



Freedom, the Law and the State.

A Comparative and Historical Sketch of Three Core Institutions of Open Societies with a View of the Future of European Integration.

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Abstract

Private law (personal freedom), public law (the state), republican forms of government (political freedom) and money-denominated contracts, as opposed to customary tribal reciprocal exchange or redistribution by religion based moral authorities, constitute the institutions that define open societies. Codified in continental law based upon Justinian's 534 *corpus iuris civilis*, these concepts are part of the common law tradition as well, forming the core ideas of western civilization. This paper develops a precise comparative analysis of social relations in private and public law, republican government, international public law and customary relations in stateless tribal communities. Using the concept of jural correlatives developed by Wesley N. Hohfeld, commonalities of all and specific elements of each type of relation are carved out. Since the basic principles of stateless customary and state-based legal relations are in conflict, and the basic principles of public and private law are in conflict as well, the transition from one to the other has historically often been less than smooth. A comparative sketch of selected historical transitions from tribalism to statehood, from statehood to private law and personal freedom and from authoritarian to republican government (and back) will be provided for european history, raising the question what can be learned from these transitions for the process of state/law building for european integration and europe's current neo-nationalist predicament.

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1. Introduction

Is the world today an open society? Concerning the state of our world system as a whole, Karl Popper would have certainly denied this question. But what is an “open society” after all? Invented as a term by Henri Bergson (1932), Karl Popper made this conception widely known in his work “The Open Society and its Enemies”, which he decided to write on March 1st of 1938, the day of Nazi Germany’s invasion of Austria. The writing extended into 1943, so “most of the book was written during the grave years”.²

But not only did Popper experience the totalitarian work of Nazis first hand and also the works of contemporary Communist totalitarianism, he also identified certain “intellectual leaders of mankind” as enemies of the open society (Popper 1945, p. 1). One of those identified by Popper was G.W.F. Hegel. While the accusation of being an “enemy” of an “open society” is a heavy one, it is quite hard to deny it in substance, given certain unequivocal positions of Hegel concerning the state and the individual. Requiring the individual’s “true courage” and the “readiness for sacrifice”³, Hegel was declaring the state as “absolutely rational”⁴ and “the sovereignty of the state” as “the genuine, absolute, final end” (Hegel 1896, §§258, 328). Add to that Hegel’s outspoken insight into Public International Law that “if states disagree and their particular wills cannot be harmonised, the matter can only be settled by war”, since “[t]here is no Praetor to judge between states”⁵, we indeed have to understand Popper’s accusation of Hegel (i.a.), specifically considering Popper’s writing of his influential book during wartime.

² Popper notes this in the preface to the 2nd edition of the first volume of “The Open Society and its Enemies”. We are emphasizing this here, as the work at hand could be easily misunderstood as a superficial criticism of Popper’s work as simply too one-sided. While Popper indeed misses out on the dialectical relations of legal institutions at the core of “open societies”, we are very sympathetic with Popper’s “one-sided” - i.e. non-dialectic - position, given his biography. Luckily, today isn’t 1938, it’s 2017. But, just as Popper ascertained almost 80 years ago, there are still misconceptions within the social sciences (Popper 1957, pp. 2-4, 27 et seqq.). We maintain that specifically the conceptualization of legal institutions within contemporary social science has contributed its part to the crisis’ of our time. Popper’s work, unfortunately, is no exception to the general mis- or underconceptualization of legal institutions in the social sciences.

³ “The true courage of civilised nations is readiness for sacrifice in the service of the state, so that the individual counts as only one amongst many.” (Hegel 1896 [1821], “Addition to §327”)

⁴ German orig.: “das an und für sich Vernünftige” (Hegel 1821, §258)

⁵ Hegel (1896 [1821], §334 and Remark to §333)

In an attempt to answer the question of what an open society *is*, we assumed in this work that (certain) western liberal democracies *are* “open societies” and furthermore decided to attempt a closer look at the legal institutions powering them.

With Fukuyama’s notion of “the international community” wanting to turn “Afghanistan, Somalia, Libya and Haiti into idealized places like “Denmark”, but it [not having] the slightest idea of how to bring this about”, we have a rather concise set of *qualities* that might characterize open societies. They should be “prosperous, democratic, secure, and well governed, and [experiencing] low levels of corruption” (Fukuyama 2014, 25). The vague term “democratic” helps at this point, as it not only is also used by Popper himself⁶, but includes Popper’s demands for open societies, too: e.g. not being “totalitarian”.

So, now we may know the qualities of an open society, but we certainly still don’t know what an open society *is*. And there are many further questions, specifically concerning the European Union (EU):

- Is the EU an open society?
- Is it too authoritarian and undemocratic⁷?
- Is it too “socialist” and should therefore be dissolved in favor of more *liberal* nation states?
- Is the EU too decentralized and too weak to take decisive action (e.g. concerning the euro area)?
- Is the EU too “neoliberal” and should it be dissolved in favor of more *social* nation states?
- Is the EU a state at all? Is it a state of law? Is it even a democratic state of law (i.e. “liberal democracy” or “open society”)?
- Does the EU have the legal structure of an open society? Shouldn’t the EU have (or aim at having) the legal structure of an open society, if it is supposed to be (or strive to become) one?

To even attempt answering questions like these we decided to take a legal institutional perspective on open societies, and are therefore firstly pursuing the following central question:

What is the precise **legal structure** of an open society?

Further questions are structuring our work as follows:

- How did today’s open societies, like Denmark, ever get to where they are today? Is there a sequence of steps or transitions that typically led to successful results? Which sequence led to compromised results or even failure concerning the establishment of an open society? See [Emergence of Key Institutions](#)
- How do we get to an open society in Europe? Is it possible to create open societies in so-called “developing countries” if we take the legal institutionalist⁸ perspective into account? How about the “international community” becoming an open society? See [Outlook on European Unification](#)

⁶ Popper emphasizes that “only democracy provides an institutional framework that permits reform without violence” (Popper 1957, p. 4).

⁷ E.g. see “DiEM25”: “Democracy in Europe Movement”, www.diem25.org

⁸ “Legal Institutionalism”, see Deakin et al. (2015).

2. Legal Structure of Open Societies

An open society without the ability of its citizens to contract freely amongst each other is unthinkable, for without the possibility to contract, economic activity amongst strangers (but citizens) would be inhibited and therefore one of the key qualities of an open society, i.e. having a prosperous economy, would not exist. To citizens of an actual open society, let's again say "Denmark", the ability to carry out a simple ***purchase*** transaction seems rather trivial. Hardly ever one week of a citizen of "Denmark" passes by without the completion of multiple purchase transactions. However, the possibility for free citizens to *contract*, already contains *in nuce* all of the necessary legal institutions that open societies are - mostly unconsciously - built upon:

Public Law ⁹ (the state)	Constitutional Law ¹⁰ (<u>political</u> freedom)
Private Law (<u>personal</u> freedom)	

Table 1: Basic Legal Institutions of Open Societies.

Contracting free citizens are not "naturally free", but are free in that they are *persons* in **private law** having their *personal* freedom and private autonomy guaranteed and defended by **the state** institutions against all other actors. Even their own freedom to act ("private autonomy") ends precisely where they would bind themselves into slavery, even if they did so by "voluntary contract". Such a "contract" would always be void in a truly open society. So, the personal freedom of the citizen is defended by the state, against everybody else, including the free citizen himself.

However, safeguarding the free citizen of despotism of the very state institutions that are responsible for the protection of the citizen's personal freedom is a non-trivial task. For the state institutions need to be designed in a way, that they keep each other from acting despotically on the one hand, while still being powerful enough to carry out the task of protection of its citizens' freedom on the other. Edmund Burke (1790) put it like this:

"To make a government requires no great prudence. Settle the seat of power, teach obedience, and the work is done. To give freedom is still more easy. It is not

⁹ We are presenting these institutions separately here, which might be misleading in that we are lead to think of them as totally separate. They are not. Public and private law are different ways to *think* and are dialectically related. Private law needs public law and *vice versa*. A society that is built merely on the "public law" principles of order and command, is not an open society at all and doesn't have a public law but mere centralization (totalitarianism). An imaginary society of pure "private law", i.e. the voluntary interaction of legally equivalent private persons in law, does not exist, for there can be no decentralization (private law) without centralization (state). See also our chapter on [History](#) below.

¹⁰ Constitutional Law shall not be confused with writing intelligent and well thought out republican principles onto pieces of paper. A constitution is not a piece of paper, but is a snapshot of actual power relations of institutions within a state. Additionally a constitution can set ideals of power relations for the future.

necessary to guide; it only requires to let go the rein. But to form a free government, that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought, deep reflection, a sagacious, powerful, and combining mind.”¹¹

In other words, the *dialectical relation* between private law and public law needs to be taken care of, it needs to be intelligently balanced. This cannot be done once and for all, not even with the most intelligent and complex institutional structure laid out in the most advanced **constitution** imaginable. The balancing needs to be done *continuously*, even though the institutions need to be rigid enough to be institutions in the first place.

Therefore, **constitutional law** (political freedom) is the third basic legal institution of open societies, whose main task is the mitigation of the dialectical tension between public law and private law and, if nothing else, it is the open - and ideally conscious - confrontation of this dialectical relation. The constitutional law of an open society completes the concept of a free citizen in that it adds political freedom to (mere) personal freedom¹². However, even mere personal freedom is not established automatically and in full for every individual by the mere existence of private law¹³, making the consideration of constitutional law and republican principles all the more important as a key legal institution of open societies.

Schematically, we can delineate the legal structure of open societies as follows:

- **Private Law (Code Civil): Citizen-Citizen, Consent**
 - Property Rights
 - Freedom of Contract, Liability to Perform, Accountability, Bookkeeping in terms of Money
 - Civil Litigation
- **Public Law: Government-Citizens, Command (top/down)**
 - Public Administration (Administrative Law)
 - Tax Law
 - Criminal Law
- **Constitutional Law: Free Citizens-Government (bottom/up)**
 - Rule of Law (not people) over Citizens AND the State
 - Popular Sovereignty & Democracy (Free Citizens = Partial Sovereigns)
 - Division of Power: Free Citizens apply “divide et impera” to State
 - Public/Private Law (fundamental Decentralization of Sovereignty)
 - Legislative, Executive and Judicial Branches of Gov’t
 - Federalism: Federal vs. State vs. Community Levels of Gov’t

How these key legal institutions might have come about and how they actually came about are questions that are leading us into the ensuing chapter. Therein we attempt to show the emergence of key legal institutions of open societies, having at the back of our minds the

¹¹ Burke (1790, pp. 352, 353)

¹² e.g. the absence of slavery on the one hand, but no right to participate in any political process at all on the other..

¹³ The mere existence of private law itself, i.e. the existence of legal interaction of (some) free legal persons, does not imply that every (wo)man is indeed a free legal person. The roman society of antiquity, where the very invention of the differentiation of private law and public law took place, was a society of owners and of slaves, i.e. not every man and woman was a free legal person. (Braun, 2001, p. 143f.).

realization that open societies cannot be “natural” in the sense, that we would be able to find them all around the world at all times. In fact, “open societies” are the historical exception, that we want to more deeply understand by exploring the emergence of its key legal institutions.

3. Emergence of Key Legal Institutions

We begin this chapter with a fictional story that is in its essence fairly well known and involves a very special kind of contract: Rousseau’s *contrat social*, that is supposed to somehow create the state, personal freedom¹⁴ and a republic all at once. We then proceed to a brief look at actual historical emergence of these key institutions for open societies in Europe.

3.1. Rousseau’s story

As a short disclaimer upfront: we try to be aware of the circumstances that Jean-Jacques Rousseau found himself in, living in 18th century absolutist France as well as in Calvinist Geneva, and we certainly appreciate that Rousseau never even claimed his “Social Contract” was a work of historical accuracy, but rather an idealization. We still allow ourselves to critically assess Rousseau’s view of the ideal way man should give up his - so-called - “natural freedom” to a republican government by compressing Rousseau’s thoughts - with a wink - into a very short story. In a nutshell, Rousseau’s story goes something like this:

In the beginning man was “naturally free”. Then someone or something took his freedom away, because now “everywhere [man] is in chains”. Man was always free to individually enter into contracts as equals and man saw the necessity for a state, to “defend and protect [...] the person and goods”. Hence, man gathered together voluntarily and contracted into existence *the state* by way of a *social contract*.¹⁵

The basic elements of this story, specifically the imaginary condition of some kind of “primordial individualism” are not unique to Rousseau at all, we do find this idea within the writings of Hobbes and Locke as well, the former even being Fukuyama’s name giver for what he calls the “Hobbesean fallacy”:

“We might label this the Hobbesean fallacy: the idea that human beings were primordially individualistic, and that they entered into society at a later stage in their development only as a result of a rational calculation that social cooperation was the best way for them to achieve their individual ends.”¹⁶

¹⁴ In Rousseau’s terms it would rather be the *preservation* of an original “freedom”.

¹⁵ “*The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.*” (Rousseau 1762a, [6. The Social Compact](#))

Rousseau seems to be well aware, at least implicitly, of the dialectical relations at the core of this process, even if the process is viewed in the imaginary form of his story delineated here. The dialectical relations and their tensions at the core of open societies are analyzed in [Dialectical Tension instead of “Natural Law”](#) below.

¹⁶ Fukuyama (2011, p. 29).

