afford.

R. G. FERREYRA: Germany and Argentina have had relations since the 19th century. However, academic relations have emerged only recently and may be a result of globalization and the new information society.

Throughout your life, you have consistently refrained from professional practice as a lawyer as well as from elective offices. In short, you have dedicated your life to science, preferring research and defending impartiality and scientific accuracy. Of course, you have received various academic awards at different locations and moments.

Professors Atilio A. Alterini and Eugenio Raúl Zaffaroni are certainly two of the most respected jurists in Ibero-America. As representatives of the University of Buenos Aires, with Alterini as Dean and Zaffaroni as Director of the Department of Criminal Law, they, along with a large group of professors, including ourselves, proposed and carried out the awarding



**Eugenio R. Zaffaroni and Atilio A. Alterini**

in 2007, on the occasion of the appointment of the former to “Profesor Emérito de la Universidad de Buenos Aires”

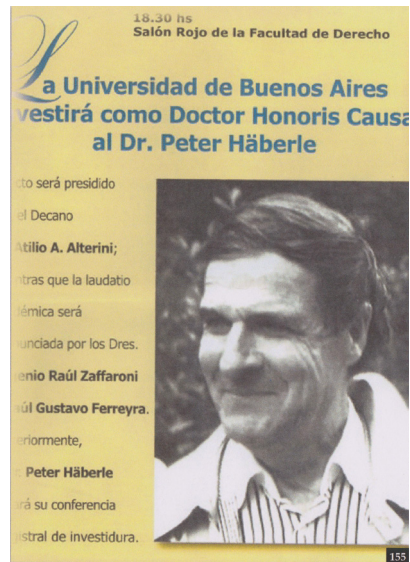


of the honorary doctorate. This honorary doctorate underlines the special significance of your valuable studies and your impressive research career.

Do you believe it is possible to deepen the academic relations between the Faculty of Law of the University of Buenos Aires and the German academy? If so, what paths do you propose for the development of academic institutional relations?

P. HÄBERLE:

- Exchange programs at the student, doctoral, and lecturer levels. Crucial is the supervision by a professor from the Constitutional Court.
- Individuals can achieve more than institutions!
- Partnership agreements
- The Law School of the University of Buenos Aires should connect with one of the best German faculties.



### Honorary Doctorate

Invitation to the Ceremony

R. G. FERREYRA: At the beginning of this interview, various constitutional experiences are mentioned: the American, the German, and the Argentine. The three states have something in common: The legal orientation of the state is federal.

Formal constitutional change, constitutional reform, has found various paths over the years: In the USA, the Constitution was amended through fewer than 18 amendments in 200 years; Argentina has amended its federal constitution five times in 156 years, and notably, Germany has amended it many more times than all the changes in Argentina and the USA combined.

When comparing the German experience with that of the USA, the flexibility of the German constitution is indeed no stronger than the inflexibility of the US constitution when it comes to comparing the stability of the constitutional systems. Both the Germans since 1949 and the Americans since 1789 manage to maintain the mentioned stability through the use of various media and instruments.

It looks to an outside observer of the German legal system as if the Germans amend their constitution as many times as necessary, and the Americans, without achieving reform, are still within the constitutional scope.

Accordingly, there is not a single formula for constitutional reform. Nevertheless, constitutional law entails an intergenerational dialogue: future generations are either benefited or harmed, both by the good that is regulated and by the omissions or mistakes of the constitutional configuration. Similarly, we are witnessing today the fantastic introduction of community law and international human rights law. What, in



your opinion, will be the situation in the world of the 21st century: “The internationalization of constitutional law” or “the constitutionalization of international law”?

P. HÄBERLE: Both are probably correct: an opening of national constitutional law towards international law. My keyword is the “cooperative constitutional state” (1978) or, as my late colleague K. Vogel put it, the concept of “open statehood”. In Europe, we speak of the Europeanization of national legal systems and constitutional courts. At the same time, we may speak limitedly and punctually of a constitutionalization of international law. However, in the process the concept of constitution needs to be clarified. Then it can only be about partial constitutions. The classic postulate remains Kant’s “Perpetual Peace” (1795), his concept of cosmopolitan intention. I myself define international law as universal human rights law. International law is today the most interesting sub-discipline of legal science. I am too old to advance this process. The next generation is called upon. We need a new School of Salamanca, which, for example, as hinted at, makes the rule of law principle binding in international law and provides guarantees for the enforcement of universal human rights by all. In Latin America, this is especially true for the oppressed indigenous population. I am pleased that at least on the constitutional text level, many Latin American constitutions consider the indigenous population. However, the constitutional reality here shows significant deficiencies. I congratulate my friend Raul G. Ferreyra for taking on pro bono work for the endangered rights and livelihoods of the indigenous people in northern Argentina, and I hope that your Supreme Court finds a way here that is also a building block for my theme of common Latin American constitutional law.

R. G. FERREYRA: In the majority of your work, you constantly thank and honor your teacher Konrad Hesse, constitutional law teacher and judge of the German Federal Constitutional Court. What are the foundations of the scientific research method that he taught and that you still remember today?



**Rudolf Smend**

1882-1975

What are the most important guidelines regarding the study subject – constitutional law – that have influenced you the most? Do you still believe that teachers learn from their students? If so, what advice would you give to those who are starting to study constitutional law today?

P. HÄBERLE: I thank you for this concluding question, which also touches on my personal relationship with my academic teacher, K. Hesse. His magnum opus is ‘Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland’ (The Basic Features of Constitutional Law of the Federal Republic of Germany, 1st edition 1967, dedicated to R. Smend, 20th edition 1995), now a modern classic. Impressive in the structuring of its subject matter and the systematic

penetration of its material, more suitable for doctoral students and colleagues than for younger students!

The central innovations of this book, which works without legal comparison and is entirely focused on the Basic Law, are:

- The normative force of the constitution, presented in the inaugural lecture in 1956, as an antithesis to G. Jellinek's normative force of the factual.
- The doctrine of practical concordance, i.e., the careful balancing by weighing up conflicting principles, such as fundamental rights on the one hand, and special status relationships such as professional civil service and the Bundeswehr (Federal Armed Forces) on the other;
- His doctrine of “concretization” in the process of interpretation regarding constitutional norms, for example, by the legislator (my doctrine of the need for elaboration of all fundamental rights) and constitutional jurisprudence.

I have adopted much of it as a basis for myself. According to Hesse's preface, I am also among the assistants who accompanied the lengthy process of its creation. Unfortunately, my attempt in 1965 to arouse his enthusiasm for the topic of culture failed.

Indeed, I believe in the scientific generational contract between teachers and students. Since antiquity (Socrates, Plato, Aristotle), since the medieval monastery schools, since the guilds of great cathedrals, there have been teacher-student relationships. They initially relate to the legal tools of the trade, later they can reach deeper heights.

My advice to first-year students: first, a personal one: seek out a mentor early on. In parallel, start reading classical texts immediately, i.e., texts from Montesquieu and Rousseau and Kant to J. Rawls and H. Jonas. Then, alongside studying your own national constitutional law, begin to delve into another national constitutional law: depending on your boyfriend/girlfriend.



