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A Study on Public Authority in the European Legal Area

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COMMON PRINCIPLES FOR A PLURALITY OF ORDERS

By Armin von Bogdandy*

Abstract

Public law was once exclusive to the type of social organisation called state. This exclusivity is no more, particularly in the European legal area: supranational and international organisations wield competences that transform them into institutions of public authority. Due to Europeanisation and internationalisation, the public law applicable on an EU Member's territory can no longer be understood through the domestic constitution alone, but flows from a multiplicity of sources fed by a multitude of actors: A new public law tout court is under construction. The present article contributes to this by a study of founding principles. It offers its understanding of this new field of research (I.), sketches the relevant principles (II.), and discusses their interrelationship (III.)

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A. The Contemporary Field of Research Regarding Basic Principles

I. Emergence of a New Public Law

Not long ago, the basic structure of public law and authority in most countries was defined by the principles of their respective constitutions. Nowadays, supranational and international institutions impinge markedly on everyday life in many societies, in particular in those which form part of the European legal area.[1] In addition, there is a new openness towards the sovereign acts of other states. These developments pose the question of how the basic structures of public law are to be understood.

The basic structures that constitute the entirety of effective public authority in Germany are the topic of this contribution. Why this particular German focus? It is due in part to the origins of this piece, which was written for a German audience.[2] But there is also a deeper justification. The complexity of the issue suggests addressing it from a specific location and perspective, as the issue might appear differently from another place. The world looks different from Beijing, Cairo, or Quito, but also, within the European legal space, from Coimbra, Heidelberg, or Oxford, not least because different constitutions apply. Therefore, this article does not make categorical claims as to truth, nor does it consider alternative constructions to be false. Given the political, cultural and ideological diversity, any contribution that purports to be conceived as universal should be viewed with suspicion. Nevertheless, this piece claims to be scientific, because of its internal coherence, the circumspection with which the legal material is presented, and the analytical potential of the concepts it offers for the understanding and the development of public law.

What is to be expected? Little. The contribution cannot, given the current state of understanding, offer a detailed and assured account of the pertinent law. A systematic, instructive and above all principled doctrine of the law of humanity,[3] cosmopolitan law,[4]

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[1] However, similar developments can be seen beyond the 'global North', see José María Serna de la Garza, *Impacto e implicaciones de la globalización en el sistema jurídico mexicano* (Universidad Nacional Autónoma de México 2012) 111-311.

[2] To have such a piece in the state centered *Handbuch des Staatsrechts* gave rise to an article in the *Frankfurter Allgemeine Zeitung*, see Max Steinbeis, 'Man kann nicht dauernd die halbe Welt für verfassungswidrig erklären' *Frankfurter Allgemeine Zeitung* (Frankfurt am Main, 7 May 2013) 25. The article provides an excellent idea of the essence of traditional *Staatsrecht*.

[3] Clarence Wilfred Jenks, *The Common Law of Mankind* (Stevens 1958); Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on

global law,[5] universal law,[6] universal internal law,[7] transnational law,[8] even public international law[9] or public law in the European legal space,[10] i.e. something roughly comparable to a public law doctrine as we know it from many countries, seems beyond what is possible, at least at the current state of play. We are at a new beginning, well shown by the terminological cacophony mentioned above.

To be sure, this is not due to insufficient scientific interest. With regards to Germany, scholars of German public law (*Staatsrecht*) have always concerned themselves with embedding Germany into larger context.[11] The theme has been very much *en vogue* since the turn of the century and excellent studies have been published.[12] It seems fair to say that the principles of human rights and the rule of law, even of democracy, are now recognised among most scholars from most places, at least in the European legal area, as *somehow* relevant for all forms of exercising public authority.[13] Yet, this is only a first starting point. There is no doctrine, i.e. a systematic

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Public International Law' (1999) [2001] 281 Recueil des cours de l'Académie de Droit International 88 ('constitution of humankind').

[4] Seyla Benhabib, 'The Philosophical Foundations of Cosmopolitan Norms', in Seyla Benhabib and Robert Post (eds), *Another Cosmopolitanism: Berkeley Tanner Lectures 2004* (OUP 2006) 13; Hauke Brunkhorst, *Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Suhrkamp 2002) 171. Immanuel Kant and Jessie H Buckland (tr), *Perpetual Peace: A Philosophical Proposal* (first published 1795/1796, Sweet & Maxwell 1927) 29ff.

[5] Rafael Domingo, *The New Global Law* (CUP 2010); Sabino Cassese, 'The Globalization of Law' (2005) 37 NYU J Int'L L & Pol 973.

[6] Mireille Delmas-Marty, *Trois défis pour un droit mondial* (Seuil 1998); Angelika Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Duncker & Humblot 2007); Udo Di Fabio, 'Verfassungsstaat und Weltrecht' (2008) 39 Rechtstheorie 399.

[7] Jost Delbrück, 'Perspektiven für ein 'Weltinnenrecht'? Rechtsentwicklungen in einem sich wandelnden internationalen System' in Joachim Jickeli, Peter Kreutz and Dieter Reuter (eds), *Gedächtnisschrift für Jürgen Sonnenschein* (De Gruyter 2003) 793; Jürgen Habermas, *Der gespaltene Westen: Kleine politische Schriften* (Suhrkamp 2004) 143, 159ff.

[8] Philip C Jessup, *Transnational Law* (Yale University Press 1956); Peer Zumbansen, 'Transnational Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Elgar 2006) 738ff.

[9] Now, monumentally in ten volumes: Rüdiger Wolfrum (ed), The Max Planck Encyclopedia of Public International Law (OUP 2012) <http://www.mpepil.com> accessed 2 July 2013, but encyclopaedic and sprawling over 11.724 pages with 1.618 entries and more than 800 authors – hardly 'systematic'.

[10] Stimuli in this direction come from the *Societas Iuris Publici Europaei* (SIPE) or the European Public Law Association. On the constitutional-historical roots see Dieter Gosewinkel and Johannes Masing (eds), *Die Verfassungen in Europa 1789-1949* (CH Beck 2006).

[11] Recall only the many pertinent events of the *Vereinigung der deutschen Staatsrechtslehrer* (the Association of German Constitutional Law Professors) and the contributions in the *Handbuch des Staatsrecht* (Handbook of State Law).

[12] Three excellent examples from recent PhD theses: Heiko Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (Springer 2008); Mehrdad Payandeh, *Internationales Gemeinschaftsrecht* (Springer 2010); Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht* (Springer 2012).

[13] This was rather different only 20 years ago. Albrecht Randelzhofer, 'Zum behaupteten Demokratiedefizit der Europäischen Gemeinschaft' in Peter Hommelhoff and Paul Kirchhof (eds), *Der*

body of thought meant and fit to guide practice, that unfolds this and instructs the practice of law, and for good reason: It is too early, not least given the effects of these constructions on the constitution of reality.[14] It will take much time and effort to flesh out the *somehow*.

Against this backdrop the present contribution offers its understanding of this new field of research (I.), grounds the relevant principles in positive law and sketches their purported application (II.), and discusses their interrelationship in order to shed some light on the entire constellation (III.). The analysis relies on certain assumptions grounded in earlier studies on the new public law.[15] These are, in brief:

In the course of the Europeanisation and internationalisation of Germany, the public law applicable on German territory is no longer capable of being comprehended solely by recourse to *national* public law (*Staatsrecht*)[16] evolving from the Basic Law, i.e. the German Constitution. Rather, it must take into account EU law, public international law and comparative legal insights, especially from other EU Members.[17] In other words, public law is to be reconceived as a public law *tout court*, fed from international, supranational and domestic sources and institutions. This modifies the scope of application of the fundamental principles of the domestic constitution and affects their importance. Their interpretation and development is to be embedded in a supranational, international and comparative dimension.

Staatenverbund der Europäischen Union (CF Müller 1994) 39, 40. Outside Europe, things may be different: on the role of the Shahri'ah in the constitutional law of Islamic states see Abou El Fadl, 'The Centrality of Shari'ah to Government and Constitutionalism in Islam' in Rainer Grote and Tilmann Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (OUP 2012) 35.

[14] '[I]st erst das Reich der Vorstellungen revolutioniert, so hält die Wirklichkeit nicht aus' [If the realm of ideas is revolutionised, the reality will not stand it]: Georg WF Hegel, 'Brief an Niethammer vom 28.10.1808' in Johannes Hoffmeister (ed), *Briefe von und an Hegel*, vol 1 (Meiner 1952) 253; Jean L Cohen, 'Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach)' (2011) 2 Humanity 127, 128.

[15] Armin von Bogdandy, 'Zweierlei Verfassungsrecht. Europäisierung als Gefährdung des gesellschaftlichen Grundkonsenses?' (2000) 39 Der Staat 163; Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2010) 11; Armin von Bogdandy, 'General Principles of International Public Authority' (2008) 9 German Law Journal 1909; Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 ICON 397.

[16] The concept *Staatsrecht* (law of the state) states well this presumed necessary link. On the ideology behind the concept and the pertinent debates see Christoph Möllers, *Der vemisste Leviathan* (Suhrkamp 2008) 15-17, 53-56. Germany is not alone with this terminology, see the identical Dutch concept *Staatsrecht* or the Swedish *statsrätt*.

[17] Armin von Bogdandy, 'National Legal Scholarship in the European Legal Area: A Manifesto' (2012) 10 ICON 614.

The German, supranational and international institutions are not to be seen as organs of an all-comprising joint (con)federation, as are the federation and the individual states in Canada, Germany or the United States of America.[18] Nevertheless, the authorities vested with national, supranational and international authority are so closely interlinked on account of the Europeanisation and internationalisation of Germany that the legitimisation of the exercise of public authority in Germany can only be ascertained in this broader context. Problems of legitimacy for one public authority negatively affect the decisions of other authorities. Fidelity to principles becomes a matter of joint interest.

The benchmark for such legitimacy is a stock of common basic principles, at least for those supranational and international institutions that touch upon everyday social life. Particularly relevant among these are principles such as human rights, the rule of law and democracy, not only as concerns doctrinal constructions, but also with respect to legitimacy. These shared fundamental principles are, however, not identical, but best understood as belonging to different legal orders, which in turn can lead to different nuances of meaning between similarly sounding principles. These principles are, thus, on the one hand reference points for overarching discourses on legal doctrine and legitimacy, but can on the other hand also justify why the institutions of a particular legal order resist the claim to validity of an act of a different legal order. Principles are of immense importance for the interaction of different legal orders.

