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After Constitutionalism

Current Pathways of Legal Domination

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3.1 Introduction

In this chapter we flip the perspective of juristocratic reckoning, which the editors of this volume see as a process taking place "from below," on its head. We argue that if there is reckoning to be observed, it is a reckoning from above, a return not to the "conventional roles" of law but a return to a different idea of the state, and of limits to its contestability through law. The expectation overload toward law that we observed in the last decades were, in many cases, expectations toward the state, as a caring state, one that would ensure the well-being of all its citizens (see e.g., Eckert 2011, 2020). In that sense, demands expressed through law, and responded to by states through law, were part of struggles over governmental regulation, then carrying within them the notion that government should have social justice at its core.

We write this chapter shortly after the overruling of *Roe vs. Wade* which ended fifty years of abortion rights in the United States. In the same week the Supreme Court ruled against restrictions on carrying guns in public space. Both decisions were sharp reminders that rights are fragile and liberal constitutions insufficient to enduringly protect non-hegemonic groups in an age of democratic decline. They point toward law's sociality, its nonfixity, and the possibility for it to be shaped in favor of and strategically utilized by repressive government, all the while maintaining the outward appearance of liberalism and the possibilities of democratic participation. Rather than speaking of such moments as

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"processes of reckoning *against* the law" (Goodale and Zenker, this volume), we would rather assert that law has no "normal" or "conventional" character independent of historical figurations of rule; what law is considered normal or conventional is always the outcome of historical struggles, including struggles through law. In these, law is redefined (Eckert et al. 2012). So, it is with the uneasy uncertainty of what yet another set of worrisome legal developments will bring, that we assert the necessity to think the manifold manifestation of current forms of legal domination. Thus, unlike the editors of this volume, we cannot observe a return to law's "normal" or "conventional" role in "conflict resolution, government regulation, and the social response to wrongdoing." Rather, what we see is a (re-)turn to a particular convention of state governance through law as a means of rule. This mode of governing decidedly repudiates encompassing visions of social protection and substantive equality.

Furthermore, we see little evidence for the claim of the juridification of protest contributing to its depoliticization.[1] We also argue thus, that the lessening significance of legal mobilization is not necessarily a result of the frustrations with the limited possibilities of law. Far from it. These limited possibilities of law were always perceived, particularly by organized collective struggles. We assume that there were only rare cases of social struggles in which hopes for caring polities were located entirely in the mobilization of "law against the state"; mostly, law was but one instrument among many in struggles for social justice. This was so also in cases where there had been encompassing promises by a developmentalist vision of the state and an activist judiciary advocating for a proactive interpretation of the constitution and holding governments to it, like in pre- and post-emergency India. There, too, collective struggles for social justice never confined themselves to the mobilization of law but combined legal with more overtly political means of struggle, ranging from demonstrations, negotiations with political representatives and state agencies, to forming parties.

Thus, what we observe instead is an *active diminishment of the already limited possibilities of law to be mobilized for social justice*. This is what

[1] In contrast, judicialization, that is the transfer of decisions from parliaments and governments to courts, has produced specific forms of depoliticization. Mostly, the critics of judicialization have deplored that authority is transferred from more representative instances such as parliaments or elected governments to an unrepresentative and unaccountable judiciary. This can lead to political concerns being shifted to "surveillance and judgement" away from questions of "legitimacy, participation and representation" (Randeria 2007: 39).

this text is about. We do not say that the active diminishment of legal possibilities is always a direct response to legal mobilization "from below." We consider it a wider trend that abandons not law's promises, but state promises, or limits them to newly restricted constituencies, often precisely to those that have not mobilized law against the state because they have been well served by the legal order as it stood.

We focus on three current trajectories of legal development: namely, authoritarian legalism, as a blunt mode of limiting the possibilities of law; the sophisticated mode of the dispersion of jurisdiction that fragments states' legal responsibilities, recalibrates the hierarchies between different bodies of law, and diminishes the reach and accessibility of specific protective bodies of law; and the benevolent mode of the tribunalization of conflict resolution, which introduces a logic of law that is not oriented toward general norms that are applied to particular cases, but confines itself to individual cases, thereby diminishing the possibilities of precedent and the wider alliances that mobilize around precedent. We observe authoritarian legalism in its incremental implementation in India, where systematically, legal measures have been introduced in recent years to "legalize" a dual-law situation long in the making that limits access to law to specific population groups. This can be observed in many other places. We observe the dispersion of jurisdiction in relation to the borders of Europe, where the access to the laws that would nominally regulate these borders (e.g., asylum law) is thwarted by the creation of new legal zones and jurisdictional responsibilities. We observe the tribunalization of conflict resolution with relation to the regulation of global capitalism, where seemingly egalitarian procedures increase asymmetries and "singularize" injuries.