Peter Häberle with Konrad Hesse

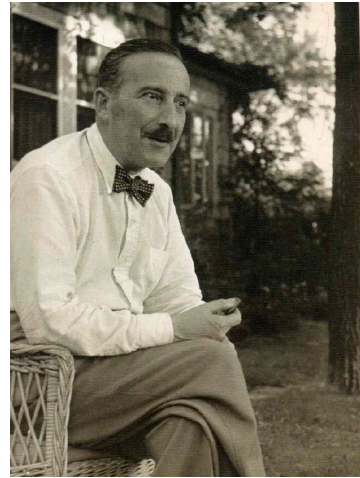
Bayreuth, 2002

### Closing words by PETER HÄBERLE:

Allow me, Don Raúl and Don Sebastiano, at the end of your impressive series of questions, to touch on a topic of my own. I believe in the future of the constitutional state throughout Latin America. There may be setbacks, as currently in Venezuela, and concrete utopias may exceed the realm of possibility, as is the case with some constitutional texts in Colombia. However, Colombia is increasingly finding good paths in constitutional reality. Stefan Zweig spoke decades ago of Brazil as a “coun-

try of the future”. After my second visit to your country, we can assume that today Argentina is a country of the future. This is for several reasons: Argentina has excellent constitutional texts that offer many possibilities for interpretation, in line with my thinking in possibilities. Argentina has a Supreme Court, with a master like Judge Zaffaroni, who can compensate for some deficiencies of the system through judicial activism. Argentina also boasts a vibrant, innovative national community of scholars in constitutional law. I have read some books and had some conversations that make me optimistic. The young generation justifies particularly high expectations. I experienced this yesterday in the seminar of your “Circulo Doxa”, which I call the “sacred circle”. The young doctoral students, as well as some students, posed highly knowledgeable questions and demonstrated how well-informed they are about constitutional matters beyond their own country: for example, regarding European integration, including the crucial question of whether Turkey might join the EU, or regarding the status of the European integration process – keyword: Treaty of Lisbon – or regarding cultural upheavals that must have arisen during the rapid reunification of Germany, which was necessary in world political terms.

As long as there are seminars like this, in the spirit of W. v. Humboldt’s unity of research and teaching, and community of educators and learners, I have no doubt about Argentina’s future. Excesses of presidentialism can be curbed by universities and young constitutional lawyers. I thank you for your hospitality, friendly feedback and rich instruction. May Argentina continue to play a leading role in the ongoing construction of its constitutional state and even make a creative contribution to the emergence of a Latin American constitutional law, as I advocated for during a conference in Mexico City about 8 years ago. Thank you very much.



Stefan Zweig, 1941

1881-1942



Facultad  
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Jueves 7 de julio de 2016 a las 18 hs. en el Salón Rojo, Facultad de Derecho (UBA)

**Seminario sobre Fundamentos Constitucionales del Estado**

## **Diálogo sobre la sociedad abierta de los intérpretes de la Constitución, texto de Peter Häberle**

**Director: Prof. Dr. Raúl Gustavo Ferreyra**  
Año III - Reunión 8

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## AFTERWORD BY THE EDITOR –

# „HIC LEONES ET FENIX“: CARTOGRAPHER OF THE UNIVERSAL CONSTITUTIONAL DOCTRINE

If a panoramic image covers 360 degrees, then the selected 180 Goethe quotes by Peter Häberle represent one half, while the other half is found in the vast, unconsidered literary production. The selection, however, is representative of Häberle's entire oeuvre, primarily focusing on monographs, as well as exemplary speeches, lectures, expressions of thanks, and book advertisements.

The metaphor of dwarfs standing on the shoulders of giants by Bernard of Chartres is one of Häberle's fundamental maxims of work (p. 46).<sup>1</sup> The giants are the scientific and artistic works of the ancients – including contemporaries, whom Häberle regularly reviews in the field of constitutional law, in line with Goethe's standpoint in the 'West-Eastern Divan':

He who cannot from three thousand years  
Render an account clear and bright,  
Remains in darkness, lost in fears,  
Just living from day to night.

In Häberle's work, he himself is a theorist of reference to other authors and sources,<sup>2</sup> no significant thinker is missing and his erudition is always comprehensive. Therefore, the legitimate question arises as to what role Goethe can even play in the thinking of a leading state law scholar in the 21st century. Interestingly, the fascination for Goethe began in 1973, the year of his father Hugo Häberle's death, while the interest in Schiller, by comparison, started as early as 1952.<sup>3</sup>

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1 Cf. only Wolfgang Graf Vitzthum, "On the shoulders of giants ...". On Peter Häberle, in: Peter Häberle, *Kleine Schriften. Beiträge zur Staatsrechtslehre und Verfassungskultur*, edited by idem, Tübingen 2002, p. 397; as part of the book title of a Festschrift for Peter Häberle: R. C. Amaral/C. Perotto Biagi/A. P. Gontijo (eds.), *Sobre os ombros de um gigante se vê mais longe – Estudos em homenagem a Peter Häberle*, Curitiba 2019.

2 *Peter Häberle/Alexander Blankenagel: Fußnoten als Instrument der Rechts-Wissenschaft*, in: *Rechtstheorie* 19 (1988), p. 116-136.

3 *Peter Häberle, Ein Portrait – Album 1934-2014*, Francisco Balaguer Callejón (ed.), Cizur Menor 2014, p. 8.

In addition to Rudolf Smend, Hans Kelsen, and Carl Schmitt, Heller was a prominent figure in Weimar state law doctrine. However, he uniquely situated his ‘Doctrine of the State’ clear-sighted within the realm of cultural studies with reference to Wilhelm Dilthey, Werner Sombart, Max Weber, and Hans Freyer.<sup>8</sup> Although Smend influenced Häberle in his habilitation thesis (p. 132),<sup>9</sup> Heller’s classification served as his point of reference for the establishment of ‘Constitutional Theory as Cultural Science’ (1982; 2<sup>nd</sup> edition 1998), always further developed up to ‘The Cooperative Constitutional State – from Culture and as Culture, Preliminary Studies for a Universal Constitutional Theory’ (2013).<sup>10</sup>



**Marianne and Max Weber**

Master unknown, 1900

Why Goethe appears as the most frequently cited classic in Häberle’s work is not immediately apparent at first glance. As a minister in the Secret Council of the small, insignificant petty principedom of Saxony-Weimar and Eisenach, Goethe always proves to be a reliable part of the monarchical system. Here, Goethe learned about the full range of administrative and political decisions necessary to govern and administer the duchy. During his first decade in Weimar (1776-1786), around 23,000 cases were dealt with in around 750 regular sessions, of which Goethe attended over 500.<sup>11</sup>

In a letter to Johann Caspar Lavater dated February 22, 1786, his Prince Carl August stated regarding his minister: “His existence is one of the most hard-working, moral, and best that has been maintained for over thirty [years].” In 1783, Goethe was even asked for his opinion in the Secret Council – although not within his sphere of competence – on whether a child murderer should be executed – precisely the tragedy depicted with Gretchen in ‘Faust I’. After much deliberation, Goethe – in accordance with the prevailing Imperial Law (1532)<sup>12</sup> – reluctantly noted in the records that it “might be more advisable to retain the death penalty”; the 26-year-old Carl August then signed the death sentence.<sup>13</sup>

8 *Hermann Heller*, *Staatslehre*, p. 32 seq., hier zitiert nach Gerhart Niemeyer (ed.), Tübingen 1983, p. 44 seq.; *Uwe Volkmann*, above Fn. 7, p. 485.

9 *Öffentliches Interesse als juristisches Problem*, 1970 (Freiburger Habilitationsschrift); 2006, 3<sup>rd</sup> edition as eBook 2015.

10 *Peter Häberle*, *Der Sinn von Verfassungen*, in: *AöR* 131 (2006), p. 631, but also see the reference there to Rudolf Smend’s statement from 1928: “Fundamental rights as a cultural system”.

11 *Karl Otto Conrady*, *Goethe – Leben und Werk*, München/Zürich 1994, p. 305.

12 Art. 131 *Constitutio Criminalis Carolina* from 1532 (Procedure for the judgment of capital crimes).

13 *Goethes amtliche Schriften*, W. Flach (ed.), vol. 1, Weimar 1950, p. 251; detailed *Heinz Müller-Dietz*, *Goethe und die Todesstrafe*, in: K. Lüderssen (ed.), „Die wahre Liberalität ist Anerkennung“, *Goethe und die Jurisprudenz*, Baden-Baden 1999, p. 15 et seq.; see also *Rüdiger Volhard*, *Wie würde man heute entscheiden?*, *ibidem*, p. 43 et seq.