Referring to Rousseau, the American institutionalist John R. Commons notes in his 1934 work *Institutional Economics*, very similarly to Fukuyama:

“When the science of Political Economy began to emerge in the Eighteenth century, it fell in line with the theory, then dominant, of an original state of liberty and rationality of human beings. It was Rousseau, in his famous book *The Social Contract* (1762), who popularized the theory. Man was originally free but government had made him a slave. Man was also a rational being who would act according to reason if only he were free. This was the theory of the Declaration of Independence and the French Revolution. It remained the primary assumption of the classical, optimist and psychological schools. They based their theories on an absolutely free individual who knows his own interest, and, if allowed freely to act, then the sum total of all acts would be a harmony of interests.”¹⁷

Commons clearly recognizes the accomplishments of these theories of primordial individualism, liberty and freedom “in overthrowing absolute monarchies, abolishing slavery, and establishing universal education.”¹⁸ And he continues:

“[I]t was **not** because they were **historically true** – it was because they set up ideals for the future. Historically [...] it is more accurate to say [...] that man is originally a being [...] for whom liberty and reason are a matter of the slow evolution of moral character and the discipline **enforced by government**.”¹⁹

Was *any* open society in actual history ever formed democratically from the get-go by some kind of a Rousseau-style “social contract” and/or slow and peaceful evolution? Rousseau mentions Rome (and Sparta for that matter) as one of the rare examples where he assumes his story must have taken place, even though he unequivocally notes: “we have almost nothing beyond conjecture to go upon in explaining how [empires like the roman one] were created.”²⁰

We certainly have to take into account that Rousseau, at his time was *ideologically* opposed to absolutist monarchies like France, much like Karl Popper found himself right in the middle of an existential and ideological battle with “totalitarianism” during World War II. Historical accuracy or general understanding might not have been the prime motivation of either of them and we are not here to blame them for that. Rousseau’s writings - that seem to have worked well in setting ideals for the future and he shall be applauded for that - were taken up by readers that mostly found themselves within absolutist monarchies at the time in Europe. That is, there already *was a state*, a centralized authority, which means the first step of centralization (Centralization I) had already taken place. The centralized powers of the absolutist monarchies (the state) had to be decentralized in Rousseau’s view, and his ideas did brilliantly well concerning *this task*. But what about the European Union today? Does Rousseau-style thinking help us in this practical case at hand? Is there a european state that needs to be decentralized? How much of Rousseau’s thinking of a “social contract” is still to be found in the European institutional structure? Resembles the “contracting” of european nation states at Rome or Maastricht not to some degree Rousseau’s ideals?

¹⁷ Commons (1934, p. 390, our emph.).

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ Rousseau (1762b, [4. The Roman Comitia](#)).

We try to approach questions like the ones above by contrasting Rousseau’s story with a brief sketch of actual historical emergence of key legal institutions within European states. We do this along the lines of four distinct transitions²¹:

	Transitions	
Centralization I	Stateless →	→ State
Decentralization I	Subservience → (Economic Subjection)	→ Private Law (Personal Freedom)
Decentralization II	Monarchical Rule → (Political Subjection)	→ Popular Sovereignty (Political Freedom)
Centralization II	Confederation → (Interstate Relations)	→ Federation (Federal Statehood)

Table 2: Four Distinct Transitions Towards an Open Society.

We do not claim that these transitions have ever happened in a distinct fashion in actual history, as this scheme may seem to suggest. However, without any schemes and typologies we are poised to miss distinctions that are helpful for precise analysis. We are also stating these distinctions here upfront for didactical reasons in the hope our approach becomes all the more transparent.

3.2. History

After “Rousseau’s *story*”, we will attempt to look at “*history*” in this subchapter. We do not claim this to be a chapter on historic events as such, as we are mainly trying to get to understand underlying, generalizable structures, by looking at multiple specific historical transitions employing the comparative method in the background.

3.2.1. Centralization I: State

If human beings are on this planet longer than states are and states didn’t emerge out of nothing, then they are historic human constructs. How, when and why did humans create states for the first time? Based on the works of anthropologists and archaeologists, Francis Fukuyama calls this process “pristine state formation” and he surmises:

“Perhaps the reason [...] has to do with religion, or particular accidents of unrecoverable history.”²²

²¹ In many cases schemes like the one at hand are continuously proven too schematical by actuality. One attempt to cope with this methodological challenge is to iteratively making the currently used schemes and typologies as conscious as possible, by stating them explicitly (as we are doing in this work either explicitly or by the structure of our chapter outlines). Then using these schemes and typologies as metaphorical “glasses” to look at different cases in historical actuality and ensuingly comparing the results. The details of those findings are then tested against the schemes and typologies again. It is a self referencing methodology, not a linear one. A rather unpleasant side effect of this method: it is never done and never will be.

²² Fukuyama (2011, p. 92).

This is rather discouraging alas resembling Rousseau's assessment above (amongst many others). The way that egalitarian orders become societies that know rulers and ruled is rather unclear. Specifically for European history we seem unable to provide any specific historical example of *pristine* state formation, that is, the transition from stateless, egalitarian and acephalous, kinship based segmentary orders to cephalous (priest) **king**ships of some kind. There is more evidence concerning this type of transition in Mesopotamia and in China, but the exploration of these transitions is beyond this work, and even here, the transitions origins are obscure.²³

Custom vs. Law

While actual historical *pristine* state formation in Europe, that is the formation of a central authority where before no central authority existed, seems very unclear, the nonexistence of *legal* relations without a state seems very clear. We come to this conclusion by the insight, that law is not custom, they differ *in principle*. As the lawyer and legal anthropologist Uwe Wesel unequivocally notes:

"Custom and law are not, as Henry Maine believed, continual forms of basically the same kind of rules that could be seen as developing in an evolutionary sequence from custom via customary law to law. They are contradicting opposites. Not only do they differ in enforceability, but also by fundamental conditions and content. Law does not evolve the customs of the old order, it destroys them and creates a new order. Law [...] emerges, subordinates, absorbs and finally destroys the old order of custom, expands to dominate more and more realms of social order and can determine the entire lives of people, like in capitalism, which is totally dominated by law. Custom, in contrast, the old egalitarian order, is static, more or less peaceful, self-regulating, consensually striving for mediation, informal settlement and compromise, not just by consent of two parties, but based on the consent of the entire community. Law, by contrast, is the subordination and destruction of custom by centralized authority ... the history of law is the history of centralized state authority, of developing inequality and of the destruction of a customary, egalitarian [...] order"²⁴

While the differentiation of custom vs. law may seem to be rather insignificant at first, if we simply ignored it, we believe that would be disguising our very view onto the role that legal institutions play. For if law and custom *were* indeed the same kind of order *in principle*, not considering legal institutions should make no significant difference for our analysis.

"Corrupt" vs. "Modern" State

Once we can see the difference between (stateless) custom and law (state), we can add one other differentiation, concerning the *kind* of state or central authority, that we will employ for our assessment of the condition of European unification below. It is the difference of what Fukuyama calls a "patrimonial" or "corrupt" state and a "modern" state.²⁵ In a nutshell the difference might be illustrated with the following thought: in a "patrimonial" or "corrupt" state the state administration employs individuals who are holding positions of public power not because of their abilities as state administrators, but rather because of their political views,

²³ Fukuyama (2011, pp. 97 et seqq.).

²⁴ Wesel (1979, pp. 234, 235), translation from German to English by Wolfgang Theil (2016).

²⁵ Fukuyama (2014, e.g. p. 79).

connections, relatives etc. A “modern” state²⁶ has a meritocratic, *impersonal* bureaucracy at its disposal and is by that very reason able to at least in principle provide its citizens the much sought after “*equal application of the law*”.²⁷ A “patrimonial” or “corrupt” state administration on the other hand cannot provide that equality *in principle*, because if the individuals within such an administration have to take public actions that would concern their political views, connections, relatives etc., that played a role in making them public administrators in the first place, cannot act as it is intended by nicely conceived state and legal philosophy written down on beautiful pieces of paper of administrative law (a.o.).²⁸

While *legal* relations cannot exist without a state (centralized authority), not all relations within a state are legal relations. How *non-legal* intra-state relations can become *legal* intra-state relations will be the focus of the following two subchapters that are concerned with the possible decentralization of centralized power to avoid despotism. Hence, centralized power needs to be **restrained** by private law and republican principles, but **retained** in substance.

3.2.2. Decentralization I: Private Law (Personal Freedom, Property and Contract)

The transition we want to sketch here from subjection to personal and economic freedom, at least for a significant portion of the population, has happened several times: the Greek and Roman polis and civitas certainly being examples and above all England as one of the modern pioneers concerning this part of the transition towards an open society. However we will use yet another example: Prussia.

From “Warlordism” to “Liberal Autocracy”: Prussia Becomes a “Tiger State”

In his 2014 book “*Political Order and Political Decay*” Francis Fukuyama is considering Prussia a textbook example for the process of centralization of power and the creation of a modern bureaucracy. Its process towards a - in F.’s terminology - “modern state” took place in stages, beginning 1640 and ending in the beginning of the 19th century with the French-inspired²⁹ Stein-Hardenberg reforms after 1807.³⁰ But also concerning the transition relevant for this section, the one from subjugation to personal freedom, that is, the Prussian way towards the establishment of private law legal institutions, can serve as an illustrative

²⁶ The term “modern” might be confusing, because the first “politically modern” state for Fukuyama is ancient China. Some two millennia before the period begins that today is called the “modern era” in the west (Fukuyama 2011, e.g. p. 93).

²⁷ “The most basic form of redistribution that a state engages in is equal application of the law. The rich and powerful always have ways of looking after themselves” (Fukuyama 2014, p. 56).

²⁸ The contrasting of these two types of states is done here as if this was a dichotomy. It isn’t. Not only can the differentiation never be drawn sharply, but also once a state is deemed “politically modern” in Fukuyama’s sense, it may very well be “repatrimonialized”: “Once states come into being, kinship becomes an obstacle to political development, since it threatens to return political relationships to the small-scale, personal ties of tribal societies. It is therefore not enough merely to develop a state; the state must avoid retribalization or what I label repatrimonialization” (Fukuyama 2011, p. 81).

Hence, the maintenance of a “modern” state administration needs to be a continuous process.

²⁹ Inspired by the Prussian defeat at Jena-Auerstadt, “[t]he October Edict of 1807 abolished the legal privileges of the nobility, following the example of the French Revolution.” (ibid. p. 71)

³⁰ Fukuyama (2014, p. 70).

example, not least because it has found imitators worldwide.³¹ Fukuyama considers the Prussian-German bureaucracy as

“a widely recognized model for modern bureaucracy [and as] representative of a path taken by a select group of countries that developed modern, nonpatrimonial states as a result of military competition and saw those states survive into the modern era.”³²

The path taken by Prussia towards an economically potent full “liberal autocracy” (Rechtsstaat) in a nutshell, looks something like this:

1. Warlordism (non-centralization of power) very much until 1648 (Westphalian peace).
2. Process in steps of centralization of state power after 1640 towards a modern state, that was time and again fueled by war and existential external threats, i.a. thereby favoring merit over heritage or kinship in the military and administration.
3. Phase of repatrimonialization specifically at the end of the 18th century.
4. Decisive state action towards the establishment of private law legal institutions, specifically concerning **personal freedom, property** and **contract**, in 1807 after the defeat of Prussia by Napoleon one year prior. Thereby completing a process of public service reform that had begun in 1770 and included even a common legal code in 1794 (Preußisches Allgemeines Landrecht), i.e. ten years prior to Napoleons Code Civil in 1804, “[b]ut the old system could not overcome its inertia without the disaster of military defeat [in 1807, A/N]”.³³
5. Full “liberal autocracy” (Rechtsstaat) in the second half of the 19th century, making Prussia the main competitor of economically way more matured England at the end of the 19th century.³⁴

For contemporary state builders this textbook example of Prussia might be tempting concerning certain results:

“Germany, Japan, and a small number of other countries get high rankings for their **quality of their governments** and **low levels of corruption** in the present due to an inheritance from an authoritative phase in their political development.”³⁵

However our contemporary state builders have to be very careful what they wish for:

“We cannot call [these countries, including Germany/Prussia, A/N] lucky, since this bureaucratic autonomy [and the reliable private law legal institutions, A/N] was bought at the expense of **military competition, war, occupation, and authoritarian rule** that undermined and delayed the advent of **democratic accountability**. As Huntington made clear, in political development, **not all good things go together**.”³⁶

Three pillars of Private Law: Property, Contract and Civil Litigation

Without institutions of private law all legal relations within a society originate in “public law”, if it is even feasible to then call it public law. For without private law, that is built on the central pillars of personal freedom³⁷, property, contract and civil litigations, there can be no public

³¹ Ibid. (pp. 71, 72)

³² Ibid. (p. 79).

³³ Ibid. (p. 71).

³⁴ Ibid. (p. 72 et seqq.).

³⁵ Ibid. (p. 80, our. emph.).

³⁶ Ibid.

³⁷ “Personal freedom” is not only enabled by the right to property, it is identical to it, to a certain extent. It is the core of the idea that “I belong to myself” and to no one else. Speaking of “personal freedom” makes no sense, if “I” do not belong to myself but to another (see Braun 2001 [1997], p. 151).

law in the sense of *lawful*.³⁸ Public “law” entirely without any institutions of private law would be mere centralized authority or totalitarianism and not public law. It would be a crippling condition for economic development of its citizens, i.a. by withholding from them the right to private property:

“As long as the sovereign could claim arbitrary authority over the lives and property of his subjects, there could not exist [...] any inviolable right of property, however “natural” or “divine” it was claimed to be.”³⁹

After full completion of this specific transition from mere centralization towards private law, a depiction of the legal institutional infrastructure of a “liberal autocracy” might be looking something like this:

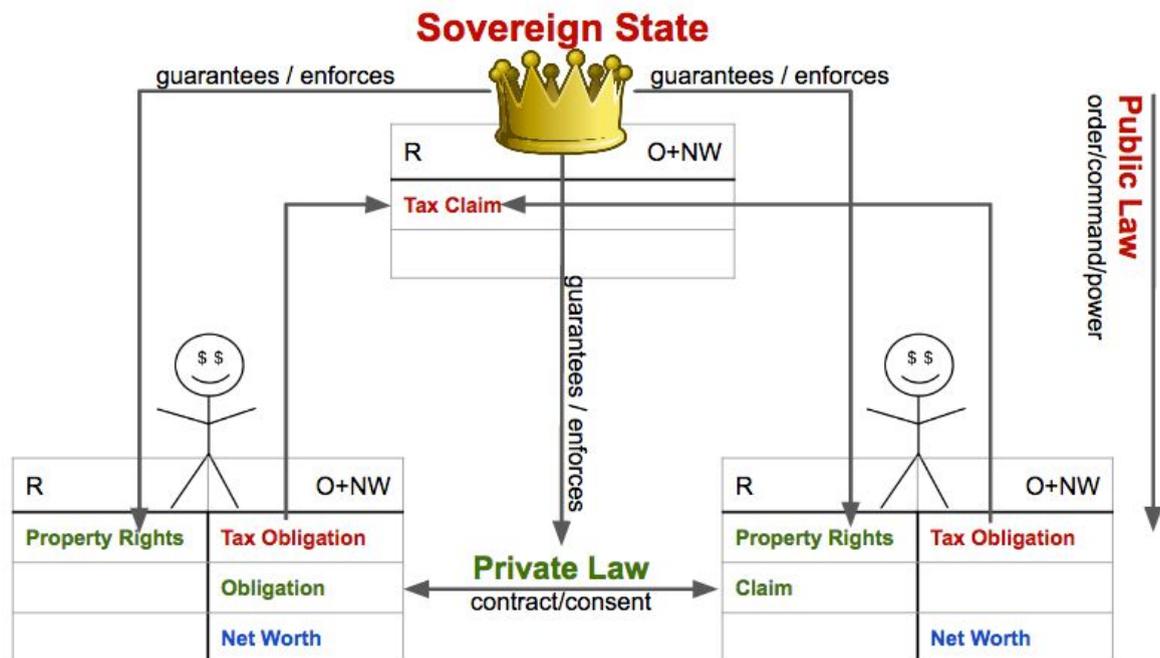


Figure 1: Idealized Depiction of the Structure of Legal Institutions of a “Liberal Autocracy”.