These examples are not part of one governance assembly; they are not connected, and in many aspects they are incomparable. While differing from each other to the degree that they cannot be compared, and without being part of an integrated strategy or governance modality, they all share the characteristic of constructing legal impediments to access to law, either in procedural or material legal innovations. Moreover, they all constitute (albeit in very different forms and contexts) a response to the constitutional state, and, more specifically, to an order which aspires to an equality of treatment under the law. These three modalities selectively respond to that project, and in doing so produce legal modes of exclusion and pathways out of constitutionalism.

Such impediments to claim-making through law have always existed. What is of interest to us here is to understand current developments of

obstacles to access law, which themselves take place through legal operations. The various sidelinings of constitutionalism each have their own historical specificity; they respond to specific historical situations. Looking at these different examples of the ways in which governments create alternatives to constitutionalism, we can take a broader view that is not limited to authoritarian legalism and illiberal democracies. It is not our intention here, however, to belittle the latter's modes of leaving constitutionalism behind, or to compare the three modes in terms of resulting misery. Rather, our aim is to point to these contemporary modes with the thesis in mind that there is a more general trend to curtail the role of law as a means of the struggle for social justice. These pathways, despite their differences, each evade, abolish, and replace the norms that many social struggles set their hopes in and the legal procedures that they have been able to enter into. Moreover, one could say, this trend in effect curtails a central tenet of liberal law, namely, its very liberalism.

We consider it the particular possibility of an anthropological perspective on law to leave behind the perspective on "law's" essential limits (in the language of critical legal studies), or an ahistorical notion of law's "normal" or "conventional" role, to consider law as having characteristics but not essences, and therefore to be (re-)made in social interactions. It seems important to us to move away from the rather general discussion of law's limits – however conceived – or of the related "law-versus-politics" arguments, to take a close look at how and what specific type of law prevents some social change and initiates another kind, and how forms of politics articulate with law in specific ways in different historical figurations. This is what we want to examine here. We outline the effects of these three modalities and argue that taken together, they are not putting an end to constitutionalism but rather, contributing to a new constitutional order in which political injunctions are authoritatively institutionalized through law but cannot be contested through it anymore. The conventional role of constitutional law to provide for the possibility to address governments and state authorities through law is increasingly diminished, and law is reduced to a one-sided instrument of rule. Thus, rather than speaking generally about the limits of law for social transformation, we want to look more precisely at the diverse but specific contemporary limits that are actively erected – possibly precisely because law's possibilities for social transformation were recently used and expanded by much "legalism from below."

3.2 The Blunt Mode: Authoritarian/Fascist Legality in Current India

India is a good example to discuss what in the Introduction to this volume is referred to by Goodale and Zenker as a context in which "*law, broadly conceived, is freighted with demands and expectations that overflow its normal institutional, instrumental, and normative carrying capacity*." India's postindependence leaders succeeded in establishing the state at the core of India's society, both through its constitutional promises and its institutional presence. The state, as the distributor of rights and entitlements and the preserver of order "was transformed from a distant, alien object into one that aspired to infiltrate the everyday lives of Indians, proclaiming itself responsible for everything they could desire" (Khilnani 1999: 41). This idea of the Indian state has shaped political negotiations even beyond its heyday and despite the fact that it neither fulfilled its promises, nor avoided the excesses of its modernist projects. Such negotiations increasingly also involved the mobilization of law, especially since India's higher judiciary sought to remedy its utter failure during the emergency of 1975–7 to safeguard civil rights by taking an activist stance to hold successive Indian governments accountable to the rights enshrined in the Indian constitution.

