Introduction

I.

> "To prevent the weaker members of the community from being preyed upon by innumerable vultures, it was needful that there should be an animal of prey stronger than the rest, commissioned to keep them down. But the king of the vultures would be no less bent upon preying on the flock than any of the minor harpies [...]."

This passage from John Stuart Mill's *On Liberty* (1859) vividly allegorizes what happens when the powerful remain unchecked. In his text, the British philosopher calls for a constitution to defend the "flock" from their "beak and claws". In a world where autocratic tendencies are becoming increasingly popular and constitutional values seem jeopardized in several countries around the globe this topic appears to be as important today as it was back in the year 1859.

It was already Mill who claimed "limits to the power which the ruler should be suffered to exercise over the community". Following this idea, the first part of the title, "Legality and Limitations of Powers" emphasizes the maxim of legality as an essential and constitutionally prescribed aspect of power limitation. However, as reflected by the second part of the title, "Values, Principles, and Regulations in Civil Law, Criminal Law, and Public Law", this volume does not focus on solely constitutional aspects but allows authors to deal with different manifestations of that idea and the implications of the legality maxim in their areas of law. Here, the "law" is understood to be the overall designation for the respective legal area on the German and South African side. Both nations unite the need for power limitations to a socially sound and legally envisaged level. At the same time, parallel structures can be revealed. Nevertheless, due to the different legal traditions, different approaches are available, each of which is critically examined.

The concept of the symposium between the law schools from Augsburg and Johannesburg, however, again demonstrates immense will and interest in learning from the respective other legal system. Interesting parallels have been uncovered, not least through the Augsburg-Johannesburg conference.

This publication constitutes a further step towards a deeper cooperation between both nations in the legal field.

II.

This volume starts with the contribution of *Rensmann* on normative values in modern constitutionalism. He hereby relates to the 60th anniversary of the *Lüth* decision, the leading case for "value-oriented" constitutionalism in Germany, although it is not a German invention. His remarks revisit the *Lüth* judgement with a view to developing the contention that the "value-oriented" jurisprudence of the German Federal Constitutional Court is not as idiosyncratically German as many German constitutional lawyers would like us to believe. The conceptual development leading up to the famous *Lüth* dictum of the constitution as an "objective value system", is instead closely linked to the emergence of international human rights law – and hence from its very beginnings the result of an intense transnational and inter-cultural discourse. He points out that although we live in different hemispheres and although our legal systems are embedded in different cultural, social and political contexts, Germans and South Africans are united by a distinctive "value-oriented" vision of the constitution. As the Constitutional Court of South Africa famously stated in Carmichele v. Minister of Safety and Security, the South African Constitution "is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system". Whereas human dignity, proportionality, and all other attributes of modern "value-oriented" constitutionalism are inextricably woven into the fabric of the South African Constitution, the text of the German Constitution ("Basic Law") is much more ambiguous in this regard. *Rensmann* concludes that *Lüth* constituted a milestone in the evolution of "value-oriented" and human rights-based constitutionalism to which both the German and the South African constitutions subscribe.

Venter comments on the paper, stating that values and principles play a central role in the South African Constitution because they created a new democratic system and transformed society, even though there is criticism that it has not lived up to its goals. However, transformation takes time and is hard to measure. In the end, there is no ultimate transformation that can be reached. In this process, however, she calls for constitutional values to be our guide so that every application of these values leaves society and the legal system more transformed than it was before.

Starting with a statement of J.H.H. Weiler that the enhancing importance of constitutional identity replaces the former discussion about the much-contested concept of state sovereignty, *Hölzlwimmer* analyses the potentials of the legal concept of constitutional identity in (quasi-)federal systems of

government to find a balance of powers between federal and sub-federal bodies in general, but concurrently raises cautions against an extended use of this notion leading to judicial activism contradicting the principle of separation of powers. She first focuses on the concept of constitutional identity from a Member State's view and in particular its interpretation and application in the case law of the German Constitutional Court as national constitutional court with one of the longest traditions and hence most powerful voices within the European Union. Thereafter, the sides are switched and the meaning of constitutional identity is examined in detail from the European Union's point of view. In the following comparative part, it is questioned whether there is a common concept of constitutional identity within the European legal system. Evaluating the pros and cons of a legal concept of constitutional identity applied by the judiciary and predicting the future development of identity claims, in particular within the European Union but also regarding its transferability to other (quasi-) federal systems of government, she calls for a restrictive interpretation of national constitutional identity with respect to the principle of general openness towards European Union law and the principle of sincere cooperation between national and Union bodies. To protect the (quasi-) federal structure of the European project "unified in diversity", *Hölzlwimmer* suggests a more precise definition not solely on a case-by-case basis but also as a clear dogmatic structure and classification to support the efficacy of this legal remedy within the European Union.