A change in the constitutional pillars of the monarchical system was beyond Goethe's reach. It wasn't until 1782 that Goethe, the commoner from Frankfurt, became socially acceptable when Emperor Joseph II, on the proposal of Duchess Anna Amalia of Saxony-Weimar and Eisenach, elevated him to the nobility. Accordingly, he avoided the major German power centers of his time; he only visited Berlin once for six days (1778) and never visited Vienna. After his trip to Italy (1786-1788), Goethe was not allowed to devote himself exclusively to poetry, however, he reversed the emphasis of his previous activities. He is now a poet and scholar, primarily responsible as a state minister for overseeing culture, science, and architecture, and he served as a theater director for a quarter of a century, overseeing the staging of around 650 plays.<sup>14</sup>



**Duchess Amalia in a masquerade ball costume, holding a black half-mask**

Johann E. Heinsius, around 1775

The reflection on the major politics of his time occurs in Goethe's literary works, primarily in his educational novel 'Wilhelm Meister' as well as in 'Faust'<sup>15</sup>. Both are often cited by Häberle. In 'Wilhelm Meister's Apprenticeship', for example, he lets the harpist Augustinus respond:

He should consider that he does not live in the free world of his thoughts and ideas, but in a constitution whose laws and conditions have assumed the invincibility of a natural law.

With the American (Declaration of Independence in 1776) and the French Revolution (1789), Goethe experienced first-hand the power of man-made "natural laws"; Pandora's box was opened.

The 'Manifesto no. 29' of the Roman Police Minister Francesco Piranesi, issued in the 2nd and final year of the Roman Republic (Feb. 1798 - Sept. 1799), a subsidiary republic of the French original, clearly reflects the secular conflict of interest that needs to be resolved:

In a republican government, it is the first duty of the citizen to know the laws of his country and to derive from them the rules for his actions.

Those of the Greeks, of the Romans, were engraved and displayed in the marketpla-

<sup>14</sup> *Gero von Wilpert*, Goethe-Lexikon, Stuttgart 1998, p. 1062.

<sup>15</sup> In-depth on 'Faust II' Peter Schneider, *Der Elefant. Goethe über Recht, Staat und Gesellschaft in Faust II*, Freiburg i. B. et al. 2009, p. 13 et seq.; see also the section „Der Jurist und Mensch in der Tragödie ‚Faust‘“ in Alfons und Jutta Pausch, *Goethes Juristenlaufbahn*, Köln 1996, p. 238 et seq.

ce; they were entrusted to the memory of the boys. Happy times, when few and incomplete laws sufficed to guide and restrain the passions of the world conquerors!

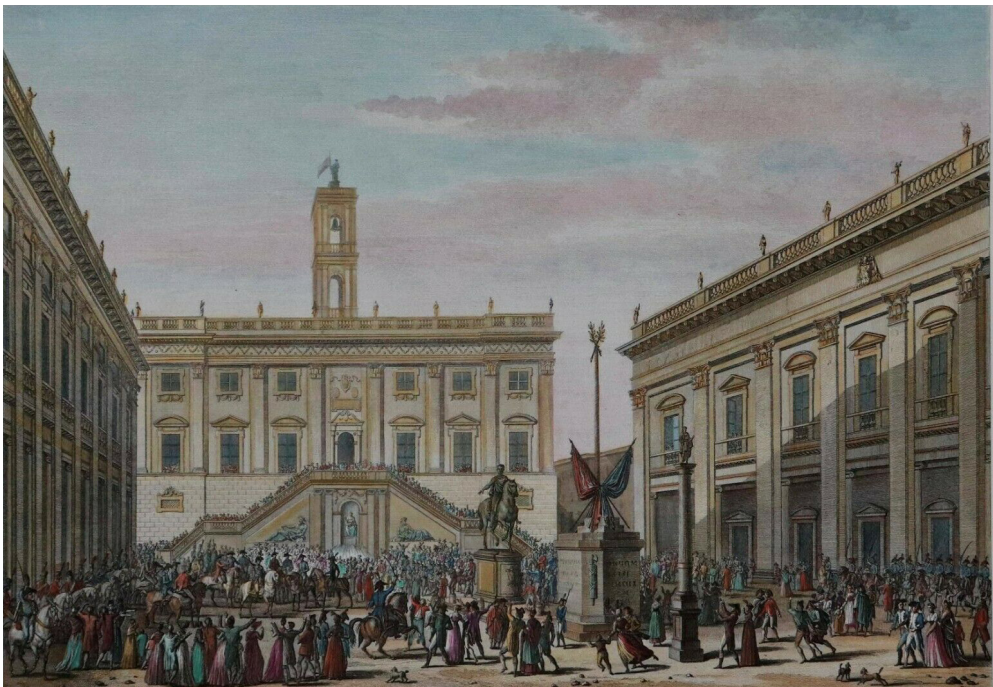
The demoralization of peoples, the corruption of governments, the intolerable attitude of aristocracy and tyranny, after having inflamed human passions, after having placed private interest in an irreconcilable opposition to the common good, have imposed upon humanity the fatal necessity of having to have a complicated legislation, but only until the point at which virtue will regain its rights among mortals, and the fulfillment of one's own duties will become a pleasant and easy habit.

The fundamental principles of democracy are already enshrined in our constitution, sworn upon by millions of people and sealed with their own blood.

But in order to be able to govern a free people, laws are necessary to decide on the interests of citizens, to guide their judgments, whether in relations among private individuals or when they present themselves in various cases and circumstances for the decision of judges.

This is indeed the purpose of legislation, as citizens can repeatedly see with the subscription to the Bulletin of Laws. The common sense, the rights of the parties in dispute, will no longer be buried under endless volumes of Justinian Jurisprudence, under the guise of a language mastered by only a few.

Thus, the wealth of citizens will no longer be exposed to the greed of vultures in robes, who, having engaged in shameful dealings of hair-splitting, have turned the un-



**Proclamation of the Roman Republic, Pluviose 27, Year VI (02/15/1798)**

Engraving by Delaunay le Jeune (1806) based on a drawing by Carle Vernet, 1798



certainty and incomprehensibility of laws into a commodity, solely to triumph amidst the plight of the people, as if they were instruments of discord among citizens.

Simplicity, clarity, and order will constitute the advantages of a philosophical legislation protected by the genius of freedom and the prudence of our representatives.

The constitution itself, the avenger of the rights belonging to every citizen, has mandated the compilation of Roman legislation, and the government, after postponing the subscription for all too well-known reasons, now finally presents it to its fellow citizens following its public vow.

It will contain the so-called Bulletin of Laws, the consular regulations, the criminal procedure law, and all the other emanations of the general will that will be published in the future by the legislative bodies.

The subscription can already be made at all central post offices of the departments. There, you can purchase the back and current issues for the price of only two Bajocchi in cash.

In this way, as in Greece and ancient Rome, may the entire nation know and comply with those duties which are the basis of peace, order and sound government.<sup>16</sup>

When Goethe joined the first coalition army against revolutionary France in 1792, he recognized the significance of the cannonade of Valmy: On September 20, 1792, the French Revolutionary Army fired around 20,000 bullets and forced the coalition army to retreat. In his ‘Campaign in France’ (1822), Goethe reports that he spoke the following words in response to this event: “From here and today, a new epoch of world history begins, and you can say you were there.” The retreat ended in a catastrophe, Goethe found himself in mortal danger multiple times, and 22,000 Prussian soldiers alone perished.<sup>17</sup>



The Battle of Valmy

Horace Vernet, 1826

The Napoleonic Empire also undertook to enact comprehensive legal codes in order to eliminate the complexity of existing laws and the resulting legal uncertainty – as hoped for by the Revolution. In the draft law of the National Convention (1793), it is stated: “Of all the benefits that France expected from the revolution, the most

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<sup>16</sup> Translation by the author, printed in Italian in: A. D’Atena, *La pubblicazione delle fonti normative*, Padova 1974, p. 124 seq., Fn. 4; see in detail *Veit Elm*, *Die Revolution im Kirchenstaat – Ein Literaturbericht über die jüngere Forschung zur Vorgeschichte und Geschichte der Repubblica Romana (1798-1799)*, Frankfurt a. M. et al. 2002, especially to the constitution p. 23 et seq.

