

LEGAL ORDER IN THE DRAFT:  
EUROPE ON THE EVE OF THE 100<sup>TH</sup> ANNIVERSARY  
OF THE TREATY OF VERSAILLES

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ABSTRACT

Europe and the Globe have in recent years witnessed a series of unprecedented challenges of fundamentals of national, European and international legal order. States ignore decisions of competent courts, put international treaties in question, or are about to marginalize constitutional principles. Consequently, legal values are not acknowledge, past experiences ignored or misinterpreted and the peaceful future put at risk. The disastrous consequences of mistakes of the Treaty of Versailles and the inability of Europe to avoid them are recalled. The situation of Europe in the aftermath of the Cold War, as seen by some prominent US observers is addressed and the “Initiative for Europe” of the French President Emmanuel Macron, pleading for an independent and sovereign Europe, analyzed. A plea is made to replace the inefficient patchwork of memoranda and treaties which came into being after the end of Cold War by an international legal order, based on clear rights and obligations of all parties directly involved, necessary to secure an enduring peace in Europe.

**Keywords:** Legal Values, Treaty of Versailles, Cold War, Initiative for Europe, Radbruch’s Formula, Pufendorf’s Treaty Standards.

1. US President Donald Trump is contesting the competence of the World Trade Organization’s (WTO) Dispute Settlement Body to decide international trade disputes, Croatia and China, although for different reasons, ignore decisions of international courts of arbitration, Hungary does not care about a judgment of the Court of Justice of the European

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Union, Catalonia does not care about the Spanish Constitution and the decision of the Spanish Constitutional Court as regards the legality of its independence plans, and Poland reduces the independence of its judiciary. The list of actual challenges of international, regional and national law could be extended at will. In view of the extent of these challenges and their possible consequences this is a relatively new and concern causing phenomenon. All the above mentioned challenges and also those not mentioned have in common that they do not acknowledge legal values, such as justice (in the sense of equality), purposiveness (the idea of intent) and legal certainty.<sup>1</sup>

Those responsible for these challenges share the characteristic that they ignore their experience from the past, either intentionally or not, or interpret them in a very biased way. Trump's USA has been the initiator and the main driving force for the establishment of the WTO and its legal order. Internationally active US companies have greatly benefitted from it and the fact that the macro-economic effects on the US economy were less favorable has nothing to do with the WTO jurisdiction. The consequent and fair application of EU law by the EU Member States has enabled Croatia to become an EU Member and benefit from its legal and economic order. The globalization which is based on WTO legal order has helped China to achieve an entirely unimaginable and unpredictable rise to the second place of economic and soon also technological and scientific world powers, with the perspective that in a few years it will even catch up or overtake the USA.<sup>2</sup> Hungary enjoys the fruits of the jurisdiction of the Court of Justice of the European Union, which over the years has responsibly co-shaped the legal order of the Union on the basis of the mentioned legal values. Catalonia has seemingly forgotten that it has achieved its remarkable economic performance within the democratic Spain, and seemingly also forgotten the catastrophe which afflicted the country nearly one hundred years ago. Finally, one of the pillars of the everywhere visible economic achievements of Poland is its membership of the European Union, whose integral and indispensable fundament is an independent judiciary.

The question is whether the initiators of those challenges are aware of the mid- and long-term risks and consequences of their activities and of their responsibility for all those directly or indirectly affected. International, regional and national laws seldom comprise sanctions against the

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<sup>1</sup> PAVČNIK 2017: 13-14. Cf. also LEAWOODS 2000.

<sup>2</sup> According to statistics compiled by the US National Science Foundation (NSF), China has already overtaken the United States in terms of total number of science publications. (cf. TOLLEFSON 2018: 390).

responsible ones, except by democratic elections, which, however, if at all can only remove the consequences of such activities. Sadly, the experience demonstrates that mistakes from the past, irrespective of their disastrous consequences, seldom prevent their repetition in the future, possibly with even more far-reaching negative consequences. Most recent scientific findings demonstrate how superior nature is in this regard: human cells, namely, record the past and predict the future.<sup>3</sup> The legal order, established at all levels by states, lacks such a mechanism. Indeed, the settled principles of “natural law” constitute the legitimation basis as well as the critical instance for assessing positive law. According to the concept of so-called “rational naturalistic law” (“rationalistisches Naturrecht”), the principles of “natural law” (“natürliches Recht”) were predetermined in human rationality (“Vernunft”) and would enable man to recognize (also in the legal sense) what is appropriate to his nature.<sup>4</sup> This sounds nice, however, because “natural law” is not subordinate to laws of nature, on whose basis our cells function its principles have no such direct and unavoidable effects. The final recognition of “what is appropriate to their nature” legal subjects, especially at the state level, as a rule, reserve for their own assessment. They invoke the principle of sovereignty although the latter is often undisputedly limited. Thereby it is not easy to get rid of the feeling that they act according to the phrase *quod licet jovi non licet bovi*, thus contrary to legal values.<sup>5</sup>