In this context *Barrie* reclaims the fundamental ideas and historical roots of the European Union. Since it is an association of sovereign states without a European Federal Constitution or federal people, the EU is not an incipient federal state but a quasi-federation. The aim of the Maastricht Treaty was to integrate the member states to a tighter economic and political union. He points out the importance of the principle of subsidiarity to guarantee the autonomy of the member states. *Barrie* also refers to Australia, where there is a debate on subsidiarity because the legislative powers were influenced by the Commonwealth. Similar to the EU there is the problem of losing constitutional identity. His solution is a stricter application of the principle of subsidiarity.

Rossi's contribution initially gives an overview of the basic principles of democracy and the constitution. The paper then points out that democratic legislation and the binding nature of a constitution can't be viewed as antipodes and sets out the multidimensional relations between them which enable societies to develop a self-determined life. Liberating stability and flexibility must be brought into balance, otherwise they threaten to damage the

constitution and democracy. The article focusses on liberating stability through concepts such as liability, stability evolving from historical experience, stability through resilience and unchangeable core guarantees. The next chapter is devoted to the democratic principles where *Rossi* states that democracy stands less for stability than for flexibility. *Rossi* then points out the reasons for this flexibility and why flexibility is necessary in the political process.

In her response to Rossi's paper, *Roux* views the model of constitutional democracy as described in Rossi's paper in light of the historical background of the South African Constitution. Applying it to the South African Constitution she tests whether it holds true for the South African modern constitutional democracy. The paper starts with the concept of a constitution as an "anchor of stability" as described by Rossi, which is reflected in a constitution as an "historical experience", as a regulatory framework, and lastly in its "changeability" that is the "guarantee" to its "self-preservation". The paper also focuses on Rossi's concepts of "democratic flexibility", as reflected in "governance for a limited period of time", in "legislative amendment as the standard type of law", and finally in "political self-restriction". Especially in ever and fast moving times, in the ever-changing context, the South African Constitution cannot ignore the circumstances in which it finds application. Therefore, the Constitution has to transform again by coming into its own by realising its purpose. At the same time, Roux concludes, as being transformative, and as it were, flexible, it will have to provide much-needed stability in a South African society that is finding it a challenge to continue believing in the high aspirations of the constitutional project.

In light of the before mentioned centuries of segregation and discrimination, holocaust and apartheid *Benecke* and *Henrico* refer to revolutionary efforts in both hemispheres to overcome discrimination. *Benecke* focuses on the European way to end discrimination. Since the EU passed the main directives regarding employment and social law around the year 2000, the Member States have been experimenting with various implementations. *Benecke* compares the German approach, the implementation of the *General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz/AGG)*, to the legislation of other Member States and sheds light on the effectiveness of the various procedural and material approaches. On one side, questions arise whether an act of discrimination should lead to criminal or civil consequences, whether the injured person, a law enforcement agency or a NGO should be able to bring an action and, if so, against whom the action should

be brought. On the other side, the paper covers questions whether the prohibited grounds should be exhaustive and how the directives' demands for damages can be adequately met without enabling fraud and abuse of the legislation. On his part, *Henrico* puts these legal problems into a South African context. The unique historical, social and legal circumstances of South Africa call for a special handling of discrimination. Consequently, *Henrico* explains how Sec. 9 of the South African Constitution protects the equality among all people. He describes how the legal framework in South Africa provides relief in the form of civil liability, how the legal protection covers a much wider area than just the workplace and how designated institutions investigate and institute class actions against perpetrators.

Our conference title, of course, also indicates the inclusion of a paper, with methodological questions addressing the heart of jurisprudence. The contribution of *Möllers* and *Brosig* presents a fundamental analysis on how to work with principles in Capital Markets Law. The paper starts with an overview of the meaning and the creation of legal principles. The authors outline the characteristics of legal principles and illustrate why it is important to distinguish between codified principles and unwritten legal principles when analysing the derivation of principles. They examine several different approaches to derivation in the literature and expose their flaws. Furthermore, they shine a light on the limits of the development of legal principles, i.e. how the arbitrariness of dogmatic justification is an issue. Eventually, the writers look at aspects of deduction and the formation of principles at a European level. In their outlook they conclude by stressing the importance of establishing legal principles at a European level and present implication for further research.

Ius est ars boni et aequi (law is the art of the good and the just): this statement by the ancient Roman jurist Celsius shows how law essentially is a dialectical, argumentative exercise of discourse and persuasion. *Van der Merwe* uses this quote to illustrate the great importance of principle in closing the inevitable gaps that every normative superstructure leaves. In his response to the paper by *Möllers* and *Brosig* he commends the authors on their work and shows how South African jurists deal with the application of principles as there is no South African "Methodenlehre". His response pictures how South African jurists harvest the fruits of Ancient Roman civil- and English case law. His comparison of the situation in South Africa and the situation in Europe shows how different approaches reach similar results.