We have to admit to not having clarified all of the details of this depiction in this paper, specifically concerning the concept of legal persons and their depiction as stick figures as well as balance sheets and their notion in legal terms, instead of using accounting terminology.⁴⁰

3.2.3. Decentralization II: Republican Constitutions

The most referred to transitions towards republican forms of government are probably the one’s of Rome in 509 B.C., the United States of America in 1776 and France in 1789. We will take a very brief look at the principles that the subscribers to the American and French revolutions attempted to realize, even though the establishment in French historic actuality

³⁸ Braun (1997 [2001], pp. 135 et seqq.)

³⁹ Commons (1934, p. 393).

⁴⁰ For a more systematic rather than slightly historical-narrative approach we refer to our previous works, see Hofer/Theil (2016), Theil/Hofer (2016) and specifically Theil (2016).

eventually failed, at the latest some 10 years after the revolution, “by the coup [...] that brought Napoleon Bonaparte to power in 1799”.⁴¹

By the principles of “no taxation without representation” and “consent of the governed” the American revolutionaries demanded of the “sovereign” King of England nothing less than becoming “free citizens”, i.e. *partial sovereigns*, themselves.⁴² While these ideas - thought of as “natural rights” - were incorporated into the Declaration of Independence in 1776, the idea of “popular sovereignty” made it into the Constitution of 1787.⁴³

While Fukuyama denies the French revolution having created “democracy”, he still sees two major contributions to that end on part of the revolutionary efforts at the end of the 18th century: first there is the establishment of a common French legal code (“Code Civil”), enshrining “modern” property rights and second the creation of a “modern” state administration. Still, the French revolution carried in thought and writing many ambitions that the American revolutionaries were more successful in actually implementing. Schematically the ambitions of either the French and the American revolution could be delineated as follows:

1. **Division of Power: Free Citizens** apply “**divide et impera**” to **State**
 - a. **Public / Private Law** Division (**Civil Liberties: Freedom *from* the state within the state, guaranteed by the state**)
 - b. Horizontal Division: Legislative, Judicial and Executive Branches of Gov’t
 - c. Vertical: Federalism (Federal, State and Community Gov’ts)⁴⁴
2. **Popular Sovereignty & Democracy** (Free Citizens = **Partial Sovereigns**)
3. **Rule of Law** (not of individuals) over **Citizens *and* the State** (“**Rechtsstaat**”)

The attempted visualization of this scheme in Figure 2 below might serve us as an idealized, summarizing depiction of the implied legal institutional structure of an individual open society. It is this very idealized structure that has achieved the ambitions of the American and French revolutions - at least to some degree and with some persistence - at least in certain nation states:

⁴¹ Fukuyama (2014, p. 15)

⁴² Fukuyama (2014, p. 13)

⁴³ Ratified by the individual American states in 1789 the realisation of the ideas in the Constitution also created a federation out of the 13 states. See [Centralization II: Federal Statehood](#).

⁴⁴ Certainly true for the US, France however is not a federal but a unitary state, as is also noted below in [Centralization II: Federal Statehood](#).

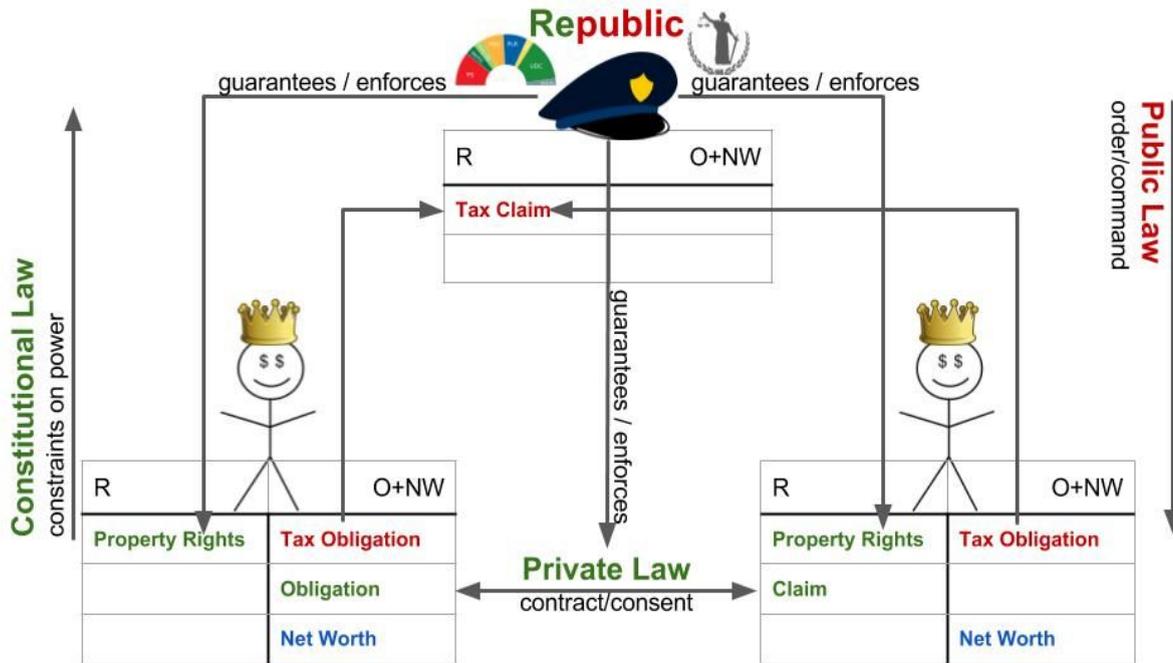


Figure 2: Idealized Depiction of the Legal Institutional Structure of an Open Society.

3.2.4. Centralization II: Federal Statehood

Generally, open societies can be built based on a state commanding a purely centralised administration, i.e. a unitary state. Among many other nation states France could serve us again as a textbook example of a unitary state at this point. Federal statehood, therefore, is not an *essential* institution of open societies in the sense that open societies would generally require it. However, it is an important institution to understand certain open societies, like the United States of America, Germany or Austria. If we think about the future development of the process of European unification, federal statehood should be considered a key institution. Taking the many differences in european peoples into account, the creation of a unitary state seems entirely out of the question for political Europe. But taking a look at the historical emergence of *federations* might still help us to see possible ways for furthering European unification and the overcoming of the EU's current neo-nationalist predicament.⁴⁵ Not only is the European Union currently built on individual states "contracting" themselves into a union without an independent third party able to enforce these "contracts", currently the whole world system is entirely built on individual nation states as legal subjects of "so-called" international law.⁴⁶ We are going into more details concerning [Inter State Relations](#) below.

⁴⁵ In 2017 the European Union is still something in between a confederation and a federation, it is not a federation. The EU is not a state (e.g. Fukuyama 2011, p. 83). If Europeans are serious about european unification, they might want to study historical transitions of confederations to federal states in detail, specifically those of the USA and Switzerland. While these transitions should also be compared in detail, this is a task that clearly exceeds the scope of this work.

⁴⁶ C.f. Hoebel (1954).

3.3. Conclusion

To sum up, there are three distinct transitions, that are generally unavoidable to reach a legal institutional structure that is typical for open societies. While we are again listing all transitions as distinctly separate, they might overlap and interleave:

1. Centralization I: Stateless (no centralized authority) → State (centralized authority of possibly very different quality).
2. Decentralization I: Subservience (personal and economic subjection) → Private Law (personal and economic freedom).
3. Decentralization II: Monarchical Rule (political subjection) → Constitutional Law (political freedom).

It is to be noted that transition number one is different *in principle* of two and three and certainly cannot be avoided at all, for the latter two make no sense without the former. An attempt of decentralization of something that was never centralized would be a confusion of decentralization and non-centralization. One wonders whether this confusion was not involved in the hopes an intentional binding of european nation states by voluntary treaty would be able to slowly bring about a european federation by continuous evolution that at the end of the day would bring about a federation with an actual capacity to act. Neither has the European Union itself gone through the transitions depicted above, yielding a modern state, nor have all of the individual european nation states gone through this process, and certainly not all in the same way, so that today they would all be able to exhibit modern state administrations of very similar quality. We will take a closer look on these issues in [Outlook on European Unification](#) below.

4. Comparing Basic Types of Social Relations

In this chapter we are carrying out a comparison of basic types of social relations, starting with contract in the form of a purchase transaction (private law), then proceeding to taxation (public law) and then non-law social relations of reciprocity of different kinds. We begin by presenting a typology of social relations, yielding a conceptual map in Figure 1 below, that is in itself the very result of the (continuous) process of comparison we are carrying out only once here. Yet, we use the map already as a didactic tool at this point, that is why we put it at the beginning.

4.1. Typology of Social Relations

Even though a typology can never be specific enough to capture the complexity and contingency of actuality, we still are using this tool here. We hope it will help us creating a conscious conceptual “cut” through actuality, thereby emphasizing certain aspects that would

otherwise be overlooked more easily. The current *typology of social relations*⁴⁷ we use within this work can be visualized as a conceptual map as shown in figure 3 below:⁴⁸

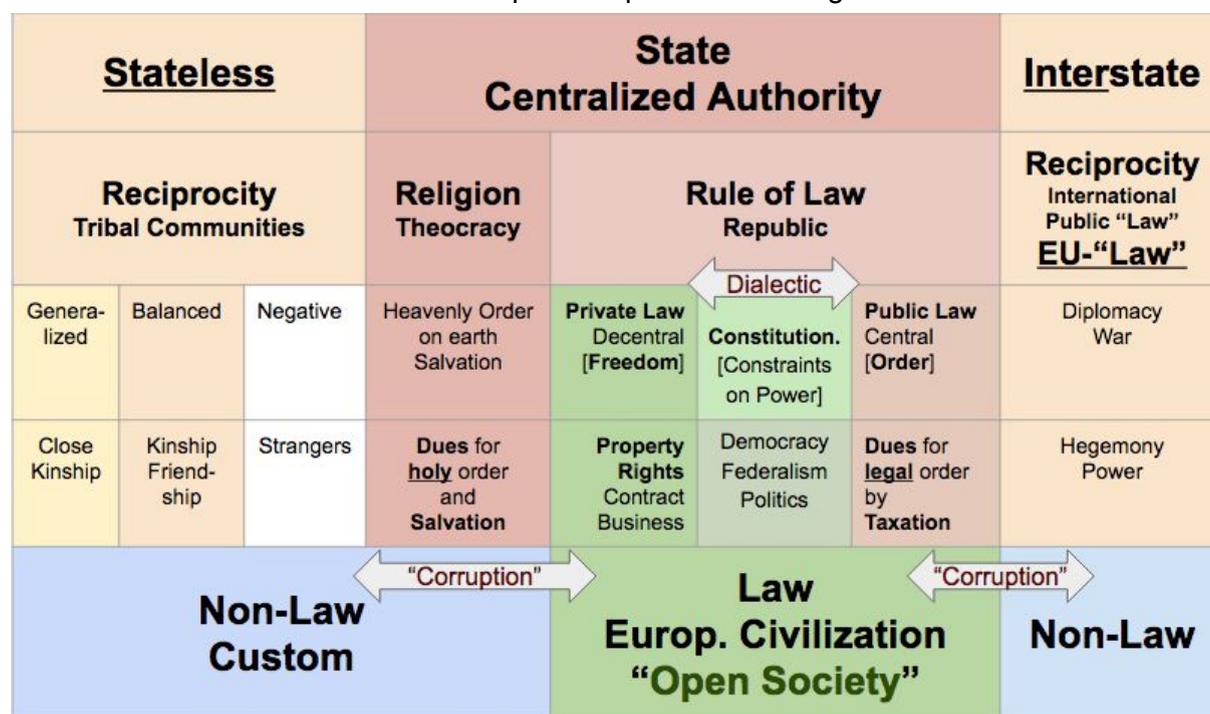


Figure 3: Conceptual Map of Social Relations

While already being rich in content, and possibly even slightly overwhelming at the very first sight, our conceptual map and the typology behind it also has multiple limitations, one being the current non-consideration of Private International Law (Conflict of Laws), i.e. private law legal relations that are linking legal persons within different jurisdictions and also the structure of enterprise organizations using multiple legal persons possibly out of multiple jurisdictions awaits systematic integration into the map. In this chapter, we will systematically compare the legal relations we have distinguished so far, starting with intra state legal relation, i.e. the relations (and institutions) in between the boxes marked "Open Society" and "Rule of Law" in the map.