The duty of society at large and especially of the legal profession is, openly and clearly, if necessary also by disregarding so-called political correctness, not only to red-flag the hazards which today jeopardize the achievements gained based on many years of strict respect for legal values, but also to exert themselves actively to pave the way for rationality and unconditional recognition of legal values. The legal profession, which as a rule actively co-shapes positive law, national and international, indeed also has an obligation to see that positive law is based on principles of justice/equality, purposiveness and legal certainty and to prevent, from the outset, the danger that positive law could conflict with legal values in the sense of one of the well-known formulae of Gustav Radbruch, namely that,

where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very

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<sup>3</sup> Cf. KELSEY, STEGLE and REIK 2017.

<sup>4</sup> More at MITTELSTRASS 2013: 513 ss., 514.

<sup>5</sup> According to BOGGS 2006-2007, this phrase symbolizes “the opposite of what I consider to be the rule of law”.

meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.<sup>6</sup>

In view of the Radbruch's formula and the as yet not addressed international public law challenges, for instance related to the events surrounding Crimea, this contribution may refer to a statement, which clearly demonstrates the hazards which evolve if legal values are not adequately respected and the lessons from the past not adequately learned. It originates from a publication of James A. Baker III, former Secretary of State of the USA, a highly respected lawyer and one of the most profound experts in the field of international relations. It reads as follows:

The Treaty of Versailles solved the 'German problem' in exactly the wrong way – by sealing the defeat with territorial and economic retribution. This resolution certainly demoralized Germany in the immediate aftermath of war, but the resulting grievances fueled something unimaginably worse and more dangerous. One hesitates to stretch historical analogies too far, but little is required to see something similar happening in Russia. The end of the Cold War was certainly not settled by anything like Versailles, but from Russia's perspective, the results have been much the same – a humiliating loss of territory, prestige and power. Russia's economic and political problems have stemmed largely from Russia's own failure to implement the necessary reforms to encourage the creation of a market economy, but it would not be difficult –indeed, it has not been difficult – for Russian demagogues to blame the West for the troubles ordinary Russian men and women have experienced during the past decade. Couple all these developments with the expansion of NATO up to Russia's doorstep and the use of NATO as an offensive (as opposed to defensive) alliance to bomb Russian allies, and you have a recipe for disaster. By continuing to treat Russia like a potential adversary, we may encourage it to become our enemy, the very thing we fear. The best way to find an enemy is to look for one, and I worry that that is what we are doing when we try to isolate Russia. The same principle would apply, of course, if we were to embark on a policy to try to isolate China.<sup>7</sup>

2. The year 2018 marks the hundredth anniversary of the end of World War One, the causes of which have been brilliantly and in great detail, but in the end and presumably on purpose, in political and legal terms, anemically presented by Christopher Clark in his 2013 book "The Sleepwalkers". In 2019, Europe will be reminded of the Treaty of Versailles signed on June 28, 1919. It is not known, whether Christopher Clark, encouraged by the

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<sup>6</sup> RADBRUCH G. 2006.

<sup>7</sup> BAKER J.A. III 2002: 95 ss., 100.

great success of his “Sleepwalkers”, is working on a book analyzing the causes of World War Two. However, if so, the Treaty of Versailles and its consequences will certainly be at the center of all of his deliberations. One would have expected that the thoughtful 2002 reminder of the former US Secretary of State, James A. Baker III of the consequences of mistakes made in the Treaty of Versailles, and his diplomatically wrapped historical analogy between the negative consequences of the Treaty of Versailles,<sup>8</sup> on the one hand, and those of the end of the Cold War, which was “certainly not settled by anything like Versailles”, on the other, would have received in Europe the attention which they certainly deserve for Europe. Instead, for the European public, politicians and lawyers the Treaty of Versailles and its disastrous consequences were seemingly buried in oblivion. Contrary to James A. Baker, who is by no means alone with his worries,<sup>9</sup> those responsible for the future of Europe, either are not aware or on purpose suppress Baker’s insightful analysis and concerns. Let alone, do they seriously try to find a balanced and resilient cure for the unresolved and frightening legacy of the Cold War which is already visible on all hands and whose primary, luckily predominantly “cold, battlefield” was indeed Europe.