II. The Exercise of Public Authority as a Research Topic

1. The Transformation of the Principle of Sovereignty

The starting point for this contribution is an account of transformation. While up until the 1990s, German public law (*Staatsrecht*), especially by means of the principles of the Basic Law, covered essentially all public law in Germany,[19] supranational and

[18] Just very few scholars argue that a European or world state is emerging, but see Mathias Albert, 'Einleitung: Weltstaat und Weltstaatlichkeit: Neubestimmungen des Politischen in der Weltgesellschaft' in Mathias Albert and Rudolf Stichweh (eds), *Weltstaat und Weltstaatlichkeit: Beobachtungen globaler politischer Strukturbildung* (VS Verlag für Sozialwissenschaften 2007) 9.

[19] Josef Isensee and Paul Kirchhof, 'Vorwort zur ersten Auflage' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol 1 (3rd eds, CF Müller 2003) IX; Klaus Stern, *Das Staatsrecht der*

international institutions, rooted in other legal orders, now notably and formatively impact social interaction in Germany. The domestic constitutional principles do not affect the making of regulations in the European Union, the sanction mechanisms of the UN Security Council or the adjudication of the European Court of Human Rights (ECtHR) in the same way as they guide the exercise of public authority through German institutions. The principle of sovereignty presents a key to better comprehension of this transformation of public law foundations.

According to the received understanding of the relationships between state and international order, of domestic public law and public international law, the whole constellation can be developed from the principle of sovereignty, with regard both to legal doctrine and legitimacy. According to Georg Jellinek, in 1888 everything could be explained "through sovereignty and from sovereignty".[20] It allowed for a remarkably clear and coherent construction that certainly provides a benchmark for new basic conceptualisations. Despite all of the problems that abstract conceptualisations tend to engender, the classic principle of sovereignty had colossal analytical and normative force. Sovereignty, understood in the sense of *Staatsrecht*, grounds the validity of all law in the will of the state (*Staatswillen*) and defines the superior authority and power of the state, assumed to be the unity of all actions of a plethora of diverse institutions, vis-à-vis all other spheres of society.[21] Sovereignty, conceived as *popular* sovereignty, justifies such authority and law as a crystallisation of the democratic principle.[22] From without, *state sovereignty* appears as a "suit of armour" that protects the predefined constellation[23] and anchors the validity of public international law, same as *Staatsrecht*, in the will of the state. Briefly put: On account of the principle of sovereignty, the state and its legal order form a normative universe.

Bundesrepublik Deutschland, vol 1 (CH Beck 1984), 551, 705; the constitutional law foothold is the homogeneity clause of art 28(1) Basic Law.

[20] Georg Jellinek, 'Die Lehre von den Staatenverbindungen' (first published 1882) edited and with an introduction by Walter Pauly (Keip 1996) 16ff, 36; see also Pauly's works, ibid VIIff.

[21] Albrecht Randelzhofer, 'Staatsgewalt und Souveränität' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol 2 (third edn, CF Müller 2004) § 17 paras 25ff, 35ff.

[22] Hermann Heller, Die Souveränität: Ein Beitrag zur Theorie des Staats- und Völkerrechts (De Gruyter 1927) 70ff; Uwe Volkmann, 'Setzt Demokratie den Staat voraus?' (2002) 127 Archiv des Öffentlichen Rechts 575, 577 and 582.

[23] On this concept see Albert Bleckmann, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge* (Duncker & Humblot 1970) 166.

This principle of sovereignty has fundamentally shaped both the configuration of domestic public law (*Staatsrecht*) and that of public international law, but in diametrically opposed directions: *Staatsrecht* has an unmistakably commandeering structure, whereas public international law has a manifestly cooperative one. Because of this conceptual background, legal bases in positive law for common principles of domestic public law and international public law, e.g. Art. 38(1)(c) ICJ Statute, Art. 25 German Basic Law, Art. 10 of the Italian, Art. 29 of the Irish or Art. 153 of the Slovenian Constitution, have given rise to few principles beyond sovereignty. The commonly recognised principles of law in the sense of Art. 38(1)(c) ICJ Statute are rooted above all in private law constructs; think only of *pacta sunt servanda*, *bona fides* and the obligation to make reparations.[24] Even human rights are very difficult to fit into this.[25] But it is not only between the national and international legal orders that shared principles are lacking: The traditional principle of sovereignty permits vastly dissimilar conceptions of order between states, *ergo*, radical pluralism.

Undeniably, the classic principle of sovereignty finds less pronounced support within the German constitution as in several other constitutional legal orders.[26] It has, moreover, always been a matter of contention whether sovereignty can at all be understood as outlined here.[27] The detractors can point to the Basic Law, which, unlike other constitutions,[28] does not cast this concept in stringent positive terms and also displays a remarkable degree of openness in its Preamble and Arts. 23 to 26, comparatively speaking.[29] But be that as it may, German *Staatslehre* and the associated doctrine have largely operated within the internal logic of the principle of sovereignty: Rainer Wahl has keenly depicted how the constitutionalisation of the legal order was the

[24] Classic: Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927).
[25] Hermann Mosler, 'General Principles of Law' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 2 (Elsevier 1995) 511, 518ff with a cautious opening to Human Rights Law.
[26] Think only of the fundamental importance of the concept of parliamentary supremacy in the United Kingdom.
[27] Foundational Hugo Preuß, 'Selbstverwaltung, Gemeinde, Staat, Souveränität' in *Festschrift für Paul Laband* (Mohr 1908) 199, 233ff; in detail see Christoph Möllers, *Staat als Argument* (2nd edn, CH Beck 2011) 291ff.
[28] Cf arts 3 and 4 of the French constitution; art 126 of the Polish constitution; art 1(1) of the Czech constitution; art 11 of the Italian constitution.
[29] Seminal Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (Mohr 1964).

great normative project of the first 40 years of the Federal Republic of Germany.[30] The predominant understanding of the general rules of public international law under Art. 25 Basic Law,[31] the for a long time rather marginal attention paid to ECtHR judgments[32] or the peripheral importance of comparative law for the adjudication of the highest courts[33] all point in that same direction. In the *Lisbon* decision of 2009, the principle of sovereignty was even endowed with a new quality giving rise to immediate legal consequences.[34] At the same time, the judgment shows the transformation of the principle: It only protects the most essential of the most essential, the absolutely inalienable, that, which can under no circumstances be transferred to a non-German authority; however, it no longer constitutes the foundation of the entire construct of doctrine or legitimacy. Most importantly, it is there to serve other principles. Whereas the traditional concept of sovereignty, as expressed by Georg Jellinek, provided a founding concept, a point of closure where legal thinking could stop, today it serves some higher principle, such as self-determination or human rights. It is being reduced to a functional concept; it is ever less a *founding* one.

2. Public Authority of Supra- and International Institutions

Nevertheless, the principle of sovereignty continues to be important for public law, international law and theories of legitimacy.[35] Because of a series of developments it is, however, no longer the key to the basic structure of public law.[36] The Europeanisation

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[30] Rainer Wahl, *Herausforderungen und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte* (De Gruyter 2006) 26ff.

[31] Christian Koenig, in von Mangoldt, Klein and Stark (eds), *Grundgesetz* (6th edn, Vahlen 2010) vol 2, art 25 paras 32ff; Matthias Herdegen, in *Maunz – Dürig: Grundgesetz Kommentar*, vol 4, art 25 paras 36ff (August 2000). In a comparative perspective: Stephan Hobe in Karl H Friauf and Wolfram Höfling (eds), *Berliner Kommentar zum Grundgesetz*, vol 2, art 25 paras 37ff (issue 36).

[32] Jochen Abr Frowein, 'Kritische Bemerkungen zur Lage des deutschen Staatsrechts aus rechtsvergleichender Sicht' (1998) 19 Die Öffentliche Verwaltung 806, 809ff.

[33] Heiko Sauer, 'Verfassungsvergleichung durch das Bundesverfassungsgericht' (2010) 18 Journal für Rechtspolitik 194.

[34] Hermann Heller, Die Souveränität: Ein Beitrag zur Theorie des Staats- und Völkerrechts (De Gruyter 1927) 70ff; Uwe Volkmann, 'Setzt Demokratie den Staat voraus?' (2002) 127 Archiv des Öffentlichen Rechts 575, 577 and 582.

[35] Cf only Dieter Grimm, *Souveränität: Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press 2009); Ulrich Haltern, *Was bedeutet Souveränität?* (Mohr Siebeck 2007); Ingeborg Maus, *Über Volkssouveränität: Elemente einer Demokratietheorie* (Suhrkamp 2011).

[36] The internal metamorphosis of the state concept is not dealt with here. On this see Jean-Bernard Auby, 'Die Transformation der Verwaltung und des Verwaltungsrechts' in Armin von Bogdandy, Sabino Cassese and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum*, vol 3 (CF Müller 2010) § 56. Note: It is not argued that the sovereignty principle no longer has a role to play. That would be untenable. See only

and internationalisation of everyday life (i.e. of the *Lebenswelten*) undermine the famous premise of the classic principle of sovereignty, according to which states are "independent communities".[37] To use a graphic image of Eyal Benvenisti's: The old sovereignty is akin to ownership of a free-standing villa on large grounds, whereas the new sovereignty resembles ownership of a high-rise with 200 different owners.[38]

This is the framework for the phenomenon that is immediately relevant here: supra- and international organisations affect social interaction in Germany to such an extent and with such autonomy, that the three-faced sovereignty cannot shoulder the entire construct, be it from the vantage point of doctrine or legitimacy.[39] To the contrary, the actual clout of such institutions makes their classification as individual public authorities appear more feasible. Put differently: the exercise of public authority is the foundational structural characteristic that state institutions nowadays share with supra- and international institutions.