⁴⁷ Please find our [Typology of Social Relations](#) in some more detail as an appendix to this work. We hope stating the typology we use in explicit writing, might help making more transparent the multitude of aspects we are omitting to create this specific "cut" through actuality. If other authors had provided us with typologies of social relations of their own, we believe much confusion might have been avoided. An example might illustrate this: if Rousseau had provided us with a typology of social relations of his own it may have looked similar to this one:

- Social relations
 - Social contracts
 - Individual contracts

Rousseau does not differentiate stateless reciprocity and state. Since his theory is one of justification of the state, not one of actual historical emergence (Jellinek 1905).

⁴⁸ This conceptual map and the underlying typology is a work in progress, started by Wolfgang Theil in his 2016 work on "Systematic Legal Foundations", that he presented at the WINIR conference of 2016 in Bristol, see Theil (2016).

4.2. Intra State Legal Relations

We begin our analysis by “zooming in” on intra state legal relations, starting with those based on private law by examining an example of a purchase transaction.

1. **Beispiel: Kauf**⁴⁹. Frame: Hohfeld. Verpfl. Geschäft, Erfüllungsgeschäft, 3 ways of paying. Lautenbachs Nominalforderung einer Rechtsperson gegen eine andere (Kern des ANEP-Paradigmas). Specify Details. (à la Commons: Legal Foundations, 85ff.)
2. Compare to tax claims/obligations. Shared Aspects. Differing Aspects.
3. Compare to stateless tribal (often confused). Shared Aspects. Non-shared, specific aspects
4. Compare to relationship between states (int. law – confederation vs. federal state)
5. Compare to relationship between citizens and government.

4.2.1. Legal Relations in Private Law

In his 1913 paper “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” Wesley N. Hohfeld makes a convincing case that the term “right” is too ambiguous and needs to be specified, to prevent - even legal professionals - to use the term “right” several times in one sentence and every time inferring to a different concept. To assess his approach in its entirety, that attempts to include the whole of the law, however is too much of a task for this section and is not why we are referencing Hohfeld here. We want to build on a specific concept he calls “jural correlatives” and it basically is the insight that “[a] right is one’s affirmative claim against another.”⁵⁰ The “claim” of one “*correlates*” to the “duty” of another. If we add to that the insight that all rights, including so-called *in rem* rights, are always legal relations towards other legal persons⁵¹, we end up with the following table on jural correlatives built for our purposes:

Jural Correlatives		
Right	Duty	Type of Relation
Owner holds Property (exclusion)	ALL others must respect exclusion	multital ⁵² (right vis a vis <u>all</u> others’ duty)
Creditor holds Claim	Debtor must serve Obligation	unital ⁵³ (right vis a vis <u>one</u> others’ duty)

⁴⁹ Enthält *in nuce* alle Unterscheidungen, die f. “Open societies” (westl. Zivilisation) - Beziehungen freier & gleicher Bürger (*persona*: Rechtspersonen) - essentiell sind, inklusive Kreditbeziehungen (Verpfl./Erfüll. Geschäft mit Geldforderung). Larenz: Schuldrecht, Bd. I (Allg. Teil) und II (Besond. Teil). Daher: Kern der westl. Zivilisation. Setzt Staat und Besteuerung voraus, daher dies im Schritt 2 einführen & vergleichen.

⁵⁰ Hohfeld (1913, p. 55)

⁵¹ “There can be no such thing as a legal relation between a person and a thing”, (Corbin 1919, p. 165).

⁵² Corbin (1919, p. 171, based on Hohfeld)

⁵³ Ibid.

We want to add to that John Commons' observation, concerning the nature of the jural correlatives, as being a *command by government* and henceforth not a mere necessity of - whatever form⁵⁴ - of logic:

“Ethics is anarchy, law is order, and the **correlation of rights and duties** is not a conclusion of logic, as is often inferred [including Hohfeld, A/N], but **is a command of government.**”⁵⁵

In John Commons' terminology we would have to call the legal relations in private law “authorized transactions”, however, to be precise, a Commonsian transaction is not an “authorized legal relation” but contains *multiple* legal relations in private law.⁵⁶ Commons quite convincingly insists that a transaction consists of at least 5 parties. However, we don't use his concept of transactions in this work, but instead confine ourselves to a schematic example of a purchase agreement between two parties, including only the always implicit third party: the state.⁵⁷

Purchase

Consider the following schematic example of a legal person A, who is the seller of a “good” and the legal person B, who is the buyer of said “good”.⁵⁸ We are structuring the purchasing process in layers, starting in “Phase 0”, in which both, seller and buyer, have mutually no obligations. They then decide to contract, which is laid out in “Phase 1”, thereby creating two legal relations: the claim of the buyer for the property rights in said “good” and the claim for the seller to get paid by the buyer. In “Phase 2” the “fulfillment” of their mutual claims happens, either smoothly, or alternatively with the “help” of the monopoly of force in case one of the parties decides to litigate. In “Phase 3” both parties are again without any mutual obligations.

Actors: Legal Person A in Private Law, seller of property
 Legal Person B in Private Law, buyer of property

Phase 0: Freedom: A ↔ B (no mutual obligations)

Phase 1: Contracting

- a. Offer of Property (by Seller A)
- b. Order (by Buyer B) & Acceptance (by Seller A) creates Contract, which creates two pairs of legal claims/obligations in private law:
 - i. Buyer's claim for Property - **specific due date**
 - ii. Seller's claim for Means of Payment (“Money”) - **specific due date** and *nominally fixed value*

Phase 2: Fulfillment of all claims at due date ... or enforcement by state through civil litigation

- a. of Claim a): delivery of object (if any) and transfer of property right
- b. of Claim b): payment (3 ways of paying):
 - i. commodity means of payment: transfer of special subtype of property
 - ii. credit means of payment: transfer of special subtype of claim

⁵⁴ Neither mono- nor polycontextural logics can escape the nature of jural correlatives.

⁵⁵ Commons (1924, pp. 86, 87, our. emph.)

⁵⁶ Commons (1924, pp. 86-89)

⁵⁷ Building on Commonsian transactions and expanding the concept the German economist Wolfgang Stützel has laid out a theory of business cycles, referencing Commons in Stützel (1972) and developing his theory on business cycles further in Grass/Stützel (1983, pp. 312 et seq.).

⁵⁸ “Good” → *property* or: a bundle of rights.

- iii. clearing/netting: offsetting mutual claims
- c. If one party has not fulfilled claim at due date, civil litigation and enforcement by state monopoly of force (self help/vigilantism is ruled out!) is legally possible for either party

Phase 3/0: Freedom: A ↔ B (no mutual obligations)

It is worthy to note that within the German Civil Code exists what is called the “principle of separation” (Trennungsprinzip), i.e. the separation of the “act of order” (Verpflichtungsgeschäft) and the “act of fulfillment” (Erfüllungsgeschäft). This is resembled in our schematic example by the separation of Phase 1 (“Contracting”) and Phase 2 (“Fulfillment”). Interestingly enough, we find a statement resembling this principle in Goethe’s Faust I, where MEPHISTOPHELES explains:

“In the first we’re free, in the second slaves to the act.”⁵⁹

Could this be one of the most beautiful and surprisingly undisguised references to the concept of path dependency in German poetry? Indeed, private law legal institutions are necessary for our concept of “personal freedom” and the “freedom” that comes with the ability to contract, but once the contracting (Phase 1) has taken place, the “total freedom” ceases, as we are ensuingly “slaves to our act(s)” (Phase 2).

Conclusion

Legal relations in private law are not possible without a centralized authority standing ready to enforce the legal relation, if need be. Please note that without a centralized authority (state), there is no civil litigation and without civil litigation a persisting legal relationship (credit) between two legal persons would be entirely different in reliability. We also argue, that without a state there are no legal persons that are able to get into *private law legal relations* by contract in the first place. Individuals that are not legal persons may get into other kinds of relations and we will look at those below in [Stateless Customary/Moral Relations](#), comparing *legal* relations to *stateless customary/moral* relations, but to get into legal relations in private law a state is essential. As Georg Jellinek puts it:

„All private law is connected to a right of acknowledgement and protection by public law. Thus, all private law rests on the foundation of public law.”⁶⁰

However, States and their institutions supporting and enforcing private law do not exist by themselves, they have to be built, which is a rather difficult task as we have seen, and they also need to be maintained. Even the most basic maintenance process needs to be powered by tax revenues, that are inevitable, if no other sources of state funding are available.

Tax revenue however is not created by contract (private law), but by command (public law) and is therefore based on legal relations in *public* law. These legal relations share aspects with legal relations in *private* law, but there are also vital differences that can be found upon closer investigation. We attempt this investigation in the ensuing section on legal relations in public law.

⁵⁹ German orig.: “Das erste steht uns frei, beim zweiten sind wir Knechte.”, Goethe (1808, Studierzimmer I), [translated by A. S. Kline](#) line 1410.

⁶⁰ Jellinek (1905, pp. 372-373, translation by Wolfgang Theil).

4.2.2. Legal Relations in Public Law

Firstly let's establish what is meant, when we use the term "public law" as opposed to "private law":

"The Romans themselves made a distinction between public law and private law. The former was concerned with the functioning of the state, and included in particular constitutional law and criminal law; the latter was concerned with relations between individuals."⁶¹

Corbin (1919) calls legal relations in public law "rules of law", but misses out on mentioning the actual precise distinction of public and private law. John Commons also seems to lack the clear distinction in the legal terminology, but implicitly he seems to fully recognize the difference, as he differentiates authorized transactions from authoritative ones, which is in essence the very same distinction.⁶² One of the most clear comparative accounts on what public law is in contrast to private law, that we have found so far, stems from the German legal scholar Jellinek, as he explains:

"In order to understand the system of public law, the essence of private law has to be considered in contrast to the essence of public law. The contradiction between public and private law can be traced to the basic idea that in private law, individuals are treated as equals. Private law thus regulates the relationships between equals whereas public law regulates ... the organization and function of governing bodies and their relationship to the subordinated subjects."⁶³

As in the previous section on legal relations in private law we will go through a schematical example for legal relations in public law in this section, always having the necessity of "taxation" in mind. If we actually want to have state institutions or deem them necessary or inevitable, these institutions need funding.

Taxation

Is taxation a special kind of contract? Once the state is established and rules of law apply, the power of the state to tax its citizens is certainly not unlimited, but does it really need the voluntary "contracting" of each individual to create a legal obligation to pay the determined amount of taxes? To look more closely at taxation and other forms of legal relations in public law we are delineating the very same scheme we used above for legal relations in private law, there we used it along the lines of a purchase transaction. Here, we look at legal relations in public law in general, thinking of a democratic state of law and its citizens and having the example taxation on our mind:

Actors: Legal Person in Public Law: State, power (Hohfeld)
Legal Person in Public Law: Citizen, liability (Hohfeld)

Phase 0: State (power) → Citizen (liability, but can litigate against the state)

Phase 1: Command (by State) creates monetary (a) or other (b) **obligation(s)** with a *specific due date(s)* for Citizen

Phase 2: Fulfillment of all claims at due date by citizen or legal enforcement by state monopoly

⁶¹ Nicholas (1962, p. 2).

⁶² Commons (1924, pp. 106-109).

⁶³ Jellinek (1905, pp. 372, 373, translation Wolfgang Theil).

of force

- a. Fulfillment of a monetary Claim by payment (3 ways of paying):
 - i. commodity means of payment: transfer of special subtype of property
 - ii. credit means of payment: transfer of special subtype of claim
 - iii. clearing/netting: offsetting mutual claimsor:
- b. Fulfillment by citizen of State's Claim concerning a performance, avoidance or forbearance:
e.g. delivery of object (if any) and transfer of property right, and:
monetary **compensation** for **expropriation** of citizen by state
- c. If the citizen has not fulfilled the state's claim at due date, **legal enforcement by state monopoly of force**
- d. **Citizen can at all times litigate against the state, if he believes the state is acting unlawfully**

Phase 3/0: State (power) → Citizen (liability, but can litigate against the state)

Comparison with Contract

Note that there is no condition of "freedom" in "Phase 0" as it was the case in the example of purchasing above: the state has power, the citizen liability.⁶⁴ Therefore in "Phase 1" the obligations towards the state are created not by the citizen's immediate and individual consent, as it is the case in contracting, but by a command of government. The fulfillment in "Phase 3" is similar concerning the payment in monetary terms and may be eligible for compensation in case of actual expropriation.⁶⁵ If the citizen does not fulfill his duties towards the state, enforcement measures are applied much the same way as they are applied concerning legal relations in private law. However the citizen also has the right to litigate against the state at all phases of the process, given we are talking about a democratic state of law.

4.3. Stateless Customary/Moral Relations

Thanks to the work of anthropologists like Lorna Marshall, who studied first hand the stateless !Kung in South Africa⁶⁶ or Marshall Sahlins and Marcel Mauss⁶⁷, we are able to come closer today to what John R. Commons had already hoped for in 1934:

"[...] especially with the aid of the modern sciences of sociology, anthropology, and historical jurisprudence, it is possible to reverse the Eighteenth Century illusion of an original state of liberty".⁶⁸

Anthropology seems to be a very appropriate way to find out what makes humans human. It is the empirical study of human behavior on the spot, potentially all around the world, thereby obviously allowing for comparison of the respective behavior. Patterns of behavior⁶⁹ that can be found at different places and in different cultures suggest that we are dealing with an

⁶⁴ In a state of law the citizen has not only liabilities, but also immunities against arbitrary state actions. See Hohfeld (1913), Vatiello (2010).

⁶⁵ Taxation is not expropriation, in the sense as it obliges the citizen to *pay*. Expropriation concerns property rights not monetary claims. Still, tax obligations reduce a citizen's net worth just as much as an expropriation of a property right (think of a balance sheet entry) that the citizen valued at the same amount as the nominally fixed amount of the tax obligation.

⁶⁶ See Marshall (1961) concerning "economic" matters or more comprehensively Marshall (1976).

⁶⁷ Sahlins (1974) and Mauss (2000).

⁶⁸ Commons (1934, p. 390)

⁶⁹ In a way: "institutions".

actually *human* trait. Concepts like the “homo oeconomicus” of economics or the “homo iuridicus” (Natural Law) of legal philosophy, that are essentially *speculative* and not empirical no matter how intrinsically “logical”⁷⁰ they seem to be, can be avoided once comparative anthropology is considered.