The reorientation of the state in the course of the neoliberal transition in India has, like in many other countries, taken the route of recalibrating the boundaries of the legitimate body politic. Hindu nationalism[2] has had the role of ideologically orienting this shift in the idea of the polity. With the ever-increasing role of Hindu nationalist political organizations in the national and state-level legislatives and their "march through all institutions," this including the higher judiciary, a differentiation of membership rights has been increasingly pursued through law,

[2] Hindu nationalism, or Hindutva, is first and foremost a unifying project that considers the threat to the community to lie in disunity, internal dissent, or contestations of the social order. It is not the denial of difference as such, since difference is institutionalized (e.g., in the caste system), but the denial of conflict between those who are considered different, especially when it concerns contestations of the social order. Thus, notions of threat relate intrinsically to the way that "order" is understood, that is, to the factors presumed to be existential for social peace. The idea of a body politic shaped by harmonious "internal" relations – that is, the organic vision of the nation held by Hindu nationalism and the denial of conflict entailed in it – has been conflated with the neoliberal approach of the quasi-automatic regulation of social inequality through market-form interactions. This confluence has led to a more fundamental delegitimization of conflict, especially when it concerns contestations of the social (or national) order.

adjudication, and legislation. While citizenship was in India, as elsewhere, always far from equal (e.g., Jayal 2001: 249), the differentiation of membership rights has gained a new degree of legitimacy.

The development of dual law in India began in the field of security laws, namely, the country's successive anti-terrorism laws. Anti-terror laws and special security legislations have a long history in India; independent India incorporated several colonial preventive laws into its criminal law and enacted successive anti-terrorist legislation. In recent years these laws have been used to target particularly Muslims, lower caste, and tribal communities. At the same time, there has been a shift of perceiving what is classified as terrorism from an "internal" problem of dissatisfied minorities, to an "external" threat: Terrorism, and in particular, Muslims accused of terrorism, have been constructed as alien others.

Divergent group-related perceptions of militancy were entered into anti-terrorism law when POTA (the Prevention of Terrorist Activities Act) was enacted. POTA confined the definition of terrorist violence to violence that (a) operates clandestinely and (b) shows clear evidence of premeditation. Clandestinity is frequently referred to as proof of planning and of malevolent intent; premeditation and planning are proof of intent, distinguishing premeditated violence from an affective one that does not fall under anti-terrorism laws. Considering the partisan position of the state agencies, the "need" to operate clandestinely is very unequally distributed between majority and minority organizations; hence, both clandestinity and premeditation are characteristic more often of minority violence. For majority organizations, clandestinity is not necessary, because they can most often ensure the cooperation or nonintervention by the local police. Majority violence by Hindus, moreover, has frequently been considered spontaneous, often irrational, and affective; it is thereby removed from the purview of anti-terrorism law. Muslim violence, however, owing to the fact that it is perceived as both clandestine and premeditated, falls under the definition of terrorism (Eckert et al. 2012). Differentiated legal treatment of the same deeds according to the ascriptive identity of the suspect or accused initiated a system of dual law. In effect, while preventive laws have been used against many forms of social and political protest, and also against protesters nominally Hindu, protest by Muslims, Dalits, and tribals entails extreme risks to be dealt with under security laws with its lack of protective safeguards.

This system of dual law was dramatically expanded beyond the regulation of protest and unrest, when in December 2019 the government under Prime Minister Modi enacted the Citizenship Amendment Act

(CAA) and, simultaneously, updated the National Register of Citizens. The two measures complemented each other: The Citizenship Amendment Act was revised to grant refugees from neighbouring countries immediate access to Indian citizenship if they were Hindus, Jains, Sikhs, Parsees, or Christian. Muslim refugees were not included and had no right to obtain citizenship when fleeing these neighbouring countries. Thereby, religion was for the first time in independent India's history the decisive criterion for the right to citizenship. At the same time, the Indian government launched the updating of the National Population Register (NPR) which registers all people residing in India, both citizens and noncitizens. The NPR made it possible to identify clearly noncitizens within India. This would enable authorities to deport people who were residing "illegally" in India. Anyone who could not prove their citizenship – which millions do not, lacking documents such as birth certificates or even ration cards that would prove their long-term legally recognized residency, for example – might be denied Indian citizenship and rendered stateless. While Hindus and other religious groups mentioned in the CAA would obtain citizenship anew via the CAA, Muslims without proof of citizenship would lose any legal status in India and be threatened with deportation. Detention centers were and are being built in several states to hold "illegal" residents before deportation, above all in Assam, where 1.9 million people are threatened to be stripped of their citizenship.