<sup>17</sup> Cf. *Nicholas Boyle*, *Goethe – Der Dichter in seiner Zeit*, vol. II, 1791-1803, translated by Holger Fliessbach, München 1999, p. 175, p. 154 et seq., p. 167.



ardently desired and most often promised was a civil code.”<sup>18</sup> From this emerged the ‘Code Napoléon’ in 1804, which excluded estate, feudal, and corporate rights, as well as other privileges.<sup>19</sup> For Anselm von Feuerbach, it contained as pillars the fundamental principles of “freedom of the person, equality before the law, separation of state and church, freedom of property, and freedom of contract”,<sup>20</sup> in which “civil legal equality ... freedom of individual sphere, especially contract and economic freedom were considered living axioms”.<sup>21</sup> Napoleon was serious and took part in 59 of 102 editorial meetings, mostly the most important ones, with commitment and a demonstrably high level of competence.<sup>22</sup>

Goethe welcomed progress; for him, good legal policy, as reflected in Napoleon’s groundbreaking legislative work, had to ensure stable social conditions as the basis for art and science, which are intended to elevate humanity. Since Napoleon’s victory at Jena and Austerlitz on October 14, 1806, Goethe referred to “in good humor ... everything before this epoch as antediluvian”,<sup>23</sup> thus pre-diluvian, as Napoleon’s legal codes eradicated millennia-old abuse through the enforcement of an impenetrable law. The state’s attitude had therefore been unequivocally formulated, even though the reality may have initially appeared different, as seen in Balzac’s satirical remark that “since 1789 France has been trying to make men believe, against all evidence, that they are equal”.<sup>24</sup>



Napoleon I on his imperial throne

Jean Auguste D. Ingres, 1806

18 Quoted after *Sten Gagnér*, *Studien zur Ideengeschichte der Gesetzgebung*, Stockholm et al. 1960, p. 79; cf. the First Title, at the end, French. Constitution of 1791: “A civil code common to the entire kingdom shall be established.”

19 Cf. *Dieter Grimm*, *Historische Erfahrungen mit Rechtsvereinheitlichung – das frühe 19. Jh. in Deutschland*, *RabelsZ* 1986, p. 64, see the comments there on the Rhine Confederation members Baden and Bavaria, who had committed themselves to the reception of the Napoleonic Code and were faced with the problem of incorporating feudal law into the Code in the reception drafts, *ibid.*, p. 67 seq.

20 Quoted according to B. Dölemeyer, Nachwort, in: *Code Napoléon – Napoleons Gesetzbuch*, Faksimile der Original-Ausgabe von 1808, Frankfurt a. M./Basel 2001, p. 1056.

21 *Franz Wieacker*, *Privatrechtsgeschichte der Neuzeit*, Göttingen 1967, p. 343.

22 *Eckhard Maria Theewen*, *Napoléons Anteil am Code civil*, Berlin 1991, p. 237 et seq., p. 253, Regarding the editorial sessions, see: p. 250 and p. 62 et seq.

23 *Friedrich Wilhelm Riemer*, *Mitteilungen über Goethe*, 1841, A. Pollmer (ed.), Leipzig 1921, p. 174.

24 *Honoré de Balzac*, *Les paysans*, cited from P. Caroni, *Saggi sulla storia della codificazione*, Milano

Goethe also witnessed how the spirits that the American and French Revolutions had stirred were fought against and successfully prevented by the corporate -monarchical state system in Germany. This reaction became known as the Codification Dispute (1814) between the legal scholars Friedrich Carl von Savigny and Anton Friedrich Justus Thibaut. Goethe knew both of them personally. Thibaut was particularly close to him; he was called to the University of Jena (1802-1805), which under Goethe's guidance temporarily became one of the leading universities in Germany, with prominent scholars and promising talents such as Hegel, Fichte, Schelling, the Humboldt brothers, Brentano, Tieck, Voß, Schiller, Novalis and Hölderlin. No other university in Germany "was administered more liberally, and so teachers and students who loved to protest in art and science came here".<sup>25</sup> Caroline Herder reported that Goethe, as chairman of the Finance Chamber, "sought to establish a fund for extraordinary expenses through savings and constraints, especially for the University of Jena."<sup>26</sup> Regarding Thibaut, who was now a professor in Heidelberg, Goethe sent his son August to study law there (1808-1809) and requested reports on the progress of the student. "My son August", Goethe wrote in the entry of 1808 in the 'Daily and Yearly Journals' (1817-1830), "went cheerfully and in good spirits to the University of Heidelberg, my blessings, worries and hopes followed him there. He was recommended from his youth to important, former Jena friends, Voss and Thibaut and he could be considered as in the parental home." Savigny, on the other hand, had been in contact with Goethe since 1807, often with his wife Kunigunde, née Brentano, and their sister Bettine, whom he very much appreciated.<sup>27</sup>

Thibaut, who knew from his own experience the superiority of the 'Code Napoléon' – its introduction was decided in Heidelberg in the Grand Duchy of Baden in 1808 and enacted from 1809 (valid until 1899)<sup>28</sup> – called for similar codifications for the German legal system in the areas of civil, criminal and procedural law as an urgent necessity of the hour:



**August von Goethe**

Julie von Egloffstein, 1817  
Drawing

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1998, p. 115.

25 *Wilhelm Bode*, *Amalie Herzogin von Weimar*, vol. III: Ein Lebensabend im Künstlerkreise, Berlin 1908, p. 58.

26 Quoted after Flodoard von Biedermann/Wolfgang Herwig (eds.), *Goethes Gespräche*, Eine Sammlung zeitgenössischer Berichte aus seinem Umgang, vol. I, 1749-1805, München 1998, p. 319, Letter no. 630.

27 Cf. *Hartmut Fröschle*, *Goethes Verhältnis zur Romantik*, Würzburg 2002, p. 108 et seq. and more often.

28 Feudal law was incorporated into the code, see *Hugo Ott*, *Baden*, in: *Deutsche Verwaltungsgeschichte*, vol. II, Stuttgart 1983, p. 594 seq.



**Anton F. J. Thibaut**

Master and date unknown  
Phototype by Josef Albert

... Our entire domestic law is an endless mass of conflicting, destructive, variegated regulations, all designed to separate Germans from each other and to make it impossible for judges and lawyers to have a thorough knowledge of the law. But even a complete understanding of this chaotic assortment does not lead far. For our entire domestic law is so incomplete and empty that out of a hundred legal questions at least ninety must be decided from the received law.<sup>29</sup>

Savigny replied that the ‘Code Napoléon’ was that “... code which must be regarded as a surmounted political disease, from which we shall indeed still experience many evils”.<sup>30</sup> Instead of a legal code, the common law, “allegedly evolving from the Volkgeist (common will of a people) has to be preserved by an organically advancing legal science”,<sup>31</sup> as legislators would disturb the balance and, if codified, bring the law into a state of rigidity; the law is bound to historical prerequisites

and cannot be created by legislation, but rather only arises from the innermost essence of the nation and its history.

According to Savigny’s “Volkgeistlehre” (common will of a people theory), the enactment of laws is entrusted to a small group, the lawyers, who represent the people as “deputies of the nation ... advocating the common will of a people”.<sup>32</sup> The state-theoretical assertion of the logically elusive “common will of a people theory” became the backbone of absolutist forms of governance. Only a small group has access to the common will of a people – which means that every parliament as the representation of the people is excluded from legislation, reduced to a kind of notarial function. The insidious aspect here is the use of the word “people”, even though it entails their incapacitation, as Savigny’s concept of a people refers to “an ‘ideal’ people, a ‘natural whole’, not the sum of specific individuals”, an “empirical polling of

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29 Anton Friedrich Justus Thibaut, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*, Heidelberg (1814), München 1973, p. 68.