4.3.1. Comparison of Legal Relations and Relations based on Reciprocity

In this subchapter we will explore stateless customary/moral relations in comparison to legal relations along the differentiation within what is called *reciprocity* by cultural anthropologists: Generalized (positive), balanced and negative reciprocity.⁷¹⁷²

Contract vs. Generalized Reciprocity

In close kinship or other close relations, like with the !Kung in South Africa, most relations are in accordance with so-called generalized reciprocity. It is primarily a generous giving and taking without even the idea of s.th. belonging to an individual in the sense of property. As Lorna Marshall puts it concerning the meat sharing of the !Kung after a successful hunt and the rather complicated customs concerning the sharing:

“The society seems to want to extinguish in every way possible the concept of the meat belonging to the hunter.”⁷³

If we more closely compare legal relations that emerge from contract and relations out of generalized reciprocity, we end up with a comparative table of the following kind:

	Law: Contract	Custom: <u>Generalized</u> Reciprocity
	Similarities	
	There is no free lunch: giving and taking must be balanced ⁷⁴	
	Differences	
Initiation	Offer between free legal subjects: <u>can</u> be ignored or refused, or accepted by consent	By birth. Solidarity between kin (relatives).
Balance	Permanent abstract Balance in terms of abstract “monetary”	Permanent Im balance Equivalence depends on

⁷⁰ Cf. “Münchhausen trilemma”: beware of assumptions that superficially seem to be self-evident, they might be unconscious dogmatic abortions of thought. Letting alone the hardship that binary logic has *in principle* with self-referencing systems, which is all we’re deal with, when we are confronted with historical actuality.

⁷¹ See Sahlins (1974), Wesel (1997, pp. 17 et seqq.), Wesel (1979).

⁷² You may also want to take a look at the large [Comparative Table: Stateless Communities vs. Law](#) in the appendix.

⁷³ Marshall (1961, p. 238).

⁷⁴ Mauss (2000).

	equivalents	personalities & situation
Due date for return service	Specified. When due, state enforcement through independent courts available	Unspecified, can be <u>very long term</u> (mother cares for baby, grownup baby cares for mom in old age)
Freedom vs. obligations	Freedom before contracting & after fulfillment, temporary legal claims/obligations, destroyed by fulfillment	Permanent mutual obligations of kin solidarity. No “freedom of contract”.

Table 3: Comparative Table of Contract and Generalized Reciprocity.

Please note that there is no “free lunch” even concerning generalized reciprocity. However the time frame and the balance are not as rigid as it is concerning legal relations. So we might say for generalized reciprocity: in the long run, there is no free lunch. The same comparison as we just did for generalized reciprocity we are carrying out for balanced reciprocity below.

Contract vs. Balanced Reciprocity

Relations based on balanced reciprocity might even be easier confused with legal relations out of contract than the relations based on generalized reciprocity above. But there are still major differences, as we shall see in table 4 below:

	Law: Contract	Custom: <u>Balanced Reciprocity</u>
	Similarities	
	There is no free lunch: giving and taking must be balanced (M. Mauss)	
	Differences	
Initiation	Offer between free legal subjects: can be ignored or refused, or accepted by consent	Gift between relatives or friends/acquaintances: cannot be ignored or refused. (Moral obligation to accept and return.)
Balance	Permanent abstract Balance in terms of abstract “monetary” equivalents	Permanent Imbalance Equivalence depends on personalities & situation
Due date for return service	Specified. When due, state enforcement through independent courts available	Unspecified, depends on circumstance.
Freedom vs.	Freedom before contracting &	Relation is maintained by

obligations	after fulfillment, temporary legal claims/obligations, destroyed by fulfillment	permanent imbalance - permanent indissoluble moral claims/obligations
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Table 4: Comparative Table of Contract and Balanced Reciprocity.

As nothing has changed for the legal relations from table 3 to 4, we can focus on the relations based on generalized reciprocity. Most notably the offered gift between relatives, friends or acquaintances cannot be ignored without consequences for the relation, there is a moral obligation to accept the “favor” and to eventually return it. Hence, there ironically is a permanent **imbalance** between individuals in relations of balanced reciprocity. We continue our comparison with the last one concerning contract and reciprocity below: negative reciprocity.

Contract vs. Negative Reciprocity

Relations based on negative reciprocity and legal relations out of contracts might be most easily confused. But, specifically concerning the financial system there are significant differences to be observed. The slightly expanded comparative table of contract and negative reciprocity, as compared to the two comparative tables above, can be found in table 5 below:

	Law: Contract	Custom: <u>Negative</u> Reciprocity
	Similarities	
	Interest Payment, maximizing personal utility, no permanent mutual obligations, possible with strangers	
	Differences	
Initiation	Offer between free legal subjects:	From offer to guile to raid
Balance	Permanent balance	Permanent imbalance
Due date for return service	Specified. When due, state enforcement through independent courts available	Unspecified, depends on circumstance.
Freedom vs. obligations	Freedom before contracting & after fulfillment, temporary legal claims/obligations, destroyed by fulfillment	Relation is maintained by permanent imbalance - permanent indissoluble moral claims/obligations
Transferability of claims	Yes - constitutes financial system	No - no banking system (however: “hawala”, based on internal personal trust and some

		external money of account)
Enforcement	State enforcement through civil courts and registries secure <u>accountability</u> of legal persons by way of liability	Self help, vigilantism
Cheating	Legally ruled out	Morally acceptable, “free lunch” as a goal

Table 5: Comparative Table of Contract and Negative Reciprocity.

Probably the most important difference of contract and negative reciprocity is the non-negotiability of relations based on negative reciprocity as opposed to the negotiability of claims in advanced private law legal systems. This is very closely related to the necessary self help or vigilantism that is necessary in negative reciprocity, once one party deems the other party non compliant. Self-help and vigilantism are ruled out and harshly punished in any reliably working legal systems. Still noteworthy is that cheating is ruled out in any reliably working legal system, while on the other hand obtaining a “free lunch” seems to be morally acceptable, for only “foreigners” are in relations based on *negative* reciprocity:

„One of the outstanding characteristics of traditional societies is the opposition that they assume between their inhabited territory and the unknown and indeterminate space that surrounds it. The former is **the world** ... , **the cosmos**; everything outside it is ... a sort of “**other world**,” a **foreign chaotic** space, peopled by ghosts, demons, “**foreigners**” [...]”⁷⁵

4.3.2. Conclusion

To sum up, what does set apart saleable legal relations from informal, reciprocity-based relations? Saleable legal relations are

1. specified in terms of “**maturity**”, i.e. they have a specific due date at which they become enforceable, see 3.
2. specified in terms of a specific “**value**” denominated in an abstract unit of account (“**money**” of account).
3. enforceable for all free and equal legal persons in the same way, by the state monopoly of force via civil litigation (civil courts as independent third parties); thereby holding the obliging parties *accountable*.
4. recorded in writing for reasons of accountability: they are accounted for by *accounting* (i.e. bookkeeping).

Thus, contractual claims and obligations (as the names of the two sides of one saleable legal relation) create accountability of debtors for creditors, thereby creating impersonal trust for the latter. Personal trustworthiness based upon directly knowing each other is replaced by creditworthiness based upon reputation and credit registers⁷⁶, thereby implicitly also relying on the trustworthiness of the state administrations. As we have seen above: it is not self-evident for a state administration to be a “modern”, impersonal administration based on merit, that is actually capable to act impersonally, if need be.

⁷⁵ Eliade (1959, p. 29).

⁷⁶ E.g. FICO Inc. in the USA or Schufa Holding AG in Germany.

We now know that a debtor (servus of the legal relation) can be held accountable at maturity by a creditor (dominus of the legal relation) by way of state enforcement of his claim. Therefore debtors must sort their assets by “liquidity”, since they need to know which saleable rights (“assets”) they are able to “shift” into a means of payment once an obligation comes due. The typical business habits of setting specific sales goals, planning and time management as well as the work-, performance- and constant improvement ethics of the “bourgeois” society become mandatory for survival of a business on the market: private law,⁷⁷ which presupposes a state and public law, is the historically specific **institutional precondition of “homo oeconomicus”**, and probably also of the humanist’s “humanity”.

4.4. Inter State Relations

It is not exactly a secret that there is no international monopoly of power. There is no global state and we are not here to propagate one. However, given the insights above that social relations differ significantly whether there is an independent third party enforcer of social relations available or not, we can but understand Hegel’s position now:⁷⁸

“The fundamental proposition of international law (i.e. the universal law which ought to be absolutely valid between states, as distinguished from the particular content of positive treaties) is that treaties, as the ground of obligations between states, ought to be kept. But since the sovereignty of a state is the principle of its relations to others, states are to that extent in a state of nature in relation to each other. Their rights are actualised only in their particular wills and not in a universal will with constitutional powers over them. This universal proviso of international law therefore does not go beyond an ought-to-be, and what really happens is that international relations in accordance with treaty alternate with the severance of these relations.”⁷⁹

We already noted in the [introduction](#), that Hegel is perfectly aware that there is no global state that could act as “Praetor” and he therefore continues:

“It follows that if states disagree and their particular wills cannot be harmonised, the matter can only be settled by war.”⁸⁰

This is the subchapter on inter state relations and private law relations across jurisdictions are not inter state relations, but one wonders whether Hegel considered the possibility of interdependent states not by inter state relations but by the close interlinking of corporations (legal persons) across jurisdictional borders within organisational structures of single enterprises. There is this notion by Mervyn King that in 2009 “global banks are global in life, but national in death”⁸¹, and we fully appreciate that insight concerning legal persons in

⁷⁷ Therein specifically contract law, property law, corporate law and bankruptcy law, cf. Pistor (2000).

⁷⁸ On Hegel see also our [introduction](#) above.

⁷⁹ Hegel (1896, §333). German orig.: “Der Grundsatz des *Völkerrechts*, als des *allgemeinen*, an und für sich zwischen den Staaten gelten sollenden Rechts, zum Unterschiede von dem besonderen Inhalt der positiven Traktate, ist, daß (sic!) die *Traktate*, als auf welchen die Verbindlichkeiten der Staaten gegeneinander beruhen, *gehalten werden* sollen. Weil aber deren Verhältnis ihre Souveränität zum Prinzip hat, so sind sie insofern im Naturzustande gegeneinander, und ihre Rechte haben nicht in einem allgemeinen zur Macht über sie konstituierten, sondern in ihrem besonderen Willen ihre *Wirklichkeit*. Jene allgemeine Bestimmung bleibt daher beim *Sollen*, und der Zustand wird eine Abwechslung von dem den Traktaten gemäßen Verhältnisse und von der Aufhebung desselben” (Hegel 1821, §333).

⁸⁰ Hegel (1896, §334). German orig.: “Der Streit der Staaten kann deswegen, insofern die besonderen Willen keine Übereinkunft finden, nur durch *Krieg* entschieden werden” (Hegel 1821, §334).

⁸¹ Schifferes (2009).

private law with their headquarters in certain national jurisdictions. However, the global central bank swap lines that were made permanent in October of 2013⁸² do speak of a global system post Great Recession that shows more resilience than the one the world was equipped with before the breakdown of international relations during the Great Depression. Hegel would probably still be rather conservative, and we have to agree *in principle*, even if there were no “make America great again” slogans to be heard:

“Kant had an idea for securing ‘perpetual peace’ by a League of Nations to adjust every dispute. It was to be a power recognised by each individual state, and was to arbitrate in all cases of dissension in order to make it impossible for disputants to resort to war in order to settle them. This idea presupposes an accord between states; this would rest on moral or religious or other grounds and considerations, but in any case would always depend ultimately on a particular sovereign will and for that reason would remain infected with **contingency**.”⁸³

But we don’t have to rely only upon a - albeit a widely known one - German legal philosopher, one that Karl Popper deemed an intellectual enemy of what he called open society. We shall also reference the legal and political anthropologist E. Adamson Hoebel who unequivocally states, that:

“[Public, A/N] International Law, so-called, is but *primitive law* on the world level.”⁸⁴

What he calls “primitive law” we are not even calling “law”, but are using a more restricted term of law, resembling Wesel’s insight noted above, that law and custom⁸⁵ are not only evolutionary steps apart, but are **contradicting opposites**. But without the view of legal anthropology this razor-sharp insight can get blurred very quickly, as implicitly Corbin’s take on Public International Law shows, he writes in 1919:

“A neutral in war time has the privilege of shipping contraband to a belligerent. Other belligerents have no-right that he shall refrain, but they too are then privileged to seize the contraband. The neutral is privileged to run, when sighted, but if he disobeys a signal to heave to, the belligerent is then privileged to sink him.”⁸⁶

Corbin, who we have already referenced above in our discussion of Hohfeld, uses the very same terminology (“privilege”, “no-right”) for inter state relations in this case as he uses in the very same paper for intra state legal relations. It is as if there was an implicit assumption that somehow there already must be a global state. The role a state or agents of the state play in general for Corbin’s argument, he does see rather clearly:

“[...] certain facts will normally be followed by certain immediate or remote consequences in the form of action or non-action by the **judicial and executive agents** of society.”⁸⁷

⁸² Kihara (2013).

⁸³ Hegel (1896, Remark to §333). German orig.: “Die *Kantische* Vorstellung eines *ewigen Friedens* durch einen Staatenbund, welcher jeden Streit schlichtete und als eine von jedem einzelnen Staate anerkannte Macht jede Mißhelligkeit beilegte und damit die Entscheidung durch Krieg unmöglich machte, setzt die *Einstimmung* der Staaten voraus, welche auf moralischen, religiösen oder welchen Gründen und Rücksichten, überhaupt immer auf besonderen souveränen Willen beruhte und dadurch mit Zufälligkeit behaftet bliebe” (Hegel 1821, § 333).

⁸⁴ Hoebel (1954, p. 331, our. emph.).

⁸⁵ When we say customary/moral, Commons would say “unauthorized” or “ethical”, (Commons 1924, p. 86).

⁸⁶ Corbin (1919, p. 168).