These developments that establish a dual law system beyond criminal justice, and also in citizenship laws, are further complemented by laws of several Indian states that Mayur Suresh has termed "social segregation laws" (Suresh 2021). These include the "disturbed areas act" as well as the laws of several Indian states such as Uttar Pradesh, Karnataka, Madhya Pradesh, and Kerala against a so-called love jihad, criminalizing interfaith marriages between Hindus and Muslims, and, more particularly, between Hindu women and Muslim men. The ban on cow slaughter in several states has led to a wave of so-called cow vigilantism that Muslims suspected of transporting cows for the purpose of slaughter have fallen victim to. There is rarely any state sanction against these vigilante murders.

These Indian examples of enacting special laws for a specific part of the population is not unprecedented at all – far from it. In the context of electoral democracies, much attention has been given to constitutional reform such as that of Hungary,[3] or the changes in the rules governing

[3] See: https://verfassungsblog.de/category/debates/restoring-constitutionalism/.

the judiciary such as in Poland (e.g., Pech & Scheppele 2017). Both are defining for illiberal democracies, in as much as they rearrange the division of powers by expanding executive powers while limiting civil liberties. What we first want to point to here is that there have been numerous efforts in other legal fields such as criminal law, civil law, or citizenship laws that similarly transform the relation between citizens and the state, often specific groups of citizens and the state,[4] which have been less discussed and have not been identified as forms of authoritarian legalism.

Moreover, the delineation of a Hindu polity does not stop at these legislative innovations. Rather, juristocratic reckoning in Modi's India has meant a thorough sidelining of law. "Law has been rendered impotent," felt a prominent lawyer. To not an insignificant degree such sidelining of law is achieved through judicial delay, that is, courts not taking up claims and petitions, so that victims of abuses are faced with a fait accompli that the courts are unwilling to reverse; or that promotions of oppositional candidates within the judiciary are simply never appointed, rendering courts dysfunctional (and further contributing to the tremendous backlog of cases at all judicial levels). Thereby the collegiate is encouraged to suggest candidates for promotion they know will be approved by the government.

For these strategies of influencing adjudication and judicial appointments to proceed systematically, all institutions of the state have by now been manned with members of, or people subservient to, the Sangh Parivar (the "family" of Hindu nationalist organizations, this including the ruling party, the BJP, as the political wind of the Sangh Parivar) in numbers significant enough to undo judicial independence. The Hindu nationalist forces have excelled in a systematic and long-term march through the institutions that all other illiberal democracies can be envious of.

The second tentative observation we want to make with this example is that these legal restrictions on the (legal) participation of some, as well as the systematic undermining of judicial independence, with which law is rendered partisan, announce globally resurfacing notions of nonconflictive polities; they potentially delegitimize more generally the employment

[4] The denationalization of "suspect subjects" (Schiffauer 2006) has now arrived also in liberal democracies, such as Britain (Hong 2021). In Germany, religious freedoms, and in particular: symbols of religious identity in public, have been interpreted differently for members of established Christian churches, than for the less centrally organized adherents to the various denominations of Islam.

of law as a means of expressing alternative understandings of polities. The derecognition of the Muslims in India as legitimate members of the body politic, and their increasing social and legal definition as alien others in law, commencing with the treatment of Muslim collective violence under anti-terrorism laws, and culminating in the potential denationalization of Muslim citizens without state documents, has recently been increasingly expanded to the collective action of other groups with ascriptive identity markers, such as tribals and Dalits. Over the decades there has been a transition from role to ascriptive identity in the categories that underlie state constructions of threat. However, the organicist ideas of the Hindu nation that have informed these exclusions have more generally delegitimated antagonistic political stances: antagonistic collective action is increasingly treated as a matter of preventive and security laws (Eckert 2014). Thus, possibilities for access to the (liberal) protections of law become ever more conditional on both a majoritarian identification of legitimate belonging and nonantagonistic political positions.