30 Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, 1814, Heidelberg 1840, p. 135; For ‘counter-texts’ to 1789, cf. Peter Häberle, 1789 als Teil der Geschichte, Gegenwart und Zukunft des Verfassungsstaates, in: H. Krauß (ed.), *Folgen der Französischen Revolution*, 1989, p. 72 et seq.

31 So Helmuth Schulze-Fielitz, *Theorie und Praxis parlamentarischer Gesetzgebung: bes. des 9. Dt. Bundestages (1980-1983)*, Berlin 1988, p. 30.

32 Paul Koschaker, *Europa und das römische Recht*, München et al. (1947) 1966, p. 197.

the people” is not considered.<sup>33</sup> Hegel railed against the “Volksgeistlehre”:

If in recent times the peoples have been denied the ability for legislation, this is not only an insult but also contains the absurdity that, given the infinite number of existing laws, not even individuals are trusted to incorporating them into a consistent system, whereas precisely systematizing, that is, elevating to the general, is the endless urge of the time.<sup>34</sup>

The “antidote” against the postulates of the American and French Revolutions was found in Savigny’s “Volksgeistlehre” (common will of a people theory). It corresponded ideally to the legal-political power concepts of the corporate-monarchical states, which, especially at the Congress of Vienna, politically and geographically reorganized the European continent in a restorative sense following Napoleon’s defeat.

When Duke Carl August wanted to involve Goethe in the upcoming negotiations of the Congress of Vienna, Goethe declined. He wrote to Georg Friedrich Sartorius on June 20, 1814: “I have indeed received urgent invitations to come to Vienna, but I cannot bring myself to plunge back into a world that I have long since renounced.”

As a result, judges appointed by princes became the actual legislators, excluding the people as sovereign, with the process of legal interpretation occurring in crucial phases based on legal sources available only in Latin, a language which only a few understood. Success was guaranteed, the maintenance of princely power was secured, and across Germany and Austria, even regardless of denomination, “civil law professorships ... were filled based on the advice and recommendation of Savigny and his disciples and followers”.<sup>35</sup> Even “in the late Wilhelmine era, during the resurgence of illiberal political metaphysics and the strengthening of anti-parliamentary tendencies”, the concept of the “Volksgeist” (common will of a people) emerges.<sup>36</sup> The “Volksgeistlehre” (common will of a people theory) and its derivatives, such as the “healthy national attitude”, were accordingly the pillars of the National Socialist “legal” system. In an exemplary enumeration, there is talk of 18 prominent National Socialist lawyers who more or less centrally linked to Savigny, saying that he “opened the eyes of many”.<sup>37</sup>



Hegel

Jakob Schlesinger, 1831

Oil painting

33 Joachim Rückert, Das „gesunde Volksempfinden“ – eine Erbschaft Savignys?, ZRG GA 1986, p. 238.

34 Georg Wilhelm Friedrich Hegel, Grundlinien der Philosophie des Rechts, 1821, vol. VII, Stuttgart <sup>3</sup>1952, § 211, p. 290, see also § 216, p. 297.

35 Paul Koschaker, Europa und das römische Recht, München et al. (1947) <sup>4</sup>1966, p. 255.

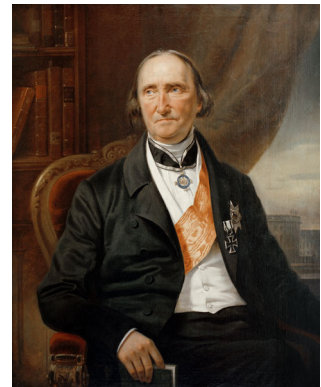
36 Joachim Rückert, Das „gesunde Volksempfinden“ – eine Erbschaft Savignys?, ZRG GA 1986, p. 243.

37 Joachim Rückert, above fn. 36, p. 200 seq., Quote with reference to G. K. Schmelzeisen on p. 201.



Savigny was a declared admirer and reader of Goethe,<sup>38</sup> they had many friends in common, but Goethe never commented on the legal historian's widely respected works. It is assumed that he was impressed by Savigny's extensive historical knowledge.<sup>39</sup> When the latter asked Goethe for a foreword to the third volume of Barthold Georg Niebuhr's 'Roman History', which he edited, Goethe declined on November 21, 1831, his only letter to Savigny.

Indeed, as a state minister within a monarchical system, Goethe had to be particularly discreet and cautious in his political expressions. He did not directly participate in the "Estate Constitution" adopted by the Grand Duchy of Saxe-Weimar and Eisenach in 1816, which – compared to the demands of the American and French Revolutions – was seen as farcical. His 'Conversation with Napoleon in 1808', a sketch from 1824 depicting an audience with the Emperor in Erfurt, he preferred to entrust to his estate. Goethe referred to Napoleon as "My Emperor", and he was proud of the Knight's Cross of the French Legion of Honor personally bestowed upon him by "his Emperor".<sup>40</sup> That enlightened absolutism was merely a transitional phase, as no ruler could truly control the exercise of power themselves, had become clear to Goethe through all the wars, upheavals, and reorganizations he experienced. His thoughts on this matter are reflected in his poetry, conversations, and letters. In a conversation with Johann Peter Eckermann on January 4, 1824, Goethe explains his point of view about law and the state:



Friedrich C. von Savigny

Franz Krüger, 1856  
Oil painting

It is true, I could not be a friend of the French Revolution; for its atrocities were too close to me and outraged me daily and hourly, while its beneficial consequences were not yet apparent at that time. Nor could I be indifferent to the fact that in Germany similar scenes were artificially attempted to be brought about, which in France were the result of dire necessity. However, I was also not a friend of arbitrary tyranny. I was also fully convinced that any great revolution is never the fault of the people, but of the government. Revolutions are entirely impossible when governments are consistently just and vigilant, so that they anticipate necessary improvements and do not resist them until the necessary changes are forcibly imposed from below. Because I detested revolutions, I was labeled as a friend of the status quo. However, that is a very ambiguous title which I would reject. If the existing state of affairs were all excellent, good, and just, I would

38 Detailed Dieter Nörr, Savigny liest Goethe, in: K. Lüderssen (ed.), „Die wahre Liberalität ist Anerkennung“, Goethe und die Jurisprudenz, Baden-Baden 1999, p. 150 et seq.

39 Hartmut Fröschle, Goethes Verhältnis zur Romantik, Würzburg 2002, p. 109.

40 See Werner Ogris, Goethe – amtlich und politisch, in: above Fn. 38, p. 308.



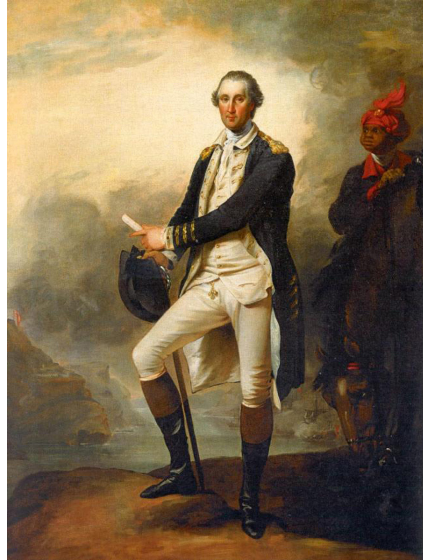
have nothing against it; but since alongside much good, there is also much bad, unjust, and imperfect, being a friend of the status quo often means not much less than being a friend of the outdated and the bad. But time is constantly progressing, and human affairs take on a different form every fifty years, so that an arrangement which was perfect in 1800 may already be a defect in 1850.