⁸⁷ Ibid. (p. 164, our. emph.).

However, exactly the “judicial and executive agents” are either lacking entirely or are simply toothless when push comes to shove on the international level. Further answers to deeper questions why this rather simple observation so far seems to remain largely unseen, might also be sought within basic metaphysical assumptions of western society that propose universalist conceptions, e.g. concerning the western dichotomisation of subject and object as the basis for the whole advent of “law”. These basic assumptions are yet either unquestioned or even entirely unconscious.⁸⁸

4.5. Conclusion

As findings of our analysis in this chapter we want to emphasize two basic dialectical⁸⁹ conflicts of globalization. They are in our view, firstly, the conflict of kinship and reciprocity vs. impersonal state/centralized redistribution⁹⁰ on the one hand and secondly, the conflict of the state (public law) and market (private law) on the other. We will explore these dialectical relations in some more detail in the subsequent chapter.

5. Dialectical Relations

What is better: night or day?

Do you prefer breathing in or breathing out?

By putting these questions in front we are attempting to indicate what kind of a relation we are talking about, when we are using the term “dialectical relation”. It is a relation of two contradicting opposites, that in some way or form can’t do without each other. Relators of dialectical relations are depending on each other and yet are to some extent contradictory in their nature. Within this chapter we are going to explore two dialectical relations that we believe have apparently emerged out of the work at hand up to this point. The two dialectical relations are [State vs. Family](#) on the one hand and [State vs. Market](#) on the other.

5.1. State vs. Family

Why are state and family in a dialectical relation? How are these relating institutions in conflict? What could be causal of such a conflict? Our current answer is: it is primarily about personal vs. impersonal relationships and different kinds of trust. A “modern” state, certainly a democratic state of law, needs a meritocratic bureaucracy that *in principle* is able to act without looking at the person but the person’s performance, avoidance or forbearance of whatever kind. Yet, if the required state however does not have an impersonalized bureaucracy but a clientelistic and/or patrimonial one, then “equal application of the law” is even structurally inhibited. This thought, however, sounds as if “usually” a state administration “should” somehow be able to perform “equal application of the law” by default, making the inability of an administration to do so seemingly the exception of some

⁸⁸ Even one of our intellectual heroes, the almost always overly precise and overly well-read Wolfgang Stützel is rather blurry concerning this very point. See Stützel (1972, p. 203).

⁸⁹ See our [Topology of Dialectical Relations](#) in the appendix for further detail.

⁹⁰ We have already noted above that for Fukuyama equality before the law is “the most basic form of redistribution”, which is exactly what doesn’t work as long as state administrations are incapable of acting impersonally *in principle*, when they are occupied by vested interests. See footnote 25.

transcendental rule. When in actuality it is exactly the other way around: the meritocratic bureaucracy is the very exception to the rule:

"[...] the political patronage relationship, whether involving family or friends, is one of the most basic forms of human social organization in existence. It is **universal** because it is **natural** to human beings. **The big historical mystery that has to be solved is thus not why patronage exists but rather why in modern political systems it came to be outlawed and replaced by impersonal organization.** [...] **When such institutions break down, we revert to patronage and nepotism as a default form of sociability.**"⁹¹

If patronage and nepotism are default form of sociability they should be widespread all around the world, at least where there are no modern states that established a different kind of sociability. Is there a map of the world showing where states have meritocratic bureaucracies and where people are more relying on a "default form of sociability"? Such a map we couldn't find as of yet - even though we will show maps concerning so-called "corruption" below - but there are several indications, for example we can contrast the International Property Rights Index map of 2011⁹² in figure 4 with the Fragile States Index map of 2014⁹³ in figure 5.

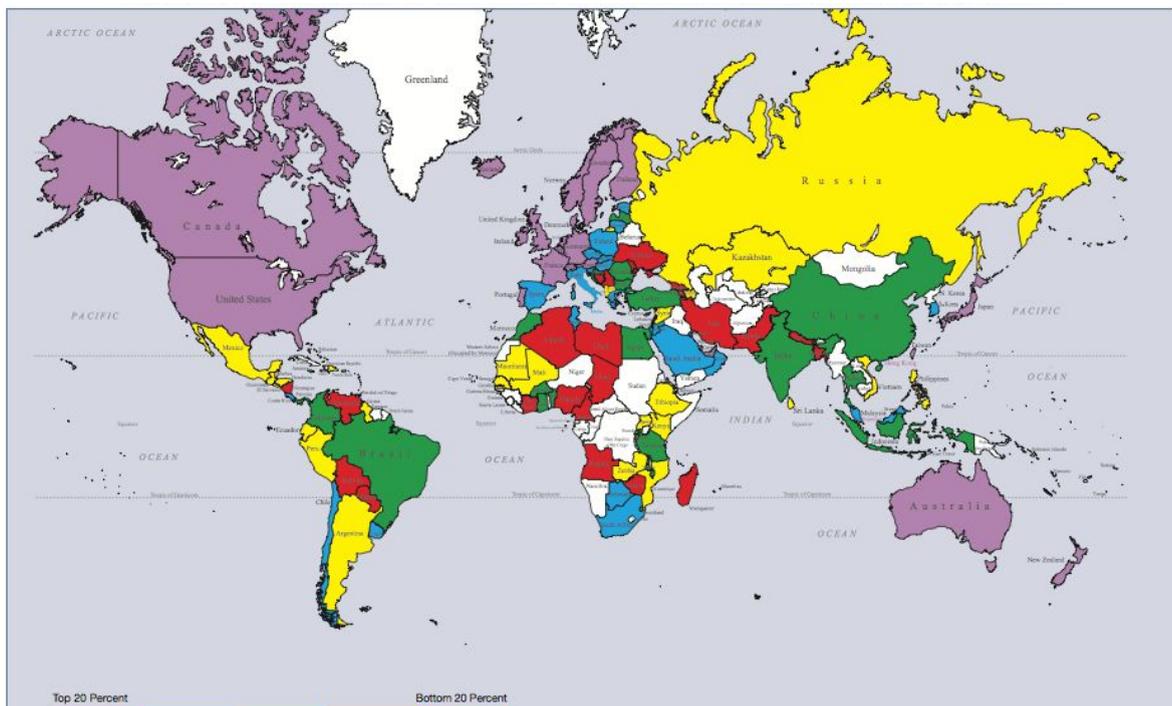


Figure 4: Map of the World Depicting the International Property Rights Index of 2011 by Quintiles.

Even a short glimpse on both of these maps in figure 4 and 5 suggest a correlation between the protection of property rights and the stability of states. Probably counterintuitively for the non-institutionalist liberal "*get government out of the way and the economy will flourish*" faction, the protection of property rights is best in those countries that have the most stable states. We are drawn to conclude that property rights, civil rights and basic freedoms are most secure where states are strong and not where states are weak. Even though both maps

⁹¹ Fukuyama (2014, pp. 88-89).

⁹² Jackson (2011, p. 2).

⁹³

show the world as a whole, please note that on both maps there is a kind of border running through Europe, separating one part of Europe as one with more stable states and more secure property rights, the other part of Europe having less secure property rights and less stable states. This border is not identical with the former border of the east/west conflict, which was a conflict that certainly had part of its roots in the dialectical relation of state vs. market. Please keep that in mind as we are attempting a [Brief Outlook on European Unification](#) in the final chapter of this work.

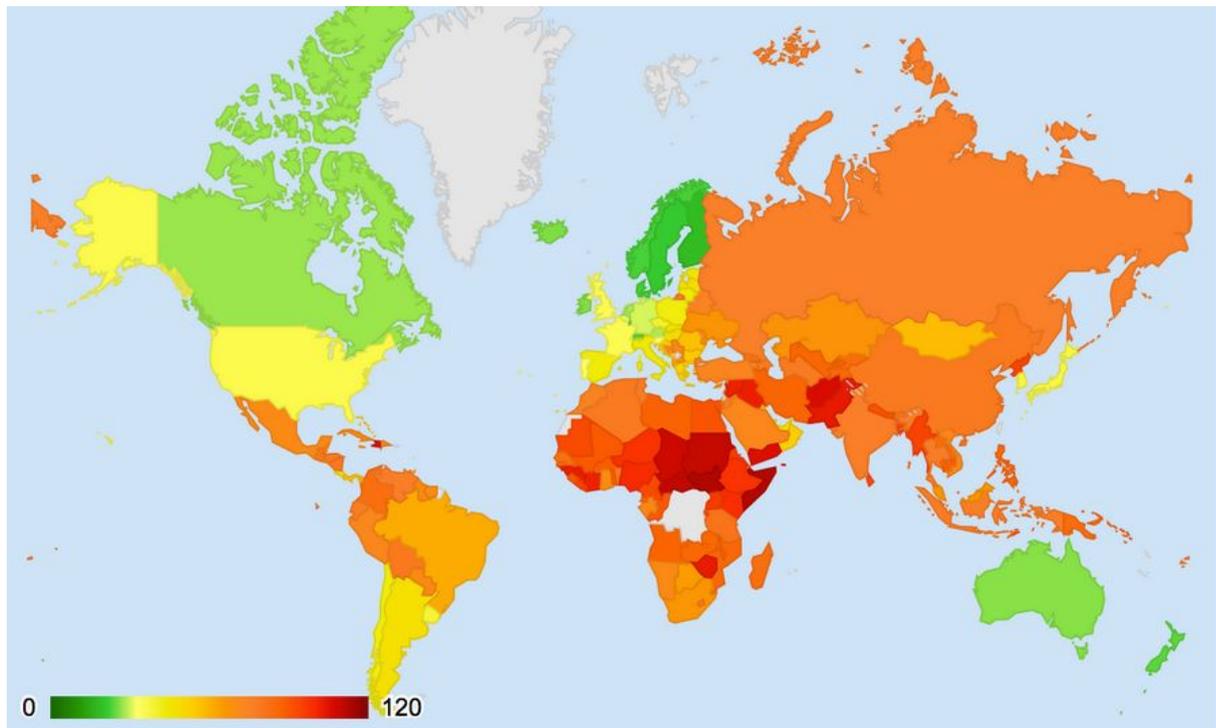


Figure 5: Map of the World Depicting the Fragile States Index of 2014.

Does a lacking or a not very well functioning modern state, that would be responsible for reliable enforcement of legal relations, mean that there is absolutely no enforcement possible at all? As we have seen above in the comparative tables of contract vs. reciprocity, it is not that there is no enforcement at all without reliable modern state institutions, but the kind of enforcement is distinctly different from the enforcement expected to be carried out by a modern state. Within reciprocal relations (i.e. not *legal* relations) enforcement is done by gossip and other rather tender methods of self-help, but can also be vigilantism and even harsher methods depending on the consideration of how far away from home or how “foreign” the assumed perpetrator is perceived by the vigilant justices. As Fukuyama in our view very correctly points out, referring to the work of Diego Gambetta:

“[T]he Mafia is simply a private organisation performing a service that normally would be performed by the state [...]”⁹⁴

If significant parts of the private parties within state don’t have the expectation, that, if need be, they can rely upon legal institutions of the state to effectively help in situations of conflict, what methods and institutions are these private parties alternatively relying upon? Could ignorance of the role of the state have helped in the rise of organized crime? Fukuyama

⁹⁴ Fukuyama (2014, p. 114).

asserts that “protection markets” might become violently competitive themselves as soon as the enforcement of legal relations and protection of property rights is not performed by reliable state institutions creating a monopoly of force.⁹⁵ The abolition of or non-existence of the states power monopoly creates a power oligopoly⁹⁶, with all the consequences of extra-legal conflict “resolution” or further aggravation. The German professor of law and banker Rudolf Kaulla asserts concerning the role of the state:

"The **abstraction from the state** in reality does not describe a stateless, anarchic condition, but on the contrary: it **presupposes a state of ideal stability** in all its institutions and functions, so its influence on economic actors can be presupposed as constant and therefore abstracted from."⁹⁷

Naive abstraction of the state does not take the state away in actuality, but simply assumes that a perfectly functioning state already existed, henceforth ignoring human nature, which the institution “family” and kinship in general certainly is an essential part of.

5.2. State vs. Market

To a certain extent state institutions have indeed attempted to do without the market (private law institutions), and also vice versa. Depending on the very historical situation and condition of institutions and given that we don’t assume it is a simple one-dimensional transition we are talking about here, some oscillation between state and market seems indeed unavoidable. But in which historical and institutional circumstances are we supposed to do what exactly? “More state”? What does that mean exactly, better state institutions (+ state ↑)? Or worsen private law legal institutions (- market ↓)? Can the quality of state institutions be assessed? Or is the situation such, that “more market” seems the solution? But what does that mean precisely? Is it the dismantling of public law legal institutions (- state ↓) or the building of private law legal institutions (+ market ↑)? The result of too much state and too little market can result in totalitarianism and eventual economic collapse, as the private law institutions might be taken away by public actors from the majority of citizens, so they can’t do business successfully. The result of too much market and too weak states on the other hand will probably yield the result of an oligarchy, with extremely wealthy individuals and extremely poor individuals. Again, economic collapse or crisis is the result, in this case however private actors were successful in expropriating a majority of citizens.

The dialectic of state vs. market is also the dialectic of public (law) vs. private (law), and if we define so-called “corruption”, as “the appropriation of public resources for private gain”⁹⁸, then we see that there can only be corruption of this particular definition, if a “public” indeed exists in the first place. “Corruption”, then, is basically *created* by state and law, in the sense that in communities of stateless reciprocity the concept of corruption of this kind does not even exist.

This view, combined with the insight that public institutions are not simply always available and certainly not in well designed fashion, makes us realize how “corruption” might be an unavoidable step towards a modern state, for it is inconceivable to have a society based on kinship and reciprocity on one day - the whole of society being entirely unaware even of the

⁹⁵ Ibid. (2014, p. 115).

⁹⁶ A power polypoly would arguably be the anarchist dream of “(almost) no power for no one.”

⁹⁷ Kaulla (1916, p. 300-301).