3.3 The Sophisticated Mode: Dispersing Jurisdiction

Our second example concerns the use of law in international and transnational governance. Under globalization, it has been argued that "cunning states" (Randeria 2003) are able to selectively mobilize the language of sovereignty to avoid international interventions in some domains such as human rights whilst willing to yield to or apply the rules of others (such as in international trade). The issue of selectivity often relates to the scalar politics of law. In "statist visions of law and the spatiality of the state" (Basaran 2020: 28), boundaries between the national and the international are considered to be clear, with the state defined as the central locus of politics and of the predominant unit of the international order. In fact, whilst law might be rendered visible through the principle of sovereignty over territory (Basaran 2020: 34), law in international governance often operates in much more invisible ways, weaving together and thus blurring different scales of jurisdiction. This, in turn, makes selective exclusions from mechanisms of accountability possible because state and territory have been fragmented by governance processes. Hence, accountability mechanisms, which include provisions for fundamental rights protections, are rendered ineffective by shifting boundaries of jurisdiction enabled by governance through/with law. This is the case in much of migration governance arrangements which

mix formal and informal structures of cooperation to "manage" unwanted migration (Lavenex 2016: 457).

At the external borders of the European Union different types of law are layered and employed to achieve cooperative interdiction of migrants fleeing by sea. Cooperative interdiction is the coordinated and unequal collaboration between European authorities (the maritime coordination centers of nation states but also EU agencies and ministries) and Libyan officials, to bar migrant sea-crossers from accessing European territory and jurisdiction. Cooperative interdiction has a complex legal architecture, which has evolved through the dynamic interplay between border externalization policies such as Integrated Border Management and litigation efforts to ensure that noncitizen's access to law (here: rights and protection) is maintained in the face of these multileveled processes of bordering.

The 2012 *Hirsi Jamaa* v. *Italy* case at the European Court of Human Rights was a landmark case that rendered unlawful Italy's handing over of migrants to the Libyan coastguard on the high seas. It extended the extraterritorial reach of the court, reviewing the actions of agents of states, party to the convention, even when they find themselves outside of the territorial boundaries of the state. However, this case has seemingly also instructed European states on how to continue to conduct policies with similar outcomes to the one condemned in *Hirsi*, only in a way that makes them more impermeable to judicial review. Jessica Greenberg (2021) has called this phenomenon "counterpedagogy."

The consequences of this "instruction" are twofold. On a practical level, the implementation of interdiction policies which aim to bar migrants from accessing EU territory have taken on a "contactless" (Moreno-Lax & Giuffré 2017) quality in terms of the law. Legal distance is put between the enablers of a policy (the EU and member states such as Italy) and the subjects targeted by these policies. The implementors (the Libyan coastguard) act as a buffer. To achieve this controversial outcome which is both material (interdiction) and legal (reduction of accountability mechanisms) the dispersion of law across varying levels of governance (which respond to different logics of review and serve different purposes) plays an important role. The European Emergency Trust Fund for Africa (EUTF), for example, acts as a key resource to train the Libyan coastguard, to equip and monitor them. The fund is thus technically dispersed across diverse development and humanitarian policy objectives, as well as directorate-generals and implementation partners responsible for them. Contributing to the fund are states, but a large majority of the funds also stem from the EU Development Fund (EDF) which is managed outside

the EU budget and therefore retains a strong intergovernmental character.[5] Moreover, through a logic of crisis exception, the very regulation of emergency trust funds exempts them from EU public procurement rules (Spijkerboer & Steyger 2019). The EUTF is instrumental in the achievement of cooperative interdiction, built out of European regulations. It is an instrument of governance that seeks to control the movement of nonEU citizens and participates simultaneously in various ways to their exclusion from law.

At sea, international maritime law contains both the injunction for migrant lives to be preserved *and* the footing for justifications by the EU authorities to delegate responsibility to their Libyan counterparts. Indeed, since the notification of the Libyan Search and Rescue Region (SRR) in June 2018, Libya has become formally responsible for coordinating rescues across a vast area of international waters. The Libyan SRR then provides a veil, a legal "cut" (Strathern 1996) in a network of interrelations making it harder for migrants to address the European Court of Human Rights since the actors that effectively violate their rights do not fall under its jurisdiction. Migrants cannot, therefore, sue European actors for violations of European human rights law, such as the prohibition of collective expulsions, rights to an effective remedy and the nonrefoulement principle.

Distance is created between the EU member states and their policies, which are carried out by others, and funded through programs that appear tangential to the ongoings in the Libyan Search and