In the United States of America, there was an orderly process of implementing basic rights and separation of powers, with the common good set as the supreme goal of the state, while in Europe, the private interests of the monarchs were in an insoluble conflict to the common good. In 'Poetry and Truth' (1811-1831), Goethe recounts how, as a young man in Frankfurt, he observed with great interest the developments in America, "one wished the Americans all happiness, and the names Franklin and Washington began to shine and sparkle in the political and martial sky."

Goethe was an expert of American history, owning a considerable number of books about America and had a keen interest in American authors.<sup>41</sup> Americans who visited Goethe in Weimar were amazed by his comprehensive knowledge of their country. For instance, George Bancroft remarked, "... as if our country were one of the most interesting subjects to him in his later years".<sup>42</sup> The culmination of Goethe's thoughts on America can be found in his later novel 'Wilhelm Meister's Journeyman Years'. While in 'Wilhelm Meister's Apprenticeship' it was stated, "... here or nowhere is America!" (VII, 3), in the 'Journeyman Years' various preparations for emigration are the focus. Wilhelm and most of the characters in the novel prepare for their emigration. A colonization project is devised, and a group of emigrants is preparing for departure to America soon:

The strong urge to move to America at the beginning of the eighteenth century was significant, as anyone who found themselves somewhat uncomfortable on this side of the Atlantic hoped to establish themselves in freedom on the other side; this drive was nourished by desirable possessions that one could obtain. (I, 7)

In contrast, Europe is characterized:



George Washington

John Trumbull, 1780

Oil painting

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41 *Johannes Urzidil*, *Das Glück der Gegenwart*, Goethes Amerikabild, Stuttgart 1958, p. 16.

42 Quoted from *Johannes Urzidil*, fn. 41, p. 27.

this invaluable culture has sprung up for several thousand years, grown, spread, subdued, depressed, never completely suppressed, breathing again, revitalizing itself and still emerging in endless activities. (I, 7)

However, in the novel, emigration remains strangely indefinite, unreal, because it does not take place. Yet, Goethe's thinking about the state – considering the evolving understanding compared to the United States of America as a democratic, federal constitutional republic – far-sightedly announces the modern rule of law and constitutional state.

Häberle appropriates Goethe's thinking in order to place and to further develop it in the context of constitutional law. Goethe combined three prerequisites that gave him an extraordinary overview of the world: on the one hand, his unique poetic power of language, and on the other hand, his extensive experience at the top of the state system – for over half a century. His worldly wisdom was based on this experience. After all, Goethe was trained as an elite lawyer, which meant he was able to understand complex issues and transform them into an understandable, often poetic structure. This later helped him with his comprehensive scientific writings. Even if Goethe had not pursued a career as a minister of state, he would have “become a great one” in forensic practice as a lawyer (admitted at the age of 22).<sup>43</sup> His father Johann Caspar was a lawyer and imperial councilor, and from the family of his mother Elisabeth, née Textor, emerged top civil servants, lawyers, judges and law teachers.<sup>44</sup>

The comprehensive picture of Häberle's work, initially derived from updated Goethean thoughts, is expanded and deepened in a second part: firstly, through a more recent lecture by Häberle, which illustrates his brilliant concept of a ‘Constitutional Theory as Cultural Science’ from the perspective of ‘Poetry and Constitution’. Following are two expert discussions – a literary genre particularly valued by Häberle – on



Farewell of the emigrants from their homeland

Karl Wilhelm Hübner, 1846

Oil painting

43 *Fritjof Haft*, Juristisches Strukturdenken bei Goethe, in: R. Geimar/R. A. Schütze (eds.), *Recht ohne Grenzen*, Festschrift für Athanassios Keissis zum 65. Geburtstag, Köln 2012, p. 337; For Goethe's brief career as a lawyer see in detail *Alfons and Jutta Pausch*, *Goethes Juristenlaufbahn, Rechtsstudent, Advokat, Staatsdiener*, Köln 1996, p. 116 et seq.

44 See in detail *Alfons und Jutta Pausch*, *Goethes Juristenlaufbahn, Rechtsstudent, Advokat, Staatsdiener*, Köln 1996, p. 20 et seq.

poetry and culture in constitutional law, which in the lively flow of spoken words also revolve around the concept of “Constitutional Theory as Cultural Science”.

Regarding the magnum opus of his academic teacher Konrad Hesse – ‘Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland’ (The Basic Features of Constitutional Law of the Federal Republic of Germany – Häberle writes: “... not only in retrospect do the earlier publications, particularly monographs and essays, prove to be ‘preliminary studies’ for the ‘Basics’. Hesse systematically developed specific chapters of his later textbook.”<sup>45</sup> Similarly, Häberle approaches his ‘Constitutional Theory as Cultural Science’. Here, many of his efforts as a state law professor culminate, and important works from his outstanding research laboratory are reflected: From ‘Die Wesensgehaltsgarantie des Art. 19 Abs. 2 Grundgesetz’ (The Guarantee of the essential Content of Fundamental Rights of Art. 19 Paragraph 2 of the Basic Law)<sup>46</sup> to



Goethe on the street in Jena  
Signed „Tischbein“ , 1790/94,  
Watercolor

‘The Image of Man in the Constitutional State’, the Textual Stage analysis Paradigm, comparative law in space and time as the 5th method of interpretation, wherein legal history appears as “comparative law in time”, to the “open society of constitutional interpreters and constitution makers”, and other paradigms such as the cooperative constitutional state as a higher stage of development of the sovereign nation-state.

Medieval cartographers, who were aware of the outlines of certain regions but not their interiors, speculatively included explanations such as “Hic abundant leones” (Here are abundant lions) for Asia in the ‘Anglo-Saxon World Map’ (late 10th century) or “Hic nulli habitant propter leones” (Here no one lives because of lions) for the Persian desert areas in the ‘Ebstorf World Map’ (13th/14th century), as well as “Hic leones et Fenix” (Here are lions and phoenixes) for the Arabian region in the ‘Liber Floridus’ (around 1120).<sup>47</sup>

45 Peter Häberle, Konrad Hesse (1919-2005), in: idem/M. Kilian/H. Wolff, Staatsrechtslehrer des 20. Jahrhunderts, Deutschland – Österreich – Schweiz, <sup>2</sup>2018 Berlin/Boston, p. 1042.

46 1962, <sup>2</sup>1972, <sup>3rd</sup>, greatly expanded edition 1983 (Freiburger Dissertation); in Italian translation: *Le libertà fondamentali nello Stato costituzionale*, 1993; in Spanish translation: *La Libertad Fundamental en el Estado Constitucional*, Lima 1997; new translation: *La Garantía del Contenido Esencial de los Derechos Fundamentales*, Madrid 2003.

47 Cf. Uwe Ruberg, Die Tierwelt auf der Ebstorfer Weltkarte im Kontext mittelalterlicher Enzyklopädik, in: H. Kugler (ed.), *Ein Weltbild vor Columbus*, Weinheim 1991, p. 334, fn. 34; Brigitte Englisch, *Ordo orbis terrae – Die Weltsicht in den Mappae mundi des frühen und hohen Mittelalters*, Berlin





## 'Liber Floridus' by Lambert of Saint-Omer

it is considered the first encyclopedia of the Middle Ages

Around 1120, p. 124 seq.,

On the next page the excerpt with the entry “Hic leones et fenix”

2002, p. 588 et seq., p. 652 et seq.; *Margriet Hoogvliet*, Hic nulli habitant propter leones et ursos et pardes et tigrides – Die Zoologie der Mappae mundi, in: U. Müller/W. Wunderlich (eds.), *Dämonen, Monster, Fabelwesen*, St. Gallen 1999, p. 94, fn. 30. The assertion that a “cartographer or engraver of a map of Africa ... in the Middle Ages and early modern period” speculated by inserting “Hic sunt leones” (Here are the lions) for the area of the African interior, as reported by Michael Stolleis in ‘Aufgaben der neueren Rechtsgeschichte, oder: Hic sunt leones’ (RJ 1985, p. 251), is doubtful, as the sources cited do not mention a specific map. The words “Hic sunt leones” would have to be proven by a reference to one of the over 400 mappae mundi for the period of the High Middle Ages, see for the numerical information Herma Kliege, *Worldview and Representation Practice of High Medieval World Maps*, Münster 1991, p. 19, p. 26. Certainly, “on the detailed medieval world maps... lions in the interior of the African continent are not found nearly as regularly as the gallery of monstra on its previously unexplored southern edge”, said Uwe Ruberg in his answer to a query from the author, who also kindly indicated the sentence “Hic leones et fenix” for the area of Arabia in the ‘Liber Floridus’ by Lambert of Saint-Omer.