This qualification is an essential step on the road to common principles for national, supranational and international institutions, given that common principles only make sense where there is reasonable comparability. It allows this step without problematic notions such as global constitutionalism[40] or global administrative law.[41] All the same, concepts such as "supranational public authority" and even more so

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Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) 2012 para 57 <http://www.icj-cij.org/docket/files/143/16883.pdf> accessed 19 June 2013.

[37] A classic exposition is *The Case of the SS Lotus, France v Turkey*, PCIJ Rep Series A No 10, 18.

[38] Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeolders' (2013) 107 American Journal of International Law 295.

[39] From the rich literature: Thomas Vesting, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes' (2004) 63 Veröffentlichungen der Vereinigungen der Deutschen Staatsrechtslehrer 41.

[40] This does not detract from the accomplishments of that approach; see especially Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009); on the principles Kleinlein (n 12); on the problems Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *Intl Org L Rev* 31; Joseph HH Weiler, 'Dialogical Epilogue' in Grainne de Burca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 262ff.

[41] Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence Of Global Administrative Law' (2005) 2 *Law and Contemporary Problems* 15; Eberhard Schmidt-Aßmann, 'Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen' (2006) 45 *Der Staat* 315; on these problems see Armin von Bogdandy, 'Prolegomena zu Prinzipien internationalisierter und internationaler Verwaltung' in Hans-Heinrich Trute and others (eds), *Allgemeines Verwaltungsrecht: Zur Tragfähigkeit eines Konzepts* (Mohr Siebeck 2008) 683.

"international public authority" are by no means self-evident, but instead require considerable conceptual innovation.[42]

The traditional understanding of public authority rests on the concept of state authority, which in turn characterises the state's monopoly of force and sovereign territorial authority. Since neither supranational nor international authorities are endowed with this, authority has to be defined more broadly than this,[43] should one hope to bring such institutions within the scope of application of those principles which the Basic Law considers to inform the structures of public authority. It is submitted that public authority should hence be understood as the legally grounded capacity to actually or legally restrict other actors in their freedom or to similarly determine its use.[44] This can firstly happen by way of obligatory legal acts, which is the least demanding constellation from a conceptual point of view. An act is legally obligatory whenever it modifies the legal situation of a subject of law, in particular when an action, which runs contrary thereto, is illegal.[45] In light of the *modus operandi* of many international institutions the concept of public authority should, however, extend beyond legal obligations. Notable effects are also occasioned by international courts and their case law: Although there is no doctrine of *stare decisis* in public international law, over the last 20 years many international courts have played an important role in the development of international law, especially regarding intra-statal matters such as human rights, criminal law, commercial law or environmental law.[46] The same applies

[42] In more detail see Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 German L J 1375; cf also Michael Zürn, Martin Binder and Matthias Ecker-Ehrhardt, 'International Authority and Its Politicization' (2012) 4 *International Theory* 69; for an excellent review of the various approaches Birgit Peters and Johan Schaffer, 'The Turn to Authority Beyond States' (2014) TLT (forthcoming, on file with the author).

[43] 'Definition' is understood here as the development of sufficient conceptual elements that can accommodate the most important constellation. This is not an attempt at a totalising definition. See Hans-Joachim Koch and Helmut Rüßmann, *Juristische Begründungslehre* (CH Beck 1982) 75.

[44] Similarly Michael Barnett and Raymond Duvall, 'Power in Global Governance' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (CUP 2005) 1, 8; the traditional approach is narrower, see eg Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Mohr Siebeck 2005) 81ff.

[45] An example for such legal determination is a decision regarding refugee status by the UNHCR, see Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refuge Status Determination' (2008) 9 German L J 1779.

[46] On the problems concerning lawmaking by international courts see contributions in Armin von Bogdandy and Ingo Venzke (eds), 'Beyond Dispute: International Judicial Institutions as Lawmakers'

to non-legally binding acts of international institutions; they too can limit the freedom of other legal subjects or determine its use similarly. This happens whenever pressure is generated which other subjects can only withstand with a degree of difficulty.[47] Such an exercise of international public authority occurs regularly through the setting of nonbinding standards, which have to be followed, *inter alia*, because the advantages of their compliance outweighs the costs of noncompliance (e.g. as with the OECD Guidelines on double taxation) or because they have implementation mechanisms whereby positive or negative sanctions can be imposed (e.g. as in the case of the FAO Code of Conduct for Responsible Fisheries).[48] In addition to that, legal subjects can be conditioned via acts that do not have any kind of deontic quality (e.g. the statistical Data of the PISA reports), which, however, engender communicative power that the addressee can only avoid at a certain price, be it through a loss of reputation or financial means. This expansion of the authority concept can above all be grounded in theories of communicative action.[49] Nevertheless, such an act must exceed a certain threshold. That will especially be the case where it is connected to a specific mechanism which effectively demands consideration by the addressee. There are many of these: international organisations have proved to be remarkably inventive in this respect.[50]

This broad concept of authority rests on the empirical insight that nowadays many acts of supranational and international institutions can in the end effectively curtail personal freedom and collective self-determination in the same way as legally binding acts of state organs. The legal obligation to comply with a binding act of a supra-

(2011) 12 German L J 979. The specific problems concerning the exercise of public authority by international courts will not be discussed in this contribution.

[47] Most illuminating is the discussion concerning the law of the Catholic Church in the 17th century, Thomas Duve, 'Katholisches Kirchenrecht und Moraltheologie im 16. Jahrhundert: Eine globale normative Ordnung im Schatten schwacher Staatlichkeit' in Stefan Kadelbach, Klaus Günther (eds), *Recht ohne Staat? Zur Normativität nichtstaatlicher Rechtsetzung* (Campus 2011) 147, 159-166.

[48] Ekkehart Reimer, 'Transnationales Steuerrecht' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 181, 187, 207; Jürgen Friedrich, 'Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' (2008) 9 German L J 1539, 1551ff.

[49] Matthias Goldmann, 'Internationale öffentliche Gewalt' (thesis, University of Heidelberg 2013) pt 2 B; Ingo Venzke, *How Interpretation Makes International Law* (OUP 2012).

[50] For example see Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institution Advancing International Institutional Law* (Springer 2010).

or international institution can be derived from the Basic Law's provision of legality,[51] it is, however, also frequently flanked by external sanctioning mechanisms. The legal freedom not to follow a merely conditioning act is often a mere fiction.[52] There is also a principled consideration buttressing this broad conceptualisation of authority: Whenever public law is considered, in line with its liberal and democratic tradition, as an order securing personal freedom and enabling collective self-determination, every act that affects these values, no matter whether binding or nonbinding, must be considered within this definition, inasmuch as its effects are important enough to give rise to reasonable doubts as to its legitimacy. It is to be stressed that qualifying an act as an exercise of public authority does *not* imply its legitimacy. Unlike authors such as Joseph Raz or Myres McDougal, we distinguish the two concepts.[53]

Notice that this conceptual broadening, being a definition, is of course not indisputable. It remains possible to explain the phenomena from the point of view of the traditional principle of sovereignty; to put the will of the state centre stage and to conceive public authority solely as national authority. The idea of the state imposing the application of supranational and international acts is central to this. Any corresponding doctrine, however, neglects the extent to which other legal orders impact social interaction in everyday life and runs the risk of being blind and deaf to such weighty phenomena.

Of concern to freedom, in particular in light of this wide concept of authority, are also the acts of private entities. Consider, for example, classifications by rating agencies, decisions of big corporations on structure and location or parental measures vis-à-vis children. When is the exercise of authority a phenomenon of *public* authority? Supranational and international public authority is any authority that rests on a competence, which was itself afforded by joint action of public actors – usually states – ,

[51] See the Görgülü decision of 14 October 2004 by the Federal Constitutional Court of Germany on the jurisdiction of the ECtHR: BVerfGE 111, 307 and BVerfGE 22, 293 concerning the law of the then EEC.
[52] Barnett and Duvall (n 44); Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Intl Organisation 421; Charles Lipson, 'Why are some international agreements informal?' (1991) 45 Intl Organisation 495.
[53] Joseph Raz, *The Authority of Law* (Clarendon 1979) 28ff; Myres McDougal and Harold Laswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 AJIL 1, 9; in detail Goldmann and Venzke (n 49).

in order to fulfil a public function that was permissibly defined as such by those actors.[54] The public nature of the exercise of "authority" thus depends on the *legal basis*. The institutions analysed thus exercise public authority which has been granted them through political communities on the basis of legal acts (be they binding or nonbinding). The fundamental concept here is action (*Handeln*), which is from a legal point of view to be understood as an expression of individual freedom and, therefore, does not demand further justification.[55]

This definition of *public authority* combines many insights of legal scholarship (*Rechtswissenschaft*). Supranational public authority is exercised in the adoption of legal acts of the European Union, the administrative acts of the Union and the decision-making of the European judiciary.[56] That the EU exercises public authority appears now to be largely undisputed, even if the pertinent discussion is usually conducted under the more technical term of competences. But the authority of institutions of "global governance"[57] is also increasingly brought into the fold of this logic, as evinced by newly coined terms such as "lawmaking" by international institutions,[58] an "international" or "global" administrative law[59] or an international judiciary, in particular regarding criminal courts.[60]

Needless to say, this definition of "publicness" is rather formalistic and does not exhaust the meaning that the term has acquired in the tradition of western administration and administrative law. In liberal and democratic states this is closely connected to the duty of public institutions to serve the public interest and to comply

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[54] Some centre on the fulfilment of public function. See Matthias Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts' in Möllers, Voßkuhle and Walter (eds) (n 4848) 395, 402.
[55] This does not rule out obliging private actors, in particular multinational corporations, to abide by human rights standard see art 9(3) Basic Law. Concerning broader approaches on the global level see only the OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) and the UN Guiding Principles on Business and Human Rights; UNHCR, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31; John Gerard Ruggie, 'Bussiness and Human Rights: The Evolving International Agenda' (2007) 101 AJIL 819.
[56] Stephan Bitter, *Die Sanktion im Recht der Europäischen Union* (Springer 2011).
[57] James N Rosenau, *Governance, Order, and Change in World Politics* in James N Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government* (CUP 1992) 1.
[58] José Alvarez, *International Organizations as Law-makers* (OUP 2005).
[59] See Kingsbury, Krisch and Stewart (n 41).
[60] Frank Meyer, *Strafrechtsgenese in Internationalen Organisationen* (Nomos 2012) 601ff, 837ff.

with fundamental principles,[61] and, hence, unlike a band of robbers, to be legitimate. Such expectations should, however, not be anchored in the concept of public authority, but rather in individual principles (below A.III.).[62]

This concept of *public authority* as a common foundational concept for national, supranational and international institutions does not assert their identity in every respect. To the contrary, it forms the starting point to grasp their respective specificity. Accordingly, a state's public authority is typically characterised by the competence to originate and define competences (*Kompetenz-Kompetenz*), i.e. original public authority, as well as the means to effect physical compulsion. Moreover, most developed states can rely on social resources such as state-related collective identity and developed solidarity.[63] Supranational institutions normally differ from international institutions in that their acts regularly and directly shape social interaction in the legal spaces of states. These differences, which can only be alluded to here, will be of great importance in the concretisation of basic principles.

