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Does the Present Matter?

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zadas nas dimensões temporal, social e material. A então dominante estrutura dos sistemas sociais não correspondia, em grande parte, ao modelo textual da Constituição de Weimar.

Entretanto, não se devem esquecer o legado da Constituição de Weimar nem as lições da experiência weimariana. No caso brasileiro, em que, desde a Constituição de 1934, o modelo constitucional social-democrático de Weimar tem exercido forte influência, devem-se levar em conta as lições da experiência de Weimar neste momento em que a Constituição de 1988 passa por uma difícil prova de sobrevivência em virtude de um governo populista de extrema direita. Dessa maneira, a favor da manutenção do modelo social-democrático da Constituição de 1988 e contra a tendência autoritária dominante, cabe bradar hoje no Brasil, em relação à Constituição de Weimar, aquele grito que, na América Latina, brada-se nas manifestações políticas, em memória da / os militantes, artistas, cientistas, trabalhadora / es e política / os que lutaram contra as ditaduras das décadas de 1970 a 1980 e foram assassinada / os pelos seus agentes: *Constituição de Weimar, presente!*

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Stefan Kroll

Does the Present Matter?*

The relationship between past and present has been the subject of controversial debates in historical research time and again. In 2013, to give a prominent example, Philip Alston in a review essay discussed the issue of »Does the past matter?« with regard to a debate on the origins of human rights. The debate was dedicated to the controversial question of »[h]ow far back can we trace the genealogy of today's international human rights system«.[1] In this review, I would like to rephrase this question to ask instead to what degree the present matters for historical writing. Other than in the work of Alston, this is not meant as a question on the contingency and path-dependence of history, but rather as a reflection on how historians describe and evaluate the past and what role knowledge of the present may have in this context.

In his outstanding book on the conclusion of peace after the First World War, Marcus M. Payk describes how international law globally diffused und successfully formalized international relations during the second half of the 19th and the first half of the 20th centuries. In the book's final section, Payk states that the international order in the second half of the 20th century was without alternative, the universality of international law was not questioned, and the exclusive position of states was being shifting in favor of international organizations (665). Until recently, it would have been easy to agree with such an analysis. But as the present is marked by profound attacks on international institutions and international law, I wonder to what extent this could have an impact also on the analysis of the history of international law in this book.

With regard to violations of international law, Payk argues – and I find this generally convincing – that international law is not fundamentally endangered by its violations as long as the latter are justified by arguments based on international law (45). Payk names China and Russia as current world powers that may be contesting and adapting international norms, but are unlikely to break with this order in the foreseeable future (666). I do

* Marcus M. Payk, Frieden durch Recht? Der Aufstieg des modernen Völkerrechts und der Friedensschluss nach dem Ersten Weltkrieg, Berlin: De Gruyter Oldenbourg 2018, 793 p., ISBN 978-3-11-057845-4

1 Philip Alston, Does the past matter? On the origins of human rights, in: Harvard Law Review 126 (2013) 2043–2081.

wonder however whether the instrumentalization of international law in the case of the annexation of Crimea has crossed a line beyond which the normative integrity of international law has been considerably damaged after all. Not every use of arguments drawn from international law strengthens the order – especially if the arguments are made in bad faith. A further example would be the United States under President Donald Trump, which could not be considered in the book, but must be mentioned when thinking about the contemporary robustness of international law. When intervening in Syria, to give just one example, the Trump administration has not yet found it even necessary to justify the use of force in the terms of international law.

I refer to these current examples in order to illustrate that some of Payk's conclusions of international law being successful in formalizing and equalizing international relations throughout the 20th century sound different today, against the background of most recent developments in international politics, than they might have in 2016 when Payk finished work on his *Habilitation*. This observation is therefore not intended as a criticism of his work, which I admire, but as a reflection on how fast the world of international politics has changed in the most recent past.

To turn this into something productive, the background of the current crisis of the liberal world order, which is particularly evident in the ongoing crisis of multilateralism and international institutions, could be an opportunity to re-evaluate the paths of the formation of this order as it is described in this book by Payk. And this possibly leads to observations that do not draw the genesis of the international order quite as progressively as it is read in some passages of the book.

This shall be illustrated by at least one example. A central theme of the book is the question of sovereign equality, which became more and more established through the formalization of international relations. While Payk is aware of the role of international law in justifying European imperialism, he seems too optimistic with regard to the extent to which this has been overcome by the developments of the 20th century. Did the early 20th century truly mark the beginning of the end of Europe's dominant position in the international system (100)? Or does »such a gloss«, to quote Jennifer Pitts, »disregard the fact that Europeans fought during much of the 20th century to constrict the legal rights in standing of non-European states […] so that the admission on equal terms never in fact occurred«?[2] And is a limitation of sovereignty in the name of a responsibility to protect not also at risk of evoking colonial references (666)?