How Europe’s vision of its future is noticed by the world is best illustrated by a statement of Henry Kissinger, another highly regarded and respected former US Secretary of State, who in November 2016, asked by Jeffrey Goldberg from *The Atlantic*, “Why is there no vision in Europe?”, replied as follows:

Maybe they have gone through too much. Maybe they have lost too much. If you look at the succession of leaders in 19<sup>th</sup>-century Britain – Castlereagh, Canning, Disraeli, Gladstone, Salisbury – they were all significant men governing a coherent society. At Queen Victoria’s Jubilee at the end of the 19<sup>th</sup> century, 100 warships paraded for her. Today, the entire British navy has only one capital ship.

Beyond Britain, the EU, despite the economic Eurozone, has not been able to unite around a uniform political or strategic approach to the world. It does not seem possible to create a European army. Actually, I do not even see a mechanism

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<sup>8</sup> Most competently analyzed by KEYNES 1971.

<sup>9</sup> For Instance, James A. Warren comments and cites from the diaries of the late US diplomat George Frost Kennan, as follows: “George Frost Kennan, America’s most influential 20<sup>th</sup> century diplomat, wouldn’t have been at all surprised by Russia’s recent military incursion into Ukraine. Indeed, it could very well be said that he predicted such a development as early as 1997. ‘I have been rendered most unhappy’, wrote the former US Ambassador to Moscow, by the admission of ‘Poland, the Czech Republic and Hungary to membership in NATO’. How was such a development ‘to be reconciled with the assurances to the Russians that they need not worry, that the extension of NATO’s borders to the east has no military implications?’ Indeed, Kennan saw nothing in the rapid and reckless expansion of NATO ‘other than a new Cold War, probably ending in a hot one, and the end of the effort to achieve a workable democracy in Russia’” (WARREN 2014).

with which the continent could develop a strategic concept. Born in Europe, I say this with regret and the hope that I am describing an interval, not a trend. The decline of Europe, which shaped international order for centuries, is going to be a serious loss.

And, on the follow on question of Goldberg: “Do you consider it a loss?”, Kissinger answered:

It is not yet a loss, but it is striking that three weeks after Brexit, not one European statesman has articulated a vision of Europe’s future. They are the continent that built the international world. And *no one* has stood up with the vision of Churchill. They’re talking about tactical matters while they’re in the process of giving up the essence of what they’ve struggled for and what they’ve represented throughout history. Today, a standard statement is that when Europe is weak, it cannot conduct great foreign policy, therefore it must be, at a minimum economically cohesive. That is only partly true. At the end of World War II, when Europe was exhausted and devastated, they produced Adenauer [in Germany] and Schuman [in France] and De Gasperi [in Italy]. They had a vision. Now, their successors risk transforming their vision in bureaucracy.<sup>10</sup>

3. In November of 2016 even Henry Kissinger, who among the visionaries of Europe surprisingly has not mentioned general Charles de Gaulle, with all his experience and far-sightedness, could not foresee what will happen six months later, namely the election of the thirty-nine years old Emmanuel Macron for French President, on May 7, 2017. It is not known, whether President Macron had read the Kissinger-Goldberg conversations of November 2016, blaming the Europeans for lack of vision for Europe. In any case, it took him only four months to disprove Henry Kissinger’s verdict: On September 26, 2017, President Macron in a speech titled “Initiative for Europe – A Sovereign, United, Democratic Europe”,<sup>11</sup> has developed what Kissinger called for, namely the “vision for Europe”. For some commentators, the new French President “seems to have taken on the mantle of past French Presidents such as Charles de Gaulle and François Mitterrand, who saw Europe as the vehicle that would one day replace France’s diminishing power in world affairs.”<sup>12</sup> Indeed, as the first “Key to European

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<sup>10</sup> GOLDBERG 2016.