3. Public Authority of Other States

The domestic legal spaces of EU members have not only opened up toward "the top" but also "sideways", so that they can now be considered part of the European legal space.[64] Evidently, this aperture is not entirely new. Probably the oldest aspect thereof can be found in so-called private international law, which obliges state courts to apply the private law of other states.[65] This opening has, however, gained in importance in the course of Europeanisation and internationalisation. To begin with, the respective state law was largely harmonised through the "Rome I" and "Rome II" Regulations,[66] as well

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[61] Carl J Friedrich, *Constitutional Government and Politics* (Harper 1937) 247ff; Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press 1957); Louis Henkin, 'A New Birth of Constitutionalism' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy* (Duke University Press 1994) 39.

[62] But see Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 23, 30ff; Alexander Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20 EJIL 985, 990.

[63] BVerfGE 89, 155; BVerfGE 123, 267 (Federal Constitutional Court of Germany).

[64] Rainer Wahl, 'Europäisierung: Die miteinander verbundenen Entwicklungen von Rechtsordnungen als ganzen' in Trute and others (eds) (n 4141) 869, 897.

[65] Bernd von Hoffmann and Karsten Thorn, *Internationales Privatrecht* (10th edn, CH Beck 2012) 47.

[66] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L177/6 and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

as the "Brussels I" Regulation.[67] This not only implies a considerable opening up within the EU vis-à-vis the private law of other Member States. The domestic legal space is also agape with respect to third countries, given that the rules of the Regulations also foresee the application of non-EU Member State law pursuant to requirements that are less stringent than those of the former German law.[68]

A new moment of "lateral openness" can be encountered in administrative law. According to established law, the territorial principle applies to administrative acts; only a handful of administrative acts, e.g. driving permits, were recognised as valid across borders on account of international treaties.[69] But more recently transnational administrative acts have become constant and regular features of administrative law, to the extent that measures of other states are valid in Germany and even enforced by German authorities.[70] In many areas this is prescribed by EU law[71] and public international law.[72]

Another aperture that is of particular relevance for basic principles can be witnessed in comparative law. National courts draw upon judgments of other national courts, thereby developing in tandem legal constructions and furthering a transnational judicial interaction, even dialogue.[73] Principles are further developed in this transnational discourse. References to judicial pronouncements originating in other states have become more prominent in the adjudication of the German Federal

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[67] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1.
[68] art 2 Rome I Reg and art 3 Rome II Reg.
[69] Matthias Ruffert, 'Der transnationale Verwaltungsakt' (2001) 34 Die Verwaltung 453, 457.
[70] Eberhard Schmidt-Aßmann, 'Deutsches und Europäisches Verwaltungsrecht' (1993) 108 Deutsches Verwaltungsblatt 924, 935; Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004) 141ff.
[71] Christoph Ohler, 'Europäisches und nationales Verwaltungsrecht' in Philipp Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos 2011) 331 (344); Jürgen Bast, 'Transnationale Verwaltung des europäischen Migrationsraums' (2007) 46 Der Staat 1; Sascha Michaels, *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundsrepublik Deutschland* (Duncker & Humblot 2004) 188ff.
[72] Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 LCP 263.
[73] Eyal Benvenisti, 'Reclaiming democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard Intl L J 191; Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011) 53ff; a cautious approach concerning the German civil jurisdiction Filippo Ranieri, 'Die Rechtsvergleichung und das deutsche Zivilrecht im 20. Jahrhundert' in Mario Ascheri and others (eds), *Ins Wasser geworfen und Ozeane durchquert: Festschrift für Knut Wolfgang Nörr* (Böhlau 2003) 777, 796ff.

Constitutional Court (*Bundesverfassungsgericht*).[74] So far these are largely affirmative in nature and—with the exception of the judgments of the ECtHR—have no authoritative effect.[75] It is, however, open to question whether the decisions of other highest courts should have such effect in this context of the German legal space embedding itself into the European legal space. One might especially consider whether deviation from another court's solution should demand argumentation. Arguably, questions of shared interest should in the framework of the European legal space be conferred in a common dialogue that demands reasoned argumentation particularly in case of disagreement.[76] Of course, this engenders further challenging questions, as the example of the critical consideration of a judgment of the *Bundesverfassungsgericht* by the Czech Constitutional Court demonstrates.[77]

III. Principles

The search for principles is a routine way for legal scholarship to reveal basic structures. Yet, "principle" is a difficult and contentious term.[78] This contribution is based on an understanding of principles as particularly important norms which provide orientation. As *basic* or *founding* it understands those principles which allow for closure, i.e. where legal arguments stop.[79] Moreover, the term "principle" has attributive character. It dignifies a norm with special significance. In this respect, this contribution understands principles differently than *Alexy*, who considers principles in contradistinction to rules

[74] Sauer (n 12).
[75] On the level of authority of decisions of the ECtHR according to the German Federal Constitutional Court see its Görgülü decision (n 51) 317, 323 and BVerfGE 128, 326 (368ff) concerning preventive detention.
[76] Stephan Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 *Leiden J of Intl L* 401, 424ff.
[77] See the judgment of the Czech Constitutional Court of 3 November 2009, Pl ÚS 29/09 (Treaty of Lisbon II) especially paras 110ff, 137ff.
[78] Foundational in this respect Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 26ff; concerning the debate Riccardo *Guastini*, *Distinguendo: Studi di teoria e metateoria del diritto* (Giappichelli 1996) 115ff; Martti Koskenniemi, 'General Principles' in Martti Koskenniemi (ed), *Sources of International Law* (Dartmouth 2000) 359; Jürgen Habermas and William Rehg (tr), *Between Facts and Norms* (Polity Press 1997) 206ff; Robert Alexy and Julian Rivers (tr), *A Theory of Constitutional Rights* (OUP 2010); Franz Reimer, *Verfassungsprinzipien: Ein Normtyp im Grundgesetz* (Duncker & Humblot 2001).
[79] See above for the principle of sovereignty, A.II.2. at the end.

as optimisation commands capable of being balanced.[80] His underlying categorical distinction between rules and principles is not very convincing.[81]

Principles are typically characterised by their abstraction and vagueness, which enables ample room for interpretation, but also for connection to general normative discourses in society. Basic principles in the tradition of western liberal democracies[82] are those norms which justify and legitimise the exercise of public authority.[83] This material conception of basic principles comprises only a few norms, which in national constitutional law are not only referred to as basic principles (*Grundprinzipien*), but also as structural principles (*Strukturprinzipien*).[84]

A norm that is a principle can also be contained in types of action (*Handlungsformen*) belonging to "soft law"; this accords with the concept of public authority developed above.[85] Not least for that reason there is no homogenous legal status of principles. A norm that has been identified as a principle can confine itself to simply enabling a reconstruction of the available legal materials, being simply a doctrinal principle relating to structure or order. A norm could further be a guiding principle, which seeks to have an effect on subsequent political or administrative processes. Consensual decisions requiring further elaboration are often effected in such form in supra- and international spheres.[86] Moreover, principles can as legal principles weigh in on interpretation and in some cases even independently produce legal consequences. It follows that the mere qualification of a norm as containing a principle does not entail specific legal consequences. It bears emphasis that principles are endowed with different degrees of normativity in different legal orders; a high degree of

[80] In detail: Alexy (n 78) 47ff.
[81] András Jakab, 'Re-Defining Principles as Important Rules – A Critique of Robert Alexy' in Martin Borowski (ed), *On the Nature of Legal Principles* (Steiner 2010) 145.
[82] On the question of Eurocentrism Armin von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations' (2012) 23 EJIL 315.
[83] Concerning the expression of 'principe fondateur' Joël Molinier (ed), *Les principes fondateurs de l'Union européenne* (Presses Universitaires de France 2005) 24; similar Dworkin (n 78) 22.
[84] Horst Dreier in: Horst Dreier (ed), *Grundgesetz-Kommentar*, vol 2 (2nd edn, Mohr Siebeck 2006, art 20 (Einführung) paras 5, 8; Reimer (n 78) 26ff.
[85] The reasons for this ample legal concept comply with those for the ample concept of public authority, see above A.II.2.
[86] Cf UNGA Res 60/1. 2005 World Summit Outcome (24 October 2005) UN Doc A/RES/60/1 para 119: 'they [Rule of Law, democracy, human rights] belong to the universal and indivisible core values and principles of the United Nations'

normativity, as is typical in the German constitutional order, is not the standard.[87] The focus in the present contribution lies on presenting overarching basic principles as structural or guiding principles in order to elucidate the broader context and to underline the potential and the promise of a multilevel discourse within legal scholarship.

Accordingly, the three principles of the rule of law, democracy and the protection of human rights will be central in what follows. This does not deny the existence and importance of other principles, such as those of social welfare, sustainability or subsidiarity. However, these principles can be deduced from those three, and parsimony is a principle of scholarly construction.

B. Individual Basic Principles and Their Legal Foundations

The question how the principles of democracy, rule of law and the protection of human rights are to be conceived and respected in this new broader constellation does not only occupy legal scholarship, but also other disciplines,[88] such as political theory and legal philosophy.[89] The relationship of legal scholarship to these is as fluid as it is fraught with difficulty. Any difference cannot lie in the principles *per se*. Democracy, the rule of law and human rights are a focal point there as they are here. The distinction is rather that a theoretical or philosophical discourse can proceed purely by deduction, whereas juridical analysis has to be informed by the governing law, i.e. by positive provisions and judicial decisions. The first task of a contribution of legal scholarship to this unbounded and often public debate is to state the results thereof that have been consolidated into law. This occurs by explicating how the positive law grounds these principles and sketching their purported scope of applicability.