⁹⁸ Fukuyama (2014, p. 83).

concept of corruption - and the next day a perfectly modern administration is established. Can such an administration even theoretically be non-corrupt, i.e. perfectly “modern”, from day one? In our view the phenomenon of “corruption”, is a stage on the way to proverbial “Denmark” that simply can’t be skipped. What looks like “corruption” viewed from the position of law, is a completely natural mode of human behavior. So, the question is not how can corruption exist, but the question is: how did impersonal, perfectly modern, non-corrupt state administrations emerge? We have attempted an answer with the help of Fukuyama in our example of [Prussia](#) above. But we know that “not all good things go together”, and even with some good things and some bad things, the chronology of those “things” certainly wasn’t always the same. So, what actually is the perceived “corruption” in nation states worldwide, granted that some corruption exists within every nation? We attempt a visual answer by including the Corruption Across the World Visualized⁹⁹ as figure 6 into our work below:

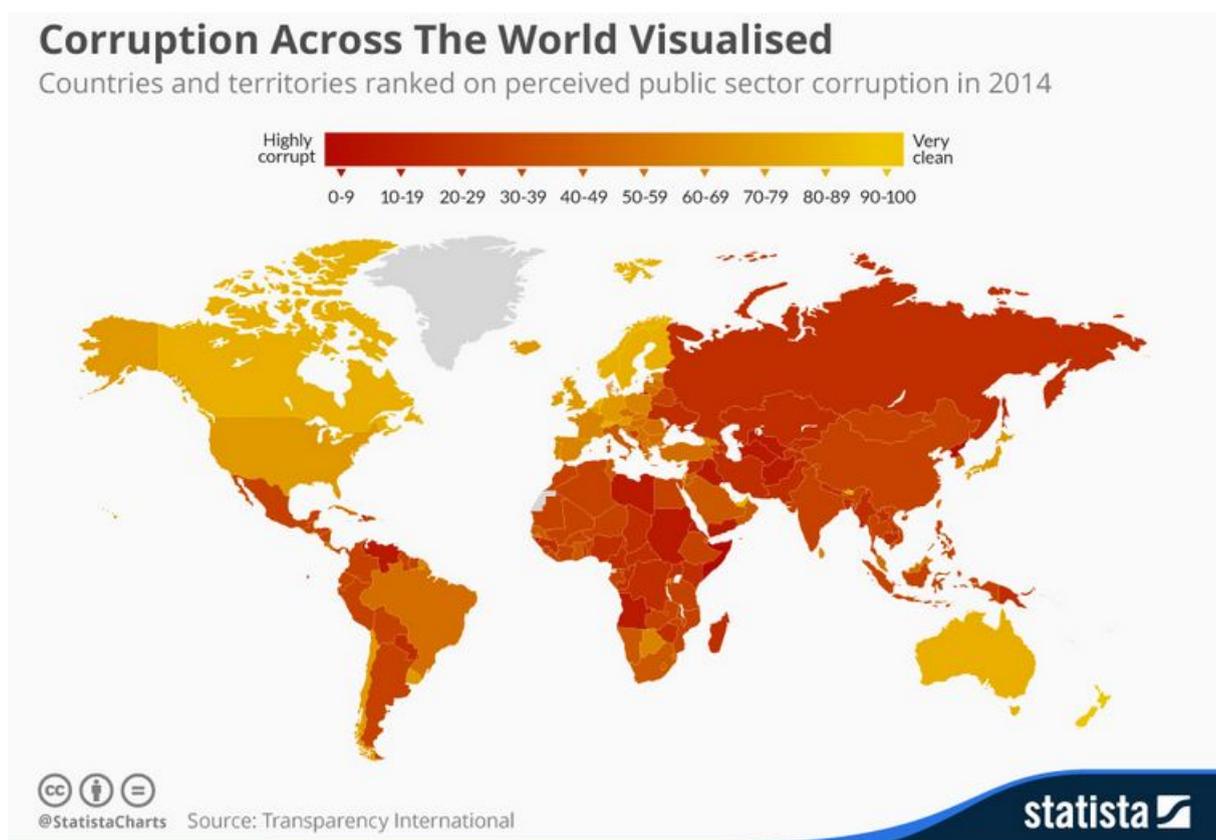


Figure 6: Map of the World Depicting the Corruption Across the World of 2015.

Albeit in different base colours, we see basically very similar color gradients worldwide, if we compare the gradients on this map with the ones on the two previous ones. The western nation states always being amongst the least corrupt, with the strongest states (public law legal institutions) and the best protection of property rights (indicator for the quality of private law legal institutions). We have to admit however, that our data here stems out of western states, so we might want to further explore these gradients, ideally powered by data from outside the west, ensuingly comparing the results. This is indicating a correlation of *quality of state institutions* and “corruption” just as we supposed should be visible.

⁹⁹ McCarthy (2015).

In table 6 below we are finally delineating the dialectical relation of public law (state) and private law (market) once again in a nutshell.

← Dialectic →	
Public Law (<i>ius publicum</i>) <i>res publica</i>	Private Law (<i>ius privatum</i>) <i>res privata</i>
State	Civil Society
Monopoly of Force	Plurality of Forces
Centralization of Sovereignty/Decisionmaking	<u>Decentralization</u> of Sovereignty/Decisionmaking
Subordination, Command	Freedom, Consent
Whole / Totality Centralization	Part / Plurality <u>Decentralization</u>

Table 6: The Dialectic of State (Public Law) and Market (Private Law)

Please note the different dialectical dimensions within the single dialectical relation of Private Law and Public Law itself. The most general dialectical relation in our view, is that of centralization vs. decentralization that the dialectical relation of public law vs. private law is a mere subtype of.¹⁰⁰

Finally, and in the closing of this chapter, we depict a summarizing table below (table 7) on institutional *quality*. Given the state of the world as depicted on the maps above, there seems some obvious room for improvement in the quality of public law legal institutions, which we want to possibly enable by at least most clearly stating what *should* be aimed for, once a specific goal - say: a “modern” bureaucracy for any one state - is set:¹⁰¹

	Modern (impersonal) bureaucratic	Neopatrimonial
Gap Written / Lived Law	<i>small</i>	<i>big</i>
Private/Public Distinction	<i>clear</i>	<i>blurred</i>
Recruitment	<i>by merit (civil service examinations)</i>	<i>by kinship / friendship (nepotism, clientelism)</i>

¹⁰⁰ Again, we point to our somewhat more detailed [Typology of Dialectical Relations](#) in the appendix for further investigation.

¹⁰¹ Based on Erdmann/Engel (2006), Fukuyama (2011, 2014), F. referencing Max Weber multiple times, specifically also concerning the criteria of well functioning bureaucracy (Fukuyama 2014, Note 4. on p. 562).

Employment of public servants	<i>full time, by contract</i>	<i>often part time extra job & income needed</i>
Salary	<i>good to enable and ensure loyalty</i>	<i>bad need for bribes & rent-seeking</i>
Corruption level	<i>low</i>	<i>high</i>

Table 7: Summary of Distinctions in the Quality of State Institutions

Let us lastly dare to take a look - not onto the world as a whole - but now on the current state of the European Union or more generally the process of European Unification that seems to have stuttered for quite some time and with the whole matter of “Brexit” certainly came to a screeching halt. At least for now. Let’s take a closer look.

6. Brief Outlook on European Unification

In the chapter on the [Emergence of Key Legal Institutions](#) above, we have shown different distinct, yet interwoven transitions that need to take place, if a stateless enterprise is to become a democratically and modern state. Can these transitions towards a modern state be found in every european nation state? In which countries can they be found? Have the specific transitions and their temporal progression yielded institutions of equivalent quality within the respective nation states?

6.1. Current State of the EU is unsustainable

We are expanding here on a thought laid out in Hofer/Theil (2016). We mentioned in our preceding work that we believed certain “legal and fiscal infrastructure (“institutions)” was lacking “in certain individual nation states within Europe and within the non-law, inter-state European Union as a political entity itself”. If the decisionmakers of the EU actually want it to survive and possibly become a federation, we are still standing by our thought that certain legal institutions are lacking. We were also mentioning the German constitutional court in the previous paper, calling the EU a “völkerrechtlicher Herrschaftsverband”, i.e. a “ruling organization based on public international law”.¹⁰²

And that is the point, because public international *law* carries but the name of “law”, yet it is no law in the most narrow sense, since it is not enforceable. Remember Germany violating the Maastricht Treaty the first time in 2002, because they could?¹⁰³ We mentioned Hoebel above, he was calling it primitive law, we are calling it non-law, for the purpose of being able to very clearly distinguish. A “ruling organization based on public international law” is no state. Hegel knew this, and Fukuyama does so too:

¹⁰² Cited after Hofer/Theil (2016, footnote 10).

¹⁰³ Just like Germany, France also violated the treaty and it happened precisely nothing to both states of significance. Would the same apply to parties in breach of contract in private law? Only if the creditor (dominus) so chose. Who are the dominating parties in the EU?

“[...] we would have to imagine a group of tribesmen one day and saying to each other, “We could become a lot richer if we turned over our cherished freedom to a dictator, who would be responsible for managing a huge hydraulic-engineering project, the likes of which the world has never seen before. And we will give up that freedom not just for the duration of the project, but for all time, because future generations will need a good project manager as well.” If this scenario were plausible, **the European Union would have turned into a state long ago.**”¹⁰⁴

Currently the institutional quality and therefore the levels of so-called “corruption” are varying to a great extent amongst the individual European nation states of the European Union. In light of our findings so far, one is prone to ask how much “Rousseau” actually is still within the legal institutional structure of the European Union. It certainly has a legal institutional structure today that is not at all like the legal institutional structure we have carved-out in our chapter on [Legal Structure of Open Societies](#). Judging by the results the EU administration itself is - granted superficially viewed - yielding, it is not exactly we are made to believe the holy grail of legal structures for open societies was found, even though the EU certainly is a “sui generis” legal subject of - so-called - public international law. But not only the EU itself has major institutional challenges ahead itself, as we can take from figure 7 below:¹⁰⁵

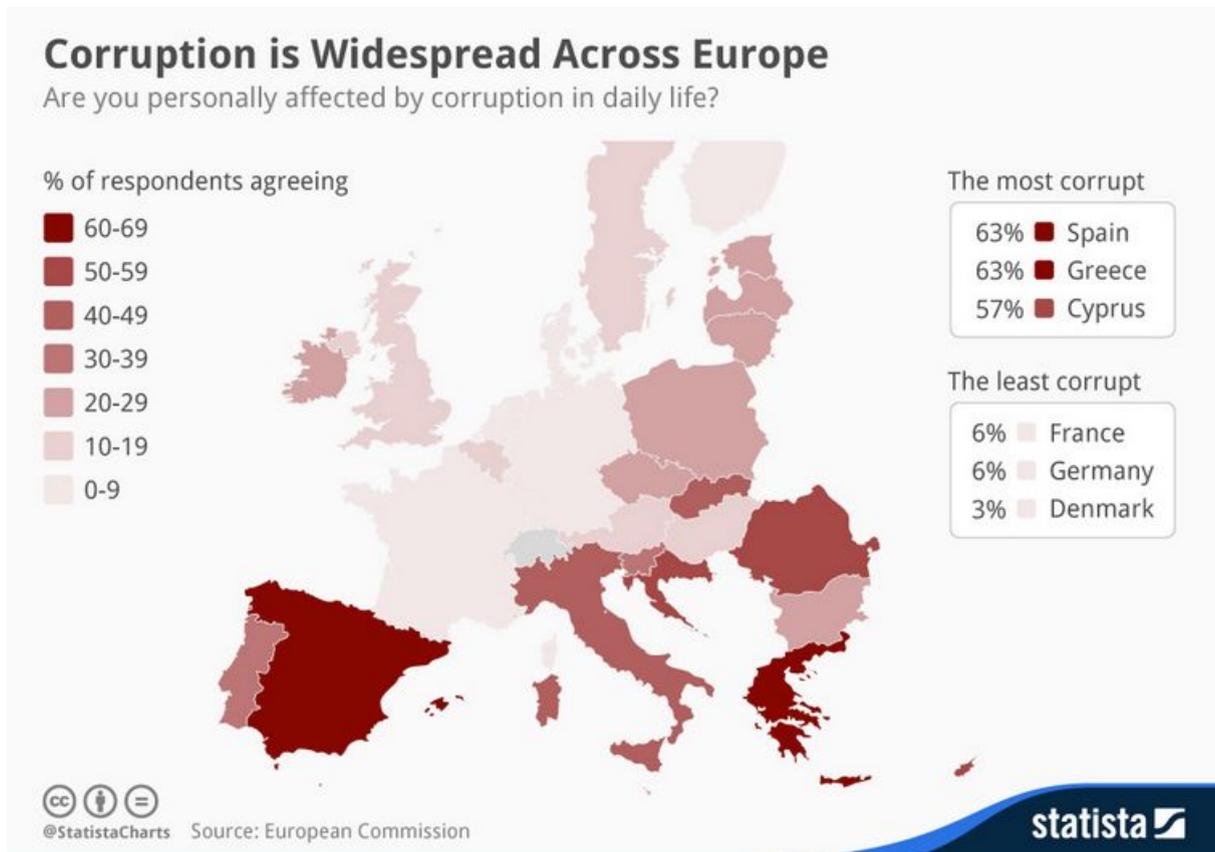


Figure 7: Map of Europe Depicting the Corruption Across the EU in 2014.

As the survey was done by the European Commission it is comprehensible that data on non-EU states is missing in this figure. But even by looking only at EU states and their depiction in coloured gradation, we see greatly varying levels of perceived “corruption” in

¹⁰⁴ Fukuyama (2011, p. 83).

¹⁰⁵ McCarthy (2014).