Häberle also proves to be a cartographer who explores and describes the Terra incognita, the “universal constitutional theory”, as one of the first, recognizing the ‘Constitutional Theory as Cultural Science’ as its central star. As the editor of the ‘Yearbook of Public Law’ from 1983 to 2014, documenting all constitutional developments worldwide was a particular concern of his. Recently, Häberle has delved into the emerging constitutionalism in Africa in his monograph ‘An African Constitutional and Reading Book – with Comparative Commentary’ (2019), in order to contextualize the process within universal constitutionalism.

Häberle’s banner, defining constitution as “a molded form that develops as it lives”, inspired by Hermann Heller’s transformed verse from Goethe’s ‘ΔΑΙΜΩΝ, Daimon’ (Daemon), points to morphology. With the concept of molding in the sense of character, Goethe alludes to metamorphosis as a principle of shaping all existence, the doctrine of organic formation, transformation, and alteration. “Constitutional Theory as Cultural Science” is alive, adaptable and open, capable of achieving pluralistic



balance internally and externally. With citizens who perceive themselves as constitutional citizens, it can be robustly protected and further developed.

The reception, which is documented here in the scientific apparatus by the (incomplete) list of ‘literature about Peter Häberle’, is corresponding. “The central position of Häberle’s thinking in ... constitutional theory because” it engages with and addresses “the new challenges of globalization, multiculturalism, fragmentation of cultural identities, the crisis of political ideologies of the 20th century, and processes of supranational integration”.<sup>48</sup> Similar judgments can be found on all continents, recently articulated eloquently in India.<sup>49</sup> The state law teacher Peter Häberle is considered one of the “worldwide most influential European lawyers”,<sup>50</sup> hailed as a “prodigy of law”,<sup>51</sup> to whom we owe the “most important constitutional theory of the present day”.<sup>52</sup> Häberle is described as “a wandering star of the constitutional state on vast paths, an illuminating, kindly shining celestial body.”<sup>53</sup>

Already in his lifetime Häberle is considered a classical writer of ever-increasing importance and fascination. May the presented selection inspire the discovery of Peter Häberle’s stupendous work and stimulate (re)engagement with Goethe.

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48 *Paolo Ridola*, Laudatio di Peter Häberle, in: *Rivista per le scienze giuridiche* 2013, IV, p. 283.

49 *Pratyush Kumar*: A European Constitutional and Public Law Scholar, in: *Indian Journal of Public Administration* 2019, p. 769-790.

50 So *Francisco Balaguer Callejón*, quoted after M. Kotzur/L. Michael, Tagungsbericht, Der Aufbau des Europäischen Verfassungsrecht, in: *JZ* 23/2009, p. 1161.

51 *Hans Maier*, Wunderkind des Rechts, in: *SZ* vom 20. Mai 1999, p. 18.

52 *Pedro de Vega*, quoted after Jorge León in conversation with Peter Häberle, in: *Peter Häberle, Vergleichende Verfassungstheorie und Verfassungspraxis. Letzte Schriften und Gespräche*, Berlin 2016, p. 347.

53 *Michael Stolleis*, In the open, The constitutional lawyer Peter Häberle turns seventy, *FAZ* from May 13, 2004, p. 36.

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**Goethe**

Christian F. Hecker, around 1788  
Sarder in the golden ring

### 3. Literature on Peter Häberle

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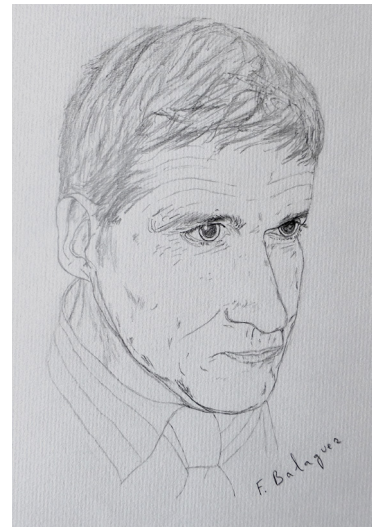
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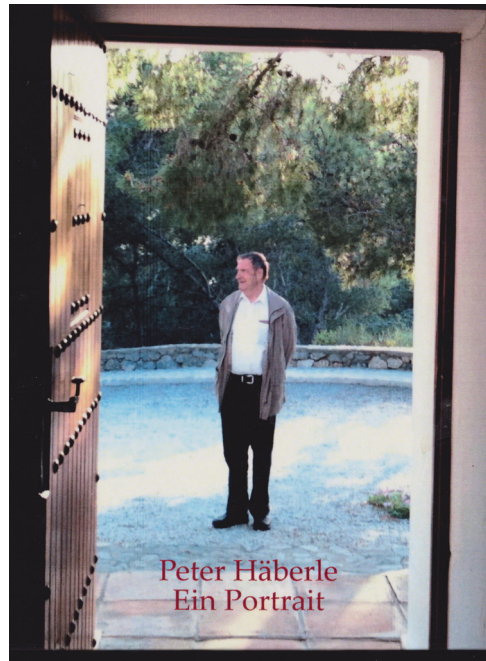
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### Peter Häberle

Ein Portrait – Album 1934-2014  
Francisco Balaguer Callejón (ed.)  
Cizur Menor 2014, 124 p.



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**View of the arch bridge on the meadows**

Georg Melchior Kraus, 1793, colored etching  
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**The three pillars on Rothäuser Berg near Weimar Castle**

Georg Melchior Kraus, undated, watercolor, detail  
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## IV. The Authors

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**H**éctor López Bofill was born in 1973 in Barbate; he is a professor of constitutional law at Pompeu Fabra University, Barcelona. At the same time, Bofill is a highly awarded poet in the Catalan language and a politician. His latest monograph is dedicated to Peter Häberle: ‘Law, Violence and Constituent Power: The Law, Politics and History of Constitution Making’, London 2021. See in detail: [www.upf.edu](http://www.upf.edu)



H. López Bofill and P. Häberle



R. G. Ferreyra and P. Häberle

1st from the right and 1st from the left, on the occasion of the conferral of an honorary doctorate from the University of Buenos Aires in 2009

He is a lawyer and holds a Master of Laws from Oxford. From 1998 to 2002, Ghibellino completed his doctorate under Peter Häberle in Bayreuth. He translated several essays by Peter Häberle into Italian, compiled in the book: ‘Cultura dei diritti e diritti della cultura nello spazio costituzionale europeo’ (The Culture of Rights and Rights of Culture in the European Constitutional Space, Milan 2003). Ghibellino lives as a Goethe researcher in Weimar. Homepage: [www.annaamalia-goethe.de](http://www.annaamalia-goethe.de)

**R**úal Gustavo Ferreyra was born in 1960 in Buenos Aires. He is a professor of constitutional law at the University of Buenos Aires and is considered one of Argentina’s leading constitutional law scholars. Ferreyra regularly conducts seminars on the work of Peter Häberle. For his career path and bibliography, see: <https://uba.academia.edu/RGFerreyra>

**E**ttore Ghibellino was born in 1969 in Waiblingen, Württemberg.



E. Ghibellino and P. Häberle

Weimar 2013

**J**ohann Wolfgang von Goethe was born on August 28, 1749, in Frankfurt am Main and died on March 22, 1832, in Weimar. He studied law in Leipzig and Strasbourg (1765-1771) and practiced as a lawyer in Wetzlar and Frankfurt (1771-

1775). In addition to his legal education and profession, Goethe became the leading poet of the literary movement “Sturm und Drang” (Storm and Stress), and his writings attracted attention far beyond German-speaking borders, making him famous.