<sup>11</sup> “Initiative pour l’Europe – Discours d’Emmanuel Macron pour une Europe souveraine, unie, démocratique”. Available at : <http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/> (accessed February 8, 2018).

<sup>12</sup> BRIANÇON 2017.

Sovereignty”, the English synthesis of the speech provided by the Elysee, reminds one of General Charles de Gaulle’s endeavors of the mid 1960s, namely:

1.A Europe that guarantees every aspect of security

**In defence, Europe needs to establish a common intervention force, a common defence budget and a common doctrine for action.** We need to encourage the implementation of the European Defence Fund and Permanent Structured Cooperation as quickly as possible, and to supplement them with a **European intervention initiative** enabling us to better integrate our armed forces at every stage<sup>13</sup> [emphasis in the original]

This plea can well be understood as recalling the right, but even after decades not yet realized ideas of his predecessors. For how urgent Emmanuel Macron views the security aspect of Europe’s sovereignty is demonstrated by the very end of the synthesis, where, indirectly the President recalls the failure of the Treaty of Versailles:

**The time when France proposes is back.** At this moment, I am thinking of Robert Schuman, who dared to propose building Europe, in Paris on 9 May 1950. I remember his powerful words: ‘A united Europe was not achieved and we had war.’

Emmanuel Macron, 26 September 2017<sup>14</sup> [emphases in the original]

It cannot be by chance that the “official” synthesis of Macron’s speech ends with this quotation which dramatically recalls the past European tragedy, which by all means should be avoided. For President Macron, whose name immediately follows the Schuman quotation, the danger of a war in Europe seems real. Surprisingly and even causing deep concern is the fact that in the aftermath of the speech, not the security aspect of Europe but the other five keys to European sovereignty, namely the migration challenge, focus on Africa and the Mediterranean, Europe exemplary in sustainable development, Europe’s innovation and regulation adapted to the digital world and Europe standing as an economic and monetary power, stand at the center of political discussion. The same is true for those issues

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<sup>13</sup> Link to this official synthesis in <http://www.elysee.fr/assets/Initiative-for-Europe-a-sovereign-united-democratic-Europe-Emmanuel-Macron.pdf> (accessed February 8, 2018).

<sup>14</sup> It is noted that in the full French text of the speech reproduced by Elysee, does not end with the quoted sentence: “Mais le temps où la France propose pour avancer avec l’Europe et avec tous les Européens qui le souhaitent, ce temps-là est revenu, et je pense à cet instant à Robert Schuman le 9 mai 1950, à Paris, osant proposer de construire l’Europe. Je pense à ses mots saisissants lorsqu’il dit: ‘L’Europe n’a pas été faite et nous avons eu la guerre’”.

which President Macron has addressed under “a united Europe”, “a democratic Europe” and “What Europe for 2024?”. The difficulties which even Germany, the one part of that Franco-German engine which the French President views as decisive for mastering the challenges of Europe, has with accepting Macron’s vision, are well illustrated in a shattering testimony of Jürgen Habermas. Habermas, who sees in Macron’s initiative a “historically unrivaled opportunity”, and Germany obliged “to take possessions of the ball kicked into their half of the field by the French President”, writes as follows:

When looked at dispassionately, though, it is just as unlikely that the next German government will have sufficient far-sightedness to find a productive, a forward-looking answer when addressing the question Macron has posed. I would find some measure of relief were they even able to identify the significance of the question.<sup>15</sup>

4. The French President Macron is certainly correct with his claim that Europe with its 500 Million inhabitants should be truly sovereign, i.e. avoid to become, if not already remain, in the global context “an animal which is less equal than others”, to paraphrase George Orwell.<sup>16</sup> Therefore Europe must urgently and substantially improve its armed defense capability. However, one of the lessons which Europe should have learned from the failed Versailles Treaty should certainly be that military capability to defend itself, does not secure an enduring peace. It can and does, indeed, constitute an important deterrent against potential aggressors, but even if potentially superior, it cannot eventually prevent armed conflicts with disastrous and detrimental consequences. Even the recent history is full of bitterly frightening examples of the kind.