“daily life” in several EU countries.¹⁰⁶ Specifically Spain and Italy, with about 46 and 61 million in population respectively, catch our eye. Both are big countries, but seem to have also considerably big problems with “corruption”, possibly indicating massive challenges within their legal institutional structure. Once again Fukuyama brilliantly hits the nail on the head:

“The real division [of “Northern” and “Southern” or “peripheral” Europe] is not a cultural one, [...] if we define culture by religious heritage; it is between a clientelistic and nonclientelistic Europe.”¹⁰⁷

Observing that the EU currently has a common currency union and a common trade union but does not have a federal state, combined with the legal institutional challenges within individual nation states the EU seems unsustainable in its current state. Admittedly, this topic needs a much more detailed analysis of the actual legal institutional structure of the EU and also the Eurozone, but even only given what we have learned so far, we would be greatly surprised if the EU was sustainable in its current state. In the long run either a bold step of centralization of power on the European level happens (Centralization II: Federal State), ideally accompanied by steps of Centralization I within certain, rather weak, nation states, or the Union will simply disintegrate in the medium term.

6.2. Towards a European Republic?

The German legal scholar Georg Jellinek very unambiguously states:

“The federal state is the only healthy and normal form of a political association of states”¹⁰⁸

Ironically, “Brexit” might provide a chance for centralization of power on the European level, that would have been inevitable anyhow, but could be possibly easier done without the UK, than with the UK in the EU. But it could also strengthen in the short term the “ever closer union” faction within France and Germany, that basically want to go on as they did in the past 20 some years and therefore the much needed bold step might fail to materialize.

What about “democracy”? Do we not need a “democratization” of the EU or at least of the Eurozone? What does “democratization” actually mean exactly?

“A number of the most successful modern states were created under authoritarian conditions, often by countries facing severe national security threats. This is true of ancient China, Prussia/Germany, modern Japan, and a handful of other countries. By contrast, when democracy is introduced prior to the consolidation of a modern state, it often has the effect of weakening the quality of government. The prime example of this is the United States, which invented clientelistic party government after the opening up of the democratic franchise in the 1820s and was thereafter saddled with a patronage-riddled bureaucracy for much of the next century. This is also the story of

¹⁰⁶ Comparing this survey that the European Commission has done within the EU concerning corruption with the “Corruption Across the World Visualized” we depicted above, and we are therein looking for European states, we see some differences in their findings, but also commonalities. These indices are “perception” indices and perceptions certainly are prone to change. Nonetheless, in both surveys certain differences within European nation states can be clearly observed.

¹⁰⁷ Fukuyama (2014, p. 96, our emph.).

¹⁰⁸ German orig.: “Der Bundesstaat als einzig gesunde und normale Form der Staatenverbindungen politischer Art” (Jellinek 1905, pp. 787-789, our translation and emph.).

Greece and Italy, both of which developed sophisticated clientelistic systems that impeded the growth of modern state administrations. Clientelism remains pervasive among democratic countries in the developing world and undermines the quality of governments from India and Mexico to Kenya and the Philippines.”

We do not advocate authoritarianism here, but are simply attempting to observe actual historical developments, in the hopes to learn as much as possible from them, to not necessarily be poised to make certain mistakes twice, if it can be avoided. But Fukuyama isn't done:

“[T]he idea that public officials should be constrained by strict rules and stripped of administrative discretion runs contrary to the most common complaint about government, namely, that it is too rule bound, rigid, and lacking in common sense.”

Not even the idea of greater transparency, that was advocated very intensively by the upcoming young and tech-savvy “Pirate Party” in a number of European countries in the late 2000s and early 2010s is considered some kind of golden key by Fukuyama. Instead he finds:

“Moreover, the idea that greater transparency and accountability is a necessary path to better bureaucracy flies in the face of a great deal of history, in which relatively clean [non-corrupt, A/N], modern bureaucracies have been built under nondemocratic circumstances.

[...]

All of this suggests that **state building and democracy building are not the same thing, and in the short run they often exist in a great deal of tension with one another.** There may be other routes to good government, and indeed democracy may under certain circumstances be an obstacle rather than an advantage. We need a more sophisticated theory of public administration, one that pays particular attention to the interface among state administration, law, and democratic accountability.”¹⁰⁹

Let's hope this more sophisticated theory of public administration will be available soon for everyone interested in progressing the idea of european unification. Hopefully, we were able to contribute - albeit marginally - towards a more sophisticated theory of public administration, by the legal institutionalist viewpoint on open societies we shared in this work.

¹⁰⁹ Fukuyama (2014, p. 508).

7. References

- Bergson, H., 1932. Les deux sources de la morale et de la religion.
- Braun, Johann. 2001 [1997]. *Einführung in die Rechtswissenschaft* ("Introduction to Legal Studies"). Mohr Siebeck 2001.
- Burke, E., 1890 [1790]. Reflections on the Revolution in France. Macmillan.
- Commons, John R. 1924. Legal Foundations of Capitalism. New York: Macmillan.
- Commons, John R. 1934. Institutional Economics. Its Place in Political Economy. New Brunswick: Transaction Publishers 1990.
- Corbin, A.L., 1919. Legal analysis and terminology. The Yale Law Journal 29, 163–173.
- Deakin, S., Gindis, D., Hodgson, G.M., Kainan, H., Pistor, K., 2015. Legal Institutionalism: Capitalism and the Constitutive Role of Law. University of Cambridge Faculty of Law Research Paper.
- Eliade, M., 1959. The Sacred and the Profane: The Nature of Religion. Houghton Mifflin Harcourt.
- Erdmann, G., Engel, U. 2006. "Neopatrimonialism Revisited – Beyond a Catch-All Concept". In Hoffmann, Bert. *GIGA Working Papers*. German Institute of Global and Area Studies. No. 16. Online at http://repec.giga-hamburg.de/pdf/giga_06_wp16_erdmann-engel.pdf, last accessed Aug. 31st, 2017.
- Fukuyama, Francis. 2011. Origins of Political Order. From Prehuman Times to the French Revolution. New York: Farrar, Straus & Giroux.
- Fukuyama, Francis. 2014. Political Order and Political Decay. From the Industrial Revolution to the Globalization of Democracy. London: Profile Books
- Goethe, J., 1808. Faust. Eine Tragödie.
- Grass, R.-D., Stützel, W., 1983. Volkswirtschaftslehre: eine Einführung auch für Fachfremde. Vahlen.
- Haken, N., Messner, J., Hendry, K., Taft, P., Lawrence, K., Brisard, L., Umana, F., 2014. Fragile States Index 2014. Washington DC: The Fund for Peace.
- Hegel, G.W.F., 1821. Grundlinien der Philosophie des Rechts.
- Hegel, G.W.F., 1896. Hegel's Philosophy of Right, ed. SW Dyde, London: George Bell and Sons.
- Hoebel, E. Adamson. 1954. The Law of Primitive Man. Cambridge, Mass.: Harvard University Press, p.331
- Hofer, N., Theil, W., 2016. Why Assets Are Not Things, Why Buying Is Not Paying and Why a New Macroeconomic Paradigm Needs to Add Both. Online at https://www.academia.edu/27708303/Why_Assets_Are_Not_Things_Why_Buying_Is_Not_Paying_and_Why_a_New_Macroeconomic_Paradigm_Needs_to_Add_Both, last accessed Aug. 31st, 2017.
- Hohfeld, W.N., 1913. Some fundamental legal conceptions as applied in judicial reasoning. The Yale Law Journal 23, 16–59.
- Jackson, K.A., 2011. International property rights index: 2011 report.
- Jellinek, G., 1905. Allgemeine Staatslehre, vol. I. Das Recht des modernen Staates.
- Kaulla, R., 1916. Das Objekt des Tauscherts, in: Festschrift Für Lujo Brentano Zum 70. Geburtstag. Duncker & Humblot, Leipzig. Online at <https://archive.org/details/festschriftfrl00bren>, last accessed Aug. 31st, 2017.
- Kihara, L., 2013. Six major central banks make currency swap accords permanent. Reuters.
- List, F., 1841. Das nationale System der politischen Oekonomie. Erster Band. Der internationale Handel, die Handelspolitik und der deutsche Zollverein. Stuttgart, Tübingen.

- Marshall, L., 1976. *The! Kung of Nyae Nyae*. Harvard University Press.
- Marshall, L., 1961. Sharing, Talking, and Giving: Relief of Social Tensions Among !Kung Bushmen. *Africa* 31, 231–249.
- Mauss, M., 2000. *The Gift: The Form and Reason for Exchange in Archaic Societies*. WW Norton & Company.
- McCarthy, N., 2015. Infographic: Corruption Across The World Visualised [WWW Document]. Statista Infographics. URL <https://www.statista.com/chart/3878/corruption-across-the-world-visualised/>, last accessed Aug. 31st, 2017.
- McCarthy, N., 2014. Infographic: Corruption is Widespread Across Europe [WWW Document]. Statista Infographics. URL <https://www.statista.com/chart/1853/corruption-is-widespread-across-europe/>, last accessed Aug. 31st, 2017.
- Nicholas, B., 1962. *An Introduction to Roman Law*.
- Pistor, K., Raiser, M., Gelfer, S., 2000. Law and Finance in Transition Economies. *Economics of transition* 8, 325–368.
- Popper, K., 1957 [1945]. *The Open Society and its Enemies*, vol. I: *The Spell of Plato*, Londres, Reino Unido.
- Rousseau, J.-J., 1762a. *Rousseau: Social Contract: Book I*. Online at http://www.constitution.org/jjr/socon_01.htm, last accessed Aug. 31st, 2017.
- Rousseau, J.-J., 1762b. *Rousseau: Social Contract: Book IV*. Online at http://www.constitution.org/jjr/socon_04.htm, last accessed Aug. 31st, 2017.
- Sahlins, M.D., 1974. *Stone Age Economics*. Transaction Publishers.
- Schiffes, S., 2009. Can banking regulation go global?
- Stützel, W., 1972. *Preis, Wert und Macht: analytische Theorie des Verhältnisses der Wirtschaft zum Staat*. Scientia-Verlag.
- Theil, W., 2016. Systematic Legal Foundations for Monetary Economics: an Essential Step towards a New Paradigm for Political Economy. Online at https://www.academia.edu/31581486/Systematic_Legal_Foundations_for_Monetary_Economics_an_Essential_Step_towards_a_New_Paradigm_for_Political_Economy, last accessed Aug. 31st, 2017.
- Theil, W., Hofer, N., 2016. Systematic Legal Foundations for Monetary Economics - extended. Online at https://www.academia.edu/28405363/Systematic_Legal_Foundations_for_Monetary_Economics_-_extended, last accessed Aug. 31st, 2017.
- Vatiero, M., 2010. From WN Hohfeld to JR Commons, and Beyond? A “Law And Economics” Enquiry on Jural Relations. *American Journal Of Economics And Sociology* 69, 840–866.
- Wesel, U., 1979. Zur Entstehung von Recht in frühen Gesellschaften. *Kritische Justiz* 12, 233–252. Online at http://www.kj.nomos.de/fileadmin/kj/doc/1979/19793Wesel_S_233.pdf, last accessed Aug. 31st, 2017.
- Wesel, Uwe. 2006. *Geschichte des Rechts (History of Law)*. München: C.H. Beck.
- Wesel, Uwe. 2010. *Geschichte des Rechts in Europa (History of Law in Europe)*. München: C.H. Beck.

Appendix

I. Typology of Social Relations

- Stateless customary/moral relations
 - Generalized (or positive) reciprocity
 - Balanced reciprocity
 - Negative reciprocity
- Intra state relations (state = central authority)
 - Intra state *customary/moral* relations (i.e. no personal freedom (private law) and no political freedom (constitutional law))
 - Moral order
 - Religious command
 - Intra state *legal* relations (with a central authority, i.e. a state)
 - Legal relations in public law
 - Legal relations in private law
 - Property (multiple legal relations, some multital (Hohfeld))
 - Contract (at least two paucital legal relations (Hohfeld))
- Inter state relations (states as subjects)
 - Inter state reciprocity
 - Generalized (positive): certain interstate relations under specific circumstances, maybe common language, culture, etc.
 - Balanced: diplomacy
 - Negative: retaliation (incl. trade), sanctions, war
 - Inter state non-law relations, using legal terminology
 - Public International Law (“so-called”, Hoebel 1954)
 - No central authority, i.e. no state, no legal *actuality*, but:
 - Legal *terminology*: e.g. “Contracts under International Law”
- Legal relations involving legal persons in multiple jurisdictions (Private International Law or *Conflict of Laws*)
 - Natural persons involved
 - Natural persons \longleftrightarrow Natural persons (e.g. marriage)
 - Natural persons \longleftrightarrow Legal entity (e.g. cross border purchase)
 - Only legal entities
 - Intra enterprise legal relations (enterprises with multiple legal persons under their control, “trading” within the private organization)
 - Inter enterprise legal relations (enterprises trading across borders)
 - There are specific problems within Conflict of Laws to find the relevant legal central authority if a conflict is making that necessary, but at least there *are* central legal authorities available in general as opposed to International Public Law, so-called, where a central authority is generally missing]

II. Typology of Dialectical Relations

- Centralization vs Non-Centralization
 - State vs Family (Kinship)

- Enforcement by independent third party (state) vs. other types of enforcement (e.g. group pressure) but not by independent anonymous third party (family)
 - Law vs Non-Law (Custom, Reciprocity, International “Law”)
 - National Private Law vs Public International “Law”
 - Enforceable vs. non-enforceable contracts
 - Centralization vs Decentralization *in Law*
 - Public Law vs Private Law
 - Public Law vs Constitutional Law

III. Comparative Table: Stateless Communities vs. Law

Stateless communities	Law today
Conflict resolution by consent after talks and proceedings with conflicting parties	Conflict resolution by decision of a court after hearings of the parties to the dispute
If need be: self-help, vigilantism, private force	If need be: enforcement by public powers (bailiffs, penal institutions)
Little differentiation of mediating persons as special institutions of social order	Sharp distinction of institutions that need to decide in cases of conflict from the rest of the social structure
self-regulating	regulating
Static, conservative	changing, progressive
collectivist	individualizing
Concrete personal, unison of person and action	Abstract impersonal, distinction of person and action
compensatory	punishing
Compromising, without normatively calculable results	Rational, with normatively calculable result
structurally relative	territorially uniform
Norms have the functions of order and justice	Norms have the functions of order, justice, dominion and supervision of dominion
Uniformity of structure of norms	Separation of law, religion, morals and custom

Source: Wesel (1997, pp. 51-52, our translation)