Drawing our attention to law enforcement under US Antitrust Law and EU Competition Law, *Kort* brings up another aspect of legality. Analysing

leniency programmes under US antitrust law and EU competition law, *Kort* calls for a worldwide cooperation and coordination concerning leniency programmes, as leniency programmes are a key tool for competition authorities to uncover illegal cartels which often operate across borders. Companies thinking about coming clean need to know that they will benefit from leniency in the same way – whichever competition authority deals with the case. In his contribution, *Kort* compares leniency programmes in South Africa, the US and EU and finds much similarity between the different jurisdictions. As in the US and in Europe, leniency programmes in South Africa are only applicable to horizontal agreements (i.e. cartels) as such agreements are the most difficult to uncover. All three jurisdictions have in common that there is one central antitrust authority. Furthermore, in every focal region immunity only protects against fines imposed by the authorities but not from civil liability. This has made confidentiality a very important aspect in every country. As leniency programmes in the US were introduced much earlier than in other parts of the world its regulations served as a blueprint for other countries.

In turn, *Alberts* provide a closer look at the situation in South Africa and some thoughts on current questions in South African Competition Law. He briefly illustrates the role of the competition commission, the central competition authority in South Africa, and famous leniency cases, involving South African companies. The most important concern is that the effectiveness of leniency programmes might suffer from criminal prosecution of cartel conduct by the National Prosecution Authority (NPA) from which the Competition Commission cannot grant immunity. In order to ensure that leniency programmes remain an effective tool to combat such conduct a close cooperation between the two authorities is required. It remains to be seen whether this concept that has previously worked in other industrial countries will work in developing countries.

The principle of legality is the legal idea that requires all law to be clear, ascertainable and non-retrospective. In this context, *Biesinger* asks whether this also affects liability issues in company law: 20 years after the famous ARAG/Garmenbeck case, he addresses the question whether the court was right in defining corporate reputation as a possible justification to refrain from the enforcement of existing damage claims against members of the management board of a corporation. For purposes of legal consideration, he first calls for a definitional common denominator of the multi-disciplinary but legally understudied concept of corporate reputation. Pointing out today's importance of corporate reputation and the difficulties of measuring

it, *Biesinger* advocates for qualifying the enforcement decision of the supervisory board as an entrepreneurial decision. However, non-enforcement merely with reference to corporate reputation runs the risk of developing a silver bullet and abolishing legal justifications for turning away from a legal basic concept. According to his social and economic findings, the general suitability of corporate reputation as a consideration should generally be critically scrutinized.

Van der Linde gives a South African perspective on this question. She highlights structural differences and similarities of corporate governance between both legal systems. Due to the unitary board structure of South African companies, either the board itself or someone else on behalf of the company can bring proceedings against a director. *Van der Linde* states that in both instances the company's best interests is the main factor determining the decision whether proceedings should be brought. While the business judgement rule may offer some guidance for the difficult assessment there has not been any judicial guidance so far.

Turning to private international law, the paper of *Wurmnest* and *Kübler-Wachendorff* states that over the last few decades, German courts have more and more relied on provisions of the Grundgesetz to discard the application of foreign law. The article discusses the implications of this development and gives an overview of important cases in which the public policy exception has been successfully applied. They then discuss whether the European reservation clauses are to be interpreted according to autonomous European standards. Furthermore, the authors review how the most important national values can be protected and why the importance of public policy will diminish in the future.

Neels and *Fredericks* consider that the device of public policy may also be used in South African private international law to exclude the application of so-called "unwelcome" foreign law. They then pose the question whether the Bill of Rights is necessarily applicable to foreign law because the issue has not pertinently been considered by the South African courts. The authors discuss why, unlike in Germany, no reservations have been expressed in South African case law or in doctrine about the increasing influence of the Constitution in South African private international law.

The paper of *Lorenzmeier* and *Strydom* analyses basic external trade actions, Association Agreements (AA) and Economic Partnership Agreements (EPA). *Lorenzmeier* initially gives an overview of the EU's strategies and intentions of the EU's trade agreements. The first chapter is devoted to the structure of the European Union's external (trade) actions and and the corpus of legislation of the TFEU that gives the EU the power to conclude

these agreements. The paper then outlines how the aims of the Union have been achieved in the course of the negotiations of the Association Agreement with Ukraine and the Economic Partnership Agreement with the SADC countries. Furthermore the paper demonstrates the differences between these types of agreements but also focusses on its political issues. *Lorenzmeier* finally tries to gage the prospective success of these two approaches. From an African perspective, *Strydom* presents the main objectives and principles of the African Continental Free Trade Area (ACFTA) Agreeement, which was signed by 44 state parties in March 2018. The contribution also discusses problems that might occur between state parties regarding the interpretation of the agreement.

III.

As mentioned in our preface above, this publication is a product of the second Augsburg-Johannesburg conference and is the result of our collaborative research. The relatively new concept of combining papers authored by senior and junior researchers was introduced by the South African partners and has willingly been adopted by the University of Augsburg. The generous financial support by both Universities is indicative of how important both universities consider developing capacity in research. To keep the successful joint research going and to intensify our good relationship, further publications with more interesting and up-to-date topics are planned. The Augsburg-Johannesburg cooperation thereby again demonstrates groundbreaking international cooperation on a scientific level.

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