When Robert Schuman, in 1950, identified the lack of united Europe before World War Two as the cause of the war, he most probably had not in mind common European armed forces, but a Europe sharing and standing for common political, economic and social values, and respecting the legitimate interests of its states. Thus, what is most needed in Europe for an enduring peace and prosperity, in addition to a credible defense capability, is a rational, balanced, coherent, but also cohesive political, legal, economic and social order, which takes into account the interests of all

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<sup>15</sup> HABERMAS 2017. If one considers that pilots of the German Air Force, for lack of suitable/available helicopters, have to be trained on helicopters of the General Automobile Club (ADAC) (<http://www.zeit.de/politik/deutschland/2017-12/adac-bundeswehr-hubschrauber-pilote...>), this vitriolic comment of Habermas does not seem even too far-fetched.

<sup>16</sup> ORWELL 1961: 114.



directly involved parties, be they members of the EU or not. Bearing in mind that in the last fifteen years some of the concerns explicitly expressed by the former US Secretary of State, James A. Baker III, have, sadly enough, partly already materialized, Europe should undertake all possible efforts to negotiate and develop legal instruments which will complement its efforts to establish and secure its sovereignty in the global context with the establishment of a common intervention force, a common defense budget and a common doctrine for action. In order to identify the appropriate legal instruments and also the legitimate interests of all involved at, and affected by, the end of the Cold War, it may be helpful to make a closer analysis of the negotiation documents, in the meantime declassified,<sup>17</sup> which contain evidence of the circumstances and conditions under which the Cold War found its end. It should be recalled that Samuel Pufendorf, in the aftermath of the Peace of Westfalia of 1648, in his endeavor to avoid relapse into confessional warfare developed a theory “about the moral relationships of agents (individuals and groups), the authority and duties of states, and the lawful interactions among these. His chief objective, too, was to avoid destructive social conflicts and the devolution on any level into the antagonistic and, he thought, self-defeating condition known as the state of nature”.<sup>18</sup> For Pufendorf only a system of rules, organized whenever possible in the form of rights and duties, can constitute a coherent structure, a system.<sup>19</sup> It would seem that the patchwork of memoranda and treaties<sup>20</sup> which came into being after the end of the Cold War does not meet those criteria.

5. President Macron has perfectly realized for whom the bell rings. Leaving his vision of Europe and his wake up call unheard and not to undertake the necessary steps to realize at least the very core of his vision, directly

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<sup>17</sup> SAVRANSKAYA and BLANTON 2017.

<sup>18</sup> Pufendorf’s Moral and Political Philosophy, Stanford Encyclopedia of Philosophy (first published September 3, 2010, revised November 3, 2015) (<https://plato.stanford.edu/pufendorf-moral/>).

<sup>19</sup> Cf. STRÖMHOLM 2005: 1 ss., 3.

<sup>20</sup> E.g. Budapest Summit Declaration: Towards a Genuine Partnership in a New Era of December 6, 1994, Treaty on Conventional Armed Forces in Europe of March 9, 1989, Treaty on the final Settlement with respect to Germany of September 12, 1990, Charter of Paris for a New Europe of November 21, 1990 (which with its ambitious “Institutional Arrangements”, remained a “dead letter”), Convention on Conciliation and Arbitration within the OSCE of December 15, 1992, or the Memorandum on Security Assurances in connection with Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons of December 5, 1994, to name but some.

touching upon most vital genuine interest of Europe's security, would be grossly negligent. Those European leaders who criticize him, some even in a disrespectful manner, may wake up one day and see their country in a hot battlefield, feared/predicted by the wise late Ambassador George Frost Kennan already in 1997.<sup>21</sup> Only then they may realize that the conflict which would affect their country most had actually erupted without their active participation and not because of their genuine interests. They may only then also realize that the conflict could have been prevented, had Europe built up the sovereignty President Macron is pleading for, and act accordingly, i.e. successfully advocate and defend its interests in a manner that would make the 500 million Europeans "as equal" and independent "as others" global players.

Let us leave such a scenario just as a still avoidable nightmare. But, it is high noon that the international legal order, if necessary adapted to new circumstances and legitimate interests of all directly involved, sails into still air and arranges for a harmonious political and economic development and enduring peace in Europe and the entire Globe, based on legal values. All efforts must be undertaken to prove that Henry Kissinger, in 2016, described "an interval" of Europe's weakness and not a "trend" leading to its final decline! Schuman has seemingly already "found" a worthy successor. Where to find the successors of Adenauer and De Gasperi, who could join Emmanuel Macron and built up a European peace order, which will include all former Cold War adversaries and meet Pufendorfs' standards, however, is still an open question.

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<sup>21</sup> See *supra* note 9.

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