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[87] Niklas Luhmann and Klaus A Ziegert (tr), *Law as a Social System* (OUP 2004) 490 even regard this as an European anomaly in decline.

[88] Hereby, the Cluster of Excellence 'The Formation of Normative Orders' at Frankfurt/Main University is a focal point in international scholarship. See Rainer Forst and Klaus Günther, 'Die Herausbildung normativer Ordnungen. Zur Idee eines interdisziplinären Forschungsprogramms' in Rainer Forst and Klaus Günther (eds), *Die Herausbildung normativer Ordnungen* (Campus-Verlag 2011) 11.

[89] John Rawls, *A Theory of Justice* (Clarendon Press 1972) 60ff; Dworkin (n 78), 22ff; Habermas (n 78), 132, 168ff, 197.

Where to start? The provisions of the Basic Law apply within German territory as acts of the constituent power and, thus, constitute original public authority.[90] This commends them as a starting point. An exposition of the basic principles of EU constitutional law and public international law follows.

I. Basic Principles of the Basic Law

1. Parameters for German Public Authority

The Basic Law lays down numerous principles for all German institutions exercising public authority. A particular group of these are to be found in Arts. 1 and 20, namely human dignity and the fundamental core of inalienable human rights as well as democracy, federalism, the rule of law (precisely: *Rechtsstaatlichkeit*) and solidarity (precisely: *Sozialstaatlichkeit*). Comparative constitutional study reveals that these principles are within the European and international mainstream,[91] but that they are particularly dense on account of singularly intensive constitutional adjudication.[92] The central principles of respect for human dignity, democracy and the rule of law are all specified in the Basic Law itself: Respect for human rights and the democracy principle are rendered more concrete in particular through the catalogue of fundamental rights and the provisions on fair elections (Art. 38), whereas the rule of law principle is specified by way of Arts. 19(4), 97 to 104 or jurisdictional rules reflecting the separation of powers. The attendant constitutionalisation of the legal order and incorporation of any German public authority are likely the most important development within the legal order of the Federal Republic in the first forty years of its existence.[93] Although it remains unclear whether this depth of constitutionalisation should be seen as

[90] On the relevance of this constitutional legal concept Tobias Herbst, *Legitimation durch Verfassungsgebung* (Nomos 2003).
[91] Pedro Cruz Villalón, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich' in von Bogdandy, Pedro Cruz Villalón and Huber (eds) (n 36) 729.
[92] On the reasons Christoph Schönberger, 'Anmerkungen zu Karlsruhe' in Matthias Jestaedt and others, *Das entgrenzte Gericht* (Suhrkamp 2011) 9, 27. This activism is even commented by the Supreme Court of the United States, see Antonin Scalia's Dissenting Opinion in *United State v Windsor* [2013] <http://www.law.cornell.edu/supremecourt/text/12-307> accessed 26 July 2013.
[93] Wahl (n 30), see also Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (Nomos 2000).

idiosyncratic or internationally exemplary, it is beyond dispute that it has been an integral part of what has overall been a rather successful development.[94]

2. Parameters for Supra- and International Public Authorities

The Basic Law not only imposes principles for German public authority, but also for supra- and international public authority. Although it opens up the German legal space remarkably vis-à-vis international and European law[95] – only very few constitutions contain similarly far-reaching provisions[96] – it at the same time also contains in Art. 23(1) a series of prerequisites for the European Union. The latter needs to be "committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity" and provide "a level of protection of basic rights essentially comparable to that afforded by [the] Basic Law". The Basic Law is rather unique in this respect. The parameters contained in the constitutions of most other EU Member States are much vaguer.[97] They have, however, been developed by the respective national constitutional courts, often by taking a page out of the *Bundesverfassungsgericht*'s book, albeit in less detailed fashion.[98]

Parameters for international organisations are contained in Arts. 24 and 59 Basic Law. While Art. 59(2) is, comparatively speaking, more or less within the state-centric median,[99] Art. 24 belongs to those provisions that are particularly receptive to supra-national authority.[100] Its less demanding parameters in comparison to Art. 23(1) reflect the state of the debate at the time Art. 24 was revised in the early 1990s. Courts and legal scholarship have on this basis carefully developed a few principle-oriented

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[94] See only the contributions in Michael Stolleis (ed), *Herzkammern der Republik. Die Deutschen und das Bundesverfassungsgericht* (CH Beck 2011).
[95] Seminal Vogel (n 29); from the newer literature Wendel (n 73).
[96] See the Dutch constitution which provides in art 90 that the government shall promote the development of the international legal order. Far-reaching is also art 193(4) of the Suisse constitution.
[97] Certain requirements are also to be found in art 8(4) of the Portuguese constitution ('with respect for the fundamental principles of a democratic state based on the rule of law').
[98] Eg in Sweden, Hungary and the Czech Republic; cf Wendel (n 73), 449ff; summarising Peter M Huber, 'Offene Staatlichkeit: Vergleich' in Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum* vol 2 (CF Müller 2008) 433; Christoph Grabenwarter, 'National Constitutional Law Relating to the European Union' in von Bogdandy and Bast (eds) (n 15) 83, 85ff; Franz C Mayer, 'Multilevel Constitutional Jurisdiction' in ibid, 399.
[99] Similar requirements may be found in art 53 of the French constitution, art 89 of the Polish constitution and art 3a of the Slovenian constitution.
[100] Ingolf Pernice in Horst Dreier (ed) (n 84) art 24 para 14; but cautious authorisations for the transfer of public authority can also be found in art 34 of the Belgian constitution, art 90(1) of the Polish constitution, art 3a of the Slovenian constitution and art 10a of the Czech constitution.

demands. An international organisation may not, for instance, exceed its democratically legitimised mandate.[101] This affords pride of place to the doctrine of competences. In addition to that, no transfer of competences may impinge upon the basic structure of the constitution.[102] This results in certain structural requirements for international organisations, in particular as concerns the principles relating to the protection of human rights and the rule of law.[103] The democratic principle underlies the principle of positive legality contained in Art. 24 and Art. 59 in conjunction with the principle of limited attribution of competences. Therefore, the relevance of the principle of democracy for international public authority should be beyond question.

3. Parameters for Other States

The Basic Law does not contain any particular norms that specify prerequisites for the influence of acts of other states. There are, nonetheless, demands placed on the application of foreign private law and the recognition of foreign judgments in civil matters by German institutions within the limits of the so called "ordre public" (i.e. public policy). According to Art. 6 sentence 1 of the Introductory Act to the Civil Code (Einführungssgesetz zum Bürgerlichen Gesetzbuch, EGBGB), "a provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law".[104] Concerning the recognition of foreign judgments similar provisions are found in Art. 34 no. 1 Brussels I reg and § 328(1) no. 4 Code of Civil Procedure (Zivilprozessordnung, ZPO). These fundamental principles flow today from the principles of the Basic Law.[105] Furthermore, principles of public international law play a role in the interpretation of Art. 6 of the Introductory Act to the Civil Code via Art. 25 of the Basic Law. The German "ordre public" is internationalised.[106] The public policy exception only restricts, however, the recognition and effect of foreign judgments where foreign proceedings

[101] The decision of the Federal Constitutional Court of Germany of 22 November 2001 on the new strategic concept of the NATO, BVerfGE 104, 151.
[102] Pernice (n 100) para 32.
[103] Rudolf Streinz, in Michael Sachs (ed), *GG Kommentar* (6th edn, CH Beck 2011) art 24 para 29.
[104] Correspondent provisions in the European Union law in art 21 Rom I reg, art 10 Rom II reg.
[105] Art 6(2) EGBGB (Introductory Act to the German Civil Code) which underlines the compatibility with fundamental rights as a condition.
[106] Dieter Blumenwitz in Dieter Henrich (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (new edn, Sellier 2003) art 6 paras 63ff.

have flouted minimal rule of law requirements or where the result of recognition would contradict essential values of the Basic Law.[107] Parameters addressed to the public authority of other states hence only exist indirectly and within narrow confines; what is not demanded is a general configuration in line with democracy or the rule of law.

The fundamental principles of the protection of human rights, the rule of law and democracy are quintessentially relevant for all forms of public authority that have an impact within German territory. The degree of specificity, however, oscillates notably. It ranges from the rich doctrine and mass of judicial pronouncements on German public authority, to hazier demands placed on supranational authority wielded by the EU, down to essentially minimal restrictions on the effects of acts of other states. There is logic to this: The parameters for German public authority are not, without more, transferable to other institutions of public authority because that would impede the international embedding of Germany, which is in itself a constitutional objective.

II. Basic Principles of EU Law

1. Parameters for Public Authority of the European Union

EU law stipulates the basic principles of public authority in Art. 2 sentence 1 Treaty on European Union (TEU), namely "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". Many provisions of EU primary law concretise these with a view to the exercise of public authority by the Union, in particular Arts. 9 to 12 TEU for the principle of democracy or the provisions of the Charter of Fundamental Rights of the European Union (CFREU) for fundamental rights and the rule of law principle. The detailed rules laying down EU competences, i.e. Arts. 1(1), 4 and 5 TEU together with Arts. 2 to 6 TFEU, are also of heightened importance for the principles of democracy and the rule of law. Slowly an EU-specific understanding of these principles is developing, thereby concretising its "sui generis" nature.[108] These principles and attendant doctrines have to be inspired by the national discourses on

[107] Peter Gottwald in Thomas Rauscher, Peter Wax and Joachim Wenzel (eds), *Münchner Kommentar zur ZPO* (4th edn, CH Beck 2013) vol 1, § 328, paras 116ff.