The consequence of his fame was an unexpected turn in his life when, at the age of just 26, he was appointed Privy Legation Councilor with a seat and vote in the Conseil of the Duchy of Saxony-Weimar and Eisenach. This was followed by the highest state positions in the Principality of the Duodec - alternating in almost all departments until his death in 1832, such as the management of the Mining Commission (1777), the War Commission (1779), the Roads and Hydraulic Engineering Directorate (1779) as well as the Finance Chamber (1782) and the Ilmenauer Tax Commission (1784). He was also a diplomat and closest advisor to his Duke Carl August,



### Goethe in Rome

Angelika Kauffmann, 1787/88  
Oil painting

who was eight years his junior. After his trip to Italy (1786-1788), Goethe shifted his official focus to the areas of science, culture and architecture. From 1791 to 1817, he also served as the director of the Weimar Court Theater. When extensive state structural reforms were implemented in 1815, the department specifically tailored for Goethe was titled: “Supervision of the immediate institutions for science and art in Weimar and Jena.”

In addition to his official duties, Goethe created a poetic oeuvre that encompasses nearly all literary genres, with the tragedy ‘Faust’ as his magnum opus, and a multifaceted scientific work with ‘Theory of Colours’ at the top. Goethe is considered a universal genius, the greatest poet in the German language; even during his lifetime he was called an “Olympian”. His fame and influence coined the term „Goethezeit“ (Goethe Age) for his era. Goethe is likely the most widely read thinker and the most influential author at the beginning of the modern era. He has lent his name to numerous institutions, most notably the Goethe-Institut, which promotes German language and culture worldwide under its banner.



**P**eter Häberle was born on May 13, 1934, in Göppingen, Württemberg. He studied law in Tübingen, Freiburg, Bonn, and Montpellier (1953-1957). He received his doctorate in 1961 under Konrad Hesse in Freiburg, where he also served as Hesse's assistant and partially as an assistant to the State Secretary in the Federal Ministry of Justice Horst Ehmke, who was also a state law professor in Freiburg. Häberle obtained his habilitation in 1969 under Konrad Hesse in Freiburg. Peter Häberle held chairs in Public Law at Tübingen (1969), Marburg (from 1969), Augsburg (from 1976), and until his retirement in Bayreuth (1981-2002). Permanent visiting professor of legal philosophy in St. Gallen (1981-1999), annual visiting professor in Rome from 1985 and in Granada from 1994. Recipient of the Max Planck Research Prize in 1998, associated with the founding of the Bayreuth Institute for European Constitutional Law. Extensive publishing and co-editing activities, including from 1983 to 2014 editor of the 'Yearbook of Contemporary Public Law' (JöR), in which constitutional developments in European and non-European areas are analyzed and documented.

His work comprises nearly 50 monographs as well as over 350 articles. He has received numerous orders, honours, awards, and memberships.

Since 1982, Häberle has been developing his model conception of 'Constitutional Theory as Cultural Science', focusing on adaptability, prevention of abuse of power, realization of fundamental rights, and the role of citizens and institutions as interpreters and carriers of the constitution. In the development of this paradigm,

Goethe emerges as the most cited author of enduring fascination, whether as a poet, statesman, theorist or natural scientist. In 2004, the Peter Häberle Foundation was established at the University of St. Gallen. In 2010, the University of Granada inaugurated the Peter Häberle Research Center on Constitutional Law, followed by the University of Brasilia in 2011 with the opening of a Peter Häberle Research Center.



### Peter Häberle plays music

with students in his house in Bayreuth.

B. L., 1984, Drawing



Schriften zum Öffentlichen Recht

Band 436

# Verfassungslehre als Kulturwissenschaft

Von

Peter Häberle

Zweite, stark erweiterte Auflage



Duncker & Humblot · Berlin

Schriften zum Öffentlichen Recht, vol. 436

Berlin 1982, 1<sup>st</sup> edition, 84 p.

Schriften zum Öffentlichen Recht, vol. 436.2

Berlin 1998, 2<sup>nd</sup>, greatly expanded edition, XLV, 1188 p.

sal Constitutional Theory”, in order to recognize the ‘Constitutional Theory as Cultural Science’ as its central star. Most recently, *Häberle* delves into the emerging constitutionalism in Africa in his monograph ‘An African Constitution and Reading Book – with Comparative Commentary’ (2019) in order to contextualize the process within universal constitutionalism.

The constitutional law teacher *Peter Häberle* is considered one of the “worldwide most influential European lawyers”, hailed as a “prodigy of law”, to whom we owe the “most important constitutional theory of the present day”. Already during his lifetime *Häberle* is considered a classical writer of ever-increasing importance and fascination. May the presented selection encourage the discovery of *Peter Häberle’s* stupendous work and stimulate (re)engagement with *Goethe*.



**Ettore Ghibellino with his  
Doctoral supervisor Peter Häberle, 2013**

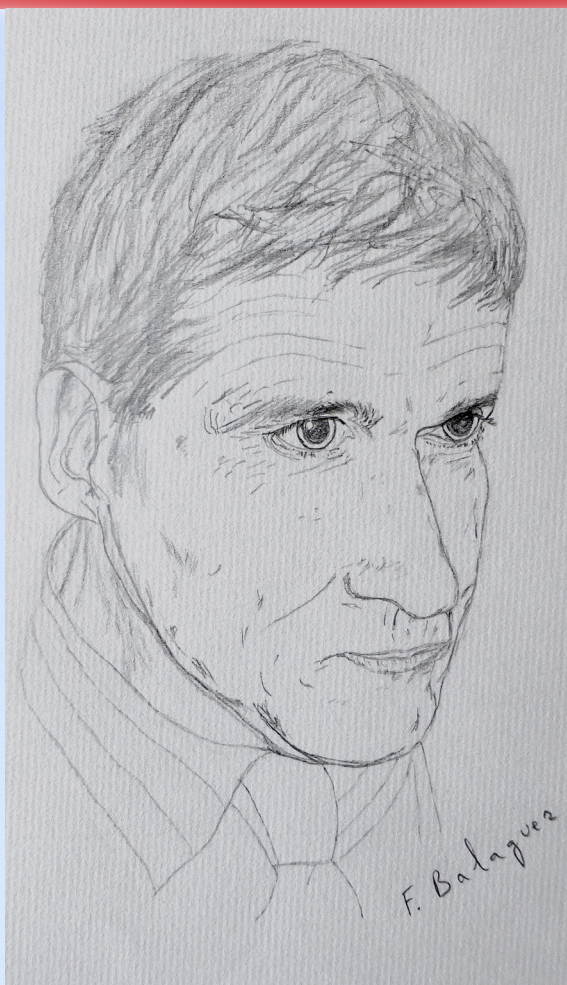
in the background the youth and cultural center  
‘mon ami’ at Goetheplatz in Weimar

Photo: Federico J. Denkena



**N**owhere did anyone want to admit that science and poetry could be compatible. They forgot that science had evolved from poetry; it was not considered that, after a turn of times, both might well meet again amicably, to their mutual benefit, on a higher ground.

**Goethe**



**O**penness alone cannot hold a vibrant constitutional state together “in its inmost folds” – to paraphrase Goethe. It needs the diversity of culture as a unifying bond, the cultural grounding of an open society.

**Peter Häberle**



ANNA AMALIA UND  
GOETHE STIFTUNG

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