However, these observations concern only the periphery of Payk's book, it is otherwise an excellent analysis of the juridification of international politics using the case study of the Paris peace negotiations. Payk shows that not only was the war itself waged in the name of international law (82), but that the peace that followed was also shaped by it and its independent logic (10 and 659). International law called for a formalization of the negotiations, which was not welcomed by everyone, but was subsequently difficult to undermine (201). Payk describes this with reference to the concept of a depoliticization of negotiations, in which legal and procedural considerations complement the balancing of political interests (e. g. 282). Payk also makes clear, however – and this is a strength of his analysis – that it is not a question of a mutually exclusive opposition of law and politics. On the contrary, his work contributes to a much better understanding of the complex interrelationship between normative expectations, justifications under international law, and political constraints (4).

In this context, the book focuses not only on the role of law, but above all on the importance of legal experts. According to Payk, the key role played by the profession is often not taken into account in historical research (220), but is clearly of the utmost importance for understanding the processes of the juridification of the international order. The diplomatic process is professionalized by academic experts (242) who meet at the level of their expertise and form what has been dubbed an

2 Jennifer Pitts, Boundaries of the International. Law and Empire, Cambridge: Harvard University Press 2018, 13–14; the book is reviewed in this issue of Rg, 384–385.

»epistemic community« (244). The sociology of the profession has dealt with these questions for a long time, as has the discipline of International Relations in the recent past.[3] This book is a very informed historical contribution to these debates.

The forced formalization of the negotiations was also linked to the epistemic authority of jurists, which, although not always respected, nevertheless became effective within the framework of the peace process. A question that arises is to what extent this also led lawyers to express a shared identity that transcended the different interests of the countries they represented. Payk decides to describe the legal experts and their work separately according to different nations and national traditions. This reinforces the impression that these experts were, in the end, primarily representatives of country interests and not of a legal profession. An internationalist (281) class of legal experts became only visible to a limited extent, but this is probably also due to the subject of peace negotiations.

Finally, the book is convincing in that it looks at important epsiodes in the juridification of international relations that have developed over a longer period of time. A central example for this, which should not be missing in a legal historian review of Payk's book, are his remarks on the formation of international arbitral tribunals and courts. In the introductory chapters, Payk describes in detail the discussions on international arbitration in the context of the Hague Peace Conferences (62). At the end of the book he picks up on this theme – which is essential for a study on »Peace through Law« – and illustrates how the discussions at the beginning of the 20th century continued in the debates within the framework of the League of Nations (577).

In sum, Payk's excellent monograph treats its immediate subject, the Paris Peace negotiations of 1919–20, with the greatest meticulousness and accuracy. The work takes into account current theoretical and methodological discussions and highlights the role of law and the legal profession – thus ultimately filling an important research lacuna in this field.

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Hendrik Simon

Das Alte in der neuen Ordnung*

In ihrer Dankesrede für den Friedenspreis des Deutschen Buchhandels argumentierte Susan Sontag 2003, der Gegensatz zwischen »alt« und »neu« stehe im Zentrum dessen, was wir unter Erfahrung verstünden. Mehr noch: »Alt« und »neu« seien die ewigen, unumstößlichen Pole aller Wahrnehmung und Orientierung in der Welt. Ohne das Alte kämen wir nicht aus, weil sich mit ihm unsere ganze Vergangenheit, unsere Weisheit, unsere Erinnerungen, unsere Traurigkeit, unser Realitätssinn verbinde. Ohne den Glauben an das Neue wiederum kämen wir nicht aus, weil sich mit dem Neuen unsere Tatkraft, unsere Fähigkeit zum Optimismus, unser blindes biologisches Sehnen, unsere Fähigkeit zu vergessen verbinde – diese heilsame Fähigkeit, ohne die Versöhnung nicht möglich sei. Mit anderen Worten: Erst eine noch so unpräzise und temporal begrenzte Unterscheidung zwischen »alt« und »neu« gestattet es uns, soziopolitische Phänomene historisch zu vergleichen, zu ordnen, zu periodisieren, und sie schließlich als Geschichte(n) zu erzählen. »Alt« und »neu« – diese mit dem

3 See e. g. Ole Jacob Sending, The Politics of Expertise: Competing for Authority in Global Governance, Ann Arbor: University of Michigan Press 2015.

* Oona A. Hathaway, Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World, New York: Simon & Schuster 2017, 608 S., ISBN 978-1-5011-0986-7