[108] Molinier (n 83); Stelio Mangiameli (ed), *L'ordinamento Europeo: I principi dell'Unione* (Giufrè 2006); Hartmut Bauer and Christian Calliess (eds), *Verfassungsprinzipien in Europa* (Sakkoulas 2008); Claudio Franzius, *Europäisches Verfassungsrechtsdenken* (Mohr Siebeck 2010), 87ff; Bengt Beutler, 'Die Werte der Europäischen Union und ihr Wert' in Ivo Appel, Georg Hermes and Christoph Schönberger (ed), *Öffentliches Recht im offenen Staat: Festschrift für Rainer Wahl zum 70. Geburtstag* (Duncker & Humblot 2011) 635.

fundamental principles, but cannot follow these blindly. For example, the German constitutional *acquis* cannot be the role model, since there are simply too many missing prerequisites at the European level, including the traumatic background, the special role of the German Federal Constitutional Court, but also the specific role of legal scholarship. Of course, there has been a constitutionalisation of Community law,[109] but this is a very different phenomenon than the constitutionalisation of the German legal order.

2. Parameters for States

The principles of Art. 2 TEU are not only prerequisites for the authority of the European Union, but also for national public authority. One has to distinguish at this point between EU Member States and third countries. The relevance of these principles for Member States emerges from Arts. 7 and 49 TEU. They apply to *every* exercise of public authority by a Member State, even if this exercise falls outside of the scope of application of Art. 51 CFREU.[110] The precise content and, in particular, "thickness" of these principles for Member States is, however, controversial.[111] The diversity of Member State constitutions and Art. 4(2) TEU militate against a stringent principle of homogeneity such as that found in the constitutions of federal states, e.g. Art. IV(4) of the Constitution of the United States of America, Art. 28(1) Basic Law or Art. 51 Suisse constitution. The EU is too diverse for such homogeneity: there are republics and monarchies; parliamentary and semi-presidential systems; strong and weak parliaments; competing and consociational democracies; states with weak and strong party structures; weak and strong societal institutions; unitary and federal orders; strong, weak and missing constitutional courts; as well as a remarkable divergence

[109] Seminal Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 *Yale L J* 2403.

[110] Meinhard Hilf and Frank Schorkopf in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, vol 1, art 2 EUV para 18 (July 2010); Matthias Ruffert in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV* (4th edn, CH Beck 2011) art 7 EU, para 4; Amaryllis Verhoeven, 'How Democratic Need European Union Members Be?' (1998) 23 EL Rev 217, 222-224, 234; Praesidium of the Convention, 'Draft of Articles 1 to 16 of the Constitutional Treaty' (Note) CONV 528/03, 6 February 2003, 11.

[111] This is reflected in the debate concerning the interpretation of art 51(1) European Charter of Fundamental Rights. On a restrictive approach see eg Peter M Huber, 'Auslegung und Anwendung der Charta der Grundrechte' (2011) 64 Neue Juristische Wochenschrift 2385; Martin Borowsky, 'Art. 51 GrCH' in Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos 2011) para 24; different Koen Lenaerts, 'Die EU Grundrechtecharta: Anwendbarkeit und Auslegung' [2012] Europarecht 3.

concerning income and the level of protection afforded by fundamental rights.[112] It is an important challenge for legal scholarship to develop adequate and meaningful European parameters against this backdrop.[113]

Regarding third countries, EU law also makes explicit demands, although it is again necessary to differentiate, this time between candidate countries and other states. Candidate countries have to comply with the basic principles of Art. 2 TEU pursuant to Art. 49 TEU.[114] This has in the past often been a catalyst for liberal-democratic reform.[115] Beyond that EU law requires EU institutions to work towards liberal-democratic developments in third states,[116] as emerges from Arts. 3(5) and 21(1) TEU. It appears that the drafters of the EU treaties see the Union as a standard bearer for democratic freedom.[117] In actual practice, however, these principles hardly affect Union policy: Discussions on the application of these norms are up until now few and far between[118] and there is little to no jurisprudence.[119]

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[112] Cruz Villalón (n 91).

[113] An attempt: Armin von Bogdandy and others, 'Reverse Solange' 49 CML Rev (2012) 489. Given recent developments in Hungary and Romania, this is an important current issue: Viviane Reding, 'Safeguarding the Rule of Law and Solving the "Copenhagen Dilemma": Towards a new EU-Mechanism' (Speech at General Affairs Council, Luxembourg, 22 April 2013) <http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm?locale=en> accessed 26 July 2013.

[114] In detail: Michael Rötting, *Das verfassungsrechtliche Beitrittsverfahren zur Europäischen Union* (Springer 2009).

[115] Wojciech Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe' (2004) 10 EurLJ 371; Ulrich Sedelmeier, 'Europeanisation in New Member and Candidate States' (2011) 6 Living Reviews in European Governance 1 <http://europeangovernance.livingreviews.org/Articles/lreg-2011-1> accessed 20 June 2013.

[116] For a political science perspective see Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 J of Common Market Studies 235; Frank Schimmelfennig, 'Europeanization beyond Europe' (2012) 7 Living Reviews in European Governance 1 <http://europeangovernance.livingreviews.org/Articles/lreg-2012-1> accessed 20 June 2013.

[117] On hegemonic aspects already Johan Galtung, *The European Community: A Superpower in the Making* (Universitetsforlaget 1973) 117ff.

[118] But see Marise Cremona, 'Values in EU Foreign Policy' in Malcolm Evans and Panos Koutrakos (ed), *Beyond the Established Legal Orders* (Hart 2011) 275, 280ff; Markus Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Foreign Policy?' (2005) 42 CML Rev 91, 106ff.

[119] Art 3(5) and art 21(1) EUT have mainly been used to underline the binding effect of international law for the EU. Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* (CJEU 21 December 2011) para 101; T-85/09, *Kadi v Commission* (Kadi II) [2010] ECR II-5177 para 115.

3. Parameters for International Organisations

The EU treaties impose no explicit requirements regarding the reception of acts from international institutions. But it is possible to read the objectives stated in Arts. 3(5) and 21(1) TEU in the sense that the Union should strive for the liberal-democratic development of international organisations, too.[120] This aim is also reflected in the pertinent empowering norms.[121]

Judgments of the Court of Justice of the European Union (CJEU) do not, however, articulate these principles for international organisations. Its decisions rather aim at the protection of the EU's autonomy and the CJEU's adjudicatory competence.[122] Particularly important in this context is the so-called *Kadi* jurisprudence. According to widespread but by no means general opinion, the CJEU missed the opportunity to apply a *Solange*-formula, which would make the reception of international acts dependent on a reasonable respect for the basic principles by the relevant international institutions.[123]

III. Basic Public Law Principles of Public International Law

1. Parameters of General International Law and Constitutionalism

Public international law lacks a foundational legal act comparable to the German Basic Law or the EU treaties that would provide principles relating to the protection of human rights, the rule of law or democracy for all authority under international law. There have, of course, been plenty of political or scholarly attempts to overcome what is considered a defect by many; these have intensified in recent years.[124] Among the

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[120] In this sense Ernst-Ulrich Petersmann, 'The 2004 Treaty Establishing a Constitution for Europe and Foreign Policy: A New Constitutional Paradigm?' in Charlotte Gaitanides, Stefan Kadelbach and Gil C Rodríguez Iglesias (eds), *Europa und seine Verfassung: Festschrift für Manfred Zuleeg zu seinem 70. Geburtstag* (Nomos 2005) 176, 185ff; Cremona (n 118) 307ff.

[121] References in art 207 TFEU (common commercial policy); art 208(1) TFEU (development cooperation); art 212(1) TFEU (economic, financial and technical cooperation with third countries) and art 214(1) TFEU (humanitarian aid).

[122] Opinion 1/91 of 14 December 1991 (EFTA) [1991] ECR I-6079 paras 34ff; Opinion 1/09 of 8 March 2011 (European and Community Patents Court) [2011] ECR I-1137 paras 64ff.

[123] Joseph HH Weiler, 'Editorial' (2008) 19 EJIL 895, 896; Daniel Halberstam and Eric Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 CML Rev 13, 60ff; eg Heiko Sauer, 'Rechtsschutz gegen völkerrechtsdeterminiertes Gemeinschaftsrecht? Die Terroristenlisten vor dem EuGH' (2008) Neue Juristische Wochenschrift 3685, 3686 detects a *Solange* approach in Kadi.

[124] Recently even the interdisciplinary journal 'Global Constitutionalism' was founded, see the editorial of the first issue Antje Wiener and others 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1.

contributions of legal scholarship, international constitutionalism is particularly noteworthy.[125]

Constitutionalism sees and develops basic international legal norms in light of liberal constitutions.[126] Occasionally it was suggested that certain international principles might be *jus cogens*, prevailing not only vis-à-vis the remainder of public international law, but over all law.[127] Such a take, however, stretches the *jus cogens* concept too far.[128] A more measured approach unfolds the UN Charter in light of basic constitutional principles.[129] Another one utilizes a material concept of constitutional law and identifies particularly important norms of public international law as constitutional.[130] It is possible to reach similar results via administrative law angles.[131] The public law approach pursued here is also dedicated to ensuring and promoting liberal-democratic authority, but it operates by way of a different conceptual foundation, which avoids the problems of those approaches by focusing, both doctrinally and from a legitimacy perspective, on the exercise of public authority.

2. Parameters for States

The requirement that all states abide by the public international law principle of the protection of human rights is well enshrined. Most states are parties to the universal human rights pacts.[132] Their specific constitutional function is expressly recognised in

[125] On the development as well as an overview see Kleinlein (n 12).
[126] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden J of Intl L 579; Stefan Kadelbach and Thomas Kleinlein, 'Überstaatliches Verfassungsrecht' (2006) 44 Archiv des Völkerrechts 235.
[127] Eg the International Criminal Tribunal for the former Yugoslavia declared in its Furundžija judgment that the prohibition of torture has the status of *jus cogens* which prohibits different national provisions and renders them void. *Prosecutor v Furundžija* (Judgment) ICTY-95-17/1-T (10 December 1998) paras 144ff.
[128] Declarations like in the World Summit Outcome Document (n 86) that the rule of law, democracy and human rights 'belong to the universal and indivisible core values and principles of the United Nations' cannot recognise *jus cogens*; Stefan Kadelbach, 'Jus Cogens, Obligations Erga Omnes and Other Rules: The Identification of Fundamental Norms' in Jean-Marc Thouvenin and Christian Tomuschat (eds), *The Fundamental Rules of the International Legal Order* (Nijhoff 2006) 30.
[129] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) 69ff; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Nijhoff 2009).
[130] See Anne Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse' (2010) 65 Zeitschrift für öffentliches Recht 3.
[131] Kingsbury, Krisch and Stewart (n 41) 15.
[132] As an authorative voice from the 'new world' see Flávia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional* (13th edn, Editora Saraiva 2012) 227.

numerous newer constitutions.[133] Not quite as patent is the obligation concerning states that are not contracting parties. Yet, a plethora of doctrinal offerings makes a convincing case for obligations at least as concerns fundamental human rights.[134] These rights include above all the right to life, the prohibition of torture, slavery and arbitrary imprisonment.[135]

What is problematic with respect to the principle of human rights is not so much the legal basis as its implementation, as many reports convincingly (and depressingly) testify. This leads to the rule of law. This principle, sometimes also called *Rechtsstaatlichkeit* or *prééminence du droit*, has many facets. Probably its most important component for the time being are procedures that enforce the normativity of law and accordingly of human rights against the exercise of public authority.

Numerous international treaties contain rule of law requirements for national administrations or courts. To name but a few: Arts. 9(3)-(4), 14, 15 ICCPR, Art. X GATT or Art. 88 ICJ Statute.[136] These demands are, however, largely sector-specifically and often do not reach the minimum requirements of developed national legal orders. Nevertheless, important authors see the robust development of this dimension of public international law and even claim that the emergence of general public international law principle of global due process can be observed.[137] Sabino Cassese, for instance, has

[133] From the European judicial area see only section 10 of the Spanish constitution; art 20 of the Rumanian constitution; art 11 of the Slovakian constitution; similar especially new provisions in the Latin American constitutions, eg section 75, 22 of the Argentinean constitution; art 6 of the Uruguayan constitution; see Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 11 German L J 1203.

[134] Olivier De Schutter, *International Human Rights Law* (CUP 2010) 49ff, Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1988/1989) 12 Austl Ybk Intl L 100; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 79; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 107ff.

[135] Kadelbach (n 128) 29.

[136] Regarding a compilation of relevant provisions see Sabino Cassese, 'A Global Due Process of Law?' in Gordon Anthony and others (eds), *Values in Global Administrative Law* (Hart 2011) 17, 21ff; on the regional European level these provisions are complemented by the guarantees of the ECHR especially arts 6 and 13.

[137] Cassese (n 136); Sérvulo Correia, 'Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and of a Global Right' in Gordon Anthony and others (eds) (n 136) 313; Gianluigi Palombella, 'The rule of law beyond the state: Failures, promises, theory' (2009) 7 ICON 442.

seminally described such a trajectory.[138] International courts play a vital role in this development.[139]

It is more difficult to ascertain with confidence a principle of democracy. The Charter of the UN demands from the Member States only that they are "peace-loving" (Art. 4(1) sentence 1 UNC). The self-determination precept, assured through many ways in public international law, points in the same direction, but it does not lay down the democratic principle in its generality.[140] Public international law indubitably reinforces through a series of provisions important aspects of democratic order, in particularly via norms that protect human rights and minorities. In addition to that, Art. 25 ICCPR prescribes free elections.[141] Beyond that, it is a matter of debate whether public international law imposes further democratic elements.[142] A string of authors perceives a tendency towards the development of a universal legal principle of democracy, which does not, however, yet exist in that form. It is, however, already established as a structural and guiding principle.[143] Moreover, all the developments described in this chapter confirm the transformation of the international sovereignty of a state. In domestic as in international law, state sovereignty is ever more seen as a *functional* concept to serve the basic principles described above.

3. Parameters for International Organisations

The public law principles of public international law are traditionally directed towards confining *domestic* public authority. The law of international organisations has long

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[138] Cassese (n 136) 51.
[139] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT-DS58/AB/R para 182.
[140] Anne Peters, *Das Gebietsreferendum im Völkerrecht* (Nomos 1995) 387ff; Daniel Thürer and Thomas Burri observe in their article 'Self-Determination' [2008] in Wolfrum (ed) (n 9) certain developments in the right to self-determination, but this should not be equated with a right to democracy; Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 213 on the right to self-determination as *jus cogens* and as an *erga omnes* obligation, but also without equating it with a right to democracy.
[141] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005) art 25 paras 1, 18. Its normativity is damaged by the constitutional practice of states such as China or Russia, but it is not destroyed.
[142] Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46; Anne Peters, in Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 263, 273ff; Niels Petersen, *Demokratie als teleologisches Prinzip* (Springer 2009); Samantha Besson, 'Das Menschenrecht auf Demokratie' in Gret Haller, Klaus Günther and Ulfrid Neumann (eds), *Menschenrechte und Volkssouveränität in Europa* (Campus Verlag 2011) 61.
[143] In detail see Petersen (n 142).

been considered in functionalistic terms, i.e. not with a view to curtailing their power, but to strengthen it.[144] Since they are in this day and age of globalisation veritable agents of public authority, the question arises whether those principles should also be applied to them. The debate started with respect to the then European Community, but now, given the increasing impact of other institutions, is becoming ever more general.

The most discussed query is to what extent international organisations are bound by human rights. Even if directly effective acts are only rarely passed by international organisations, the relevance of their practices vis-à-vis human rights is plain to see nowadays – be it in "smart sanctions" of the UN Security Council, the allocation of financial means by the World Bank or the recognition of refugee status by the UN High Commissioner for Refugees.

Since these institutions are not contracting parties to the human rights pacts, obliging them requires doctrinal constructs that in the meantime are as common as they are convincing.[145] There is likely not a single international entity today that in principle denies the relevance of human rights for its actions.[146] Evidently, heavy legitimacy costs would otherwise ensue that might threaten the organisation.

The situation is similar with respect to the various elements of the rule of law. Many international organisations possess complex institutional and procedural rules,[147] which, however, hardly operate in the sense of a developed rule of law principle. General statements are difficult to make because the legal situation differs from organisation to organisation.[148] There is in particular a dearth of clear provisions requiring and affording legal remedies in the face of actions of supra- and international institutions.[149] Be that as it may, human rights are increasingly understood as demanding at least

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[144] Jan Klabbers, 'Two Concepts of International Organisation' (2005) 2 Intl Organizations L Rev 277.
[145] Simma and Alston (n 134) 100ff; Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 EJIL 771; Robert McCorquodale, 'International Organisations and International Human Rights Law' in Kaiyan Homi Kaikobad and Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Nijhoff 2009) 141.
[146] See Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels: Report of the Secretary General' (16 March 2012) UN DOC A/66/749.
[147] Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organisations' (2008) 9 German L J 1939, 1951ff.
[148] Henry G Schermer and Niels M Blokker, *International Institutional Law* (5th edn Nijhoff 2011) 501ff.
[149] Kirsten Schmalenbach, 'International Organisations or Institutions, Legal Remedies against Acts of Organs' in Wolfrum (ed) (n 9) para 25; Matthias Ruffert and Christian Walter, *Institutionalisiertes Völkerrecht* (CH Beck 2009) 75.

functionally-equivalent procedures that grant legal recourse,[150] the Inspections Panels of the World Bank and the Ombudsperson in the context of the UN Security Council's smart sanctions are emblematic.[151] A big and as of yet unresolved question mark hangs over the issue to what extent national courts can compensate for deficiency at the international level.[152]

Even more difficult is the question of whether and to what extent a democratic principle exists for supranational and international organisations within public international law. While the EU treaty anchors the mandatory character of the democratic principle for the EU, an analogous provision is absent from the statutes of international organisations. It would, however, be too positivistic to banish democracy within international organisations from the sphere of legal thought and consign it solely to the realms of political theory. In view of these difficulties many authors conversely prefer to discuss this feedback loop of legitimation under the term *accountability*.[153] Ultimately, however, democracy remains the paramount principle in theory and law when questions arise as to how international institutions can be linked to the values, interests and convictions of the affected citizens and be responsible to them.

The debate covers a variety of issues, connected by the tradition of democratic thought. It is a basic implication of the democratic principle that international organisations are bound by their underlying legal acts.[154] Further sign posts are the transparency of international institutions and the involving of international parliamentary assemblies as well as non-governmental organisations.[155] As multifarious

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[150] Clemens A Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' (2008) 9 German L J 1513.
[151] Erika de Wet, 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' (2008) 9 German L J 1987, 2000.
[152] August Reinisch (ed), *Challenging Acts of International Organisations before National Courts* (OUP 2010).
[153] International Law Association (Committee on Accountability of International Organisations), 'Final Report' (Berlin 2004) <http://www.ila-hq.org/en/committees/index.cfm/cid/9> accessed 25 June 2013; Kingsbury (n 62); Deirdre Curtin and Anchrit Wille (eds), *Meaning and Practice of Accountability in the EU Multi-Level Context* (CONNEX 2008); Philipp Dann, 'Accountability in Development Aid Law. The World Bank, UNDP and the Emerging Structures of Transnational Oversight' (2006) 44 Archiv des Völkerrechts 381.
[154] See above, B.I.2, Rüdiger Wolfrum 'Kontrolle der auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigungen der Deutschen Staatsrechtslehrer 38, 45ff and 61ff; Jan Wouters and Philip De Man, 'International Organizations as Law-makers' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011) 190, 208ff.
[155] von Bogdandy (n 82).

and uncertain as the individual insights of this debate may be, nonetheless the general concept of democracy can serve today in the context of international organisations as a vanishing point for the constructions of legal scholarship (e.g. the doctrine of competences) and as a lens for its criticism.

C. Questions of Elaboration

I. Potentials and Problems

Principles relating to the protection of human rights, the rule of law, and, albeit to a limited extent, democracy can be identified in German law, EU law and public international law. Moreover, they apply not only to the institutions of their own legal order but also to those of interacting ones. For that reason, they form the vertices of an overarching discourse about legal foundations. This consonance has considerable potential to develop overarching and general frameworks. Even so, the fact that the norms of German, EU and international law set principled parameters for one another leads to difficult questions regarding their relative priority. The classic mode of solving such conflicts and ordering debates on principles can be found in Art. IV(4) of the Constitution of the United States of America and in the Fourteenth Amendment, roughly equivalent to Art. 28(1) and Art. 31 of the German Basic Law. According to the German provision, the structural principles of the *Länder* have to align themselves to the structural principles of the Federation.

A similarly unequivocal rule is missing in these novel contexts of conflict and interpretation.[156] Reliance must be placed on doctrinal constructions that negotiate truly fundamental issues: The mode of reciprocal allocation of statal, supranational and international provisions as well as the question regarding the meaning of comparative legal insights.

This leads to a series of different, albeit interconnected questions. For acts of public international law what is at issue is their validity, rank and effect in the territorial scope of application of EU law and national law, i.e. how the EU or German institutions have to cope with these acts. Another issue is whether EU and national institutions can assent

[156] But see art VI of the US Constitution; from the European legal area eg art 1 and 25 Basic Law, art 10 of the Italian constitution, art 55 of the French constitution, art 216(2) TFEU.

to international legal acts. Given that principles normally do not lead to direct conflicts, the question then arises how the different understandings and peculiarities of the principles, as they were developed in the positive law, jurisprudence and legal scholarship of the respective legal orders, relate to each one another; the same question can be posed with respect to the insights of comparative law.

II. Pluralism of Principles

Pondering the relationship between principles of different legal orders suffers from the defect of being spellbound by two theoretical offerings of the early 20th century: monism and dualism.[157] It is not possible to develop any plausible understanding from these. The current legal and political landscape differs fundamentally from that of a century ago, the German case is emblematic. At that time, Germany was a rather authoritarian and belligerent state. It has since become a liberal democracy, which no longer seeks to rival its neighbours for colonies or superpower status, but rather has become embedded together with them in a dense fabric of supra- and international organisations, exactly in order to overcome such rivalry. But monism is also not persuasive, neither as a doctrinal nor as a theoretical offering: Whenever questions relating to validity, rank, effect and legitimacy are to be resolved, the act in question first has to be situated in a specific legal order; legal practice hence evidently does not proceed from an amalgam of legal orders. All essential questions are always answered by reference to a specific legal order. Both monism and dualism are no longer useful as specific doctrinal constructs, since they cannot offer plausible solutions to any of the relevant legal questions. They also lead into a dead end from the point of view of theories designed to capture the entire legal constellation, both analytically and normatively. Dualism ultimately shares the fate of the traditional principle of sovereignty. Monism with public international law at its apex shares the weaknesses of world constitutionalism as a paradigm to grasp the existing law.

In constitutional law one can encounter monism that puts the state on top, for instance when principles of national constitutional law form the centre of the normative

[157] Heinrich Triepel, *Völkerrecht und Landesrecht* (Hirschfeldt 1899) 12-22; Hans Kelsen and Bonnie Litschewski Paulson and Stanley L Paulson (trs), *Introduction to the Problems of Legal Theory* (Clarendon Press 1992) 107-125; Georges Scelle, *Précis de Droit des Gens* (Recueil Sirey 1932) 31-32; Pierre-Marie Dupuy, 'International Law and Domestic (Municipal) Law' in Wolfrum (ed) (n 9).

universe; examples might include A. Scalia's discussions of comparative law[158] or those authors that consider public international law to be foreign relations law, external *Staatsrecht*.[159] But such conceptualisations are even susceptible to challenge with respect to the US Constitution, given that its founders were concerned with the integration of American institutions in a universal project of reason.[160] For Germany conceptualisations like those of Scalia's are hardly convincing given the unambiguous basic decision in favour of open statehood.

There have been many conceptual attempts to capture the larger setting which is the object of this contribution. In the German-speaking context, the terms "multilevel" system, "network" and in particular "composite" order have received particular prominence (in German: *Mehrebenensystem*, *Netzwerk*, *Verbund*).[161] One can conceive these proposals as part of an international debate on legal pluralism.[162] The core insight of pluralistic positions is that the diverse principles that lay down requirements for social interaction as part of public international law, EU law and national law are not conceived of as parts of a unitary legal order. Moreover, they reject the paradigm of hierarchy as the symbol of the overall order, in the sense of ultimate authority, or a "last say".[163]

There are two camps of pluralists. The more radical approach starts from the premise of conflict and reads the interaction as a struggle for power. On this view,

[158] Antonin Scalia's dissenting opinion in *Roper v Simmons* 543 U S (2005); 'The Relevance of Foreign Legal Material in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 ICON 519.
[159] Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP 2005); Curtis Bradley and Jack Goldsmith, *Foreign Relations Law* (2nd edn Wolter Kluwer Law & Business, 2007).
[160] Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2010) 153-154.
[161] Christoph Schönberger, 'Die Europäische Union als Bund' (2004) 129 Archiv des öffentlichen Rechts 81; Ingolf Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 EL Rev 511; Matthias Goldmann, 'Der Widerspenstigen Zähmung, oder: Netzwerke dogmatisch gedacht' in Sigrid Boysen and others (eds), *Netzwerke: 47. Assistententagung Öffentliches Recht* (Nomos 2007) 225.
[162] Klaus Günther, 'Rechtspluralismus und universeller Code der Legalität: Globalisierung als rechtstheoretisches Problem' in Wingert Lutz and Klaus Günther (eds), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit: Festschrift für Jürgen Habermas* (Suhrkamp 2001) 539; for an excellent review of the various approaches Lars Viellechner, 'Cosmopolitan Pluralism as an Approach to Law and Globalisation', (2012) 3(4) TLT 461.
[163] Giulio Itzcovich, 'Legal Order, Legal Pluralism, Fundamental Principle Europe and Its Law in Three Concepts' (2012) 18 ELJ 358, 370.

juridical rationality masks the underlying antagonism.[164] By contrast, the dialogic approach starts from the observation that the diverse legal regimes and institutions regularly manage to build stable legal relations despite maintaining their own normative independence, in particular in the European legal area. Fundamental conflicts have been the big exception, whereas intensive and oftentimes fruitful collaboration have been the norm. Of course, the concept of dialogue has so far not been deeply elaborated and can be misread as supposing a friendly or even cosy relationship between institutions. This contribution does not suggest this, but rather distinguishes institutional dialogue from a relationship which is mere interaction, as one could see between the US American courts and the International Court of Justice in the LaGrand case.[165] The difference between mere interaction and dialogue is that dialogue occurs in a setting where the legal orders and institutions accept a common responsibility for all legal normativity.[166] Dialogic pluralism is the natural choice for those who prefer Hegel's insistence on the normal case as the starting point for scientific thought rather than Carl Schmitt's exceptionalism.

This dialogical pluralism has so far mostly been applied to the relationship between institutions of the various legal orders, but it can be extended to that of the founding principles themselves. European Union law shows one possibility with its protection of "national identity" under Art. 4(2) TEU.[167] The meaning of this EU concept is shaped by the basic principles on the European as well as on the domestic level: While the EU framework prescribes some common elements, the specific meaning is determined in light of the basic constitutional principles of the Member State in question. Along similar lines international sovereignty could be reconstructed with a

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[164] Arthur Dyèvre, 'Game Theory and Judicial Behaviour' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783507> accessed 30 July 2013; Gunther Teubner, 'Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus' (1996) 15 Rechtshistorisches Journal 255, 261-262, 273; see also Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003-2004) 25 Mich J Intl L 999; Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010).

[165] *LaGrand Case (Germany v United States of America)* ICJ Rep 2001, 466; Alexander Orakhelashvili, 'Questions of International Judicial Jurisdiction in the LaGrand Case' (2002) 15 Leiden J Intl L 105.

[166] In more detail Daniel Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 85.

[167] For detail see Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CMLRev 1417.

composite legal status, responding to the constitutional self-understanding a country has of its place in the regional and global order; sovereignty becomes a *relative* concept.[168] Accordingly, international sovereignty could be informed by the respective constitutional openness towards common projects and willingness to recognise shared responsibility. Since the constitutional orders of Argentina, China, or Germany enshrine deeply different understandings of the international order and the country's place therein, depending on the role each constitution attributes to international law in general and human rights in particular as well as supranational integration. A reconstructive proposal should take those differences into account. Of course, the emerging international sovereignty will be far more nuanced and variegated. But for this very reason, such a concept of sovereignty fits better with the pluralistic world order while furthering the basic principles discussed here where political communities are disposed to advance on that path.

III. The Principles of Principles

Despite all the potential difficulties, the basic principles can provide a beacon for political action and legal reconstruction in this novel constellation, both for what is in common and for what should remain different. In order to advance, scholarly core competencies such as abstraction, specification, comparison, transfer and conflict resolution are demanded in light of dialogic pluralism.[169] A melding of diverse discourses on principles is as unlikely as is a merger of diverse legal orders. Nevertheless, under the premise of dialogic pluralism, linking them is as probable as it is necessary, since this furthers the principles of principles, viz. the protection of the core of human rights,[170] the stabilisation of normative expectations[171] as well as the

[168] The idea is first expressed in Armin von Bogdandy and Dana Schmalz, 'AJIL Symposium: Pushing Benvenisti Further - International Sovereignty as a Relative Concept' (Opinio Juris, 24 July 2013) http://opiniojuris.org/2013/07/24/ajil-symposium-pushing-benvenisti-further-international-sovereignty-as-a-relative-concept/> accessed 26 July 2013.

[169] Samantha Besson, 'The Human Right to Democracy – A Moral Defence with a Legal Nuance' in *Definition and Development of Human Rights and Popular Sovereignty in Europe* (Council of Europe Publishing 2011) 47; Hélène Ruiz Fabri, 'Principes généraux du droit communautaire et droit comparé' (2007) 45 Droits 127.

[170] Jochen von Bernstorff, 'Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: vom Wert kategorialer Argumentationsformen' (2011) 50 Der Staat 165.

[171] Habermas (n 78) 427; Luhmann (n 87) 196-203.

connection to the values, interests and convictions of those affected; in other words, the inclusion of the citizens in the exercise of public authority.[172]

[172] Jürgen Habermas, *Zur Verfassung Europas: Ein Essay* (Suhrkamp 2011) 54; see also Amartya Sen, *The Idea of Justice* (Lane 2009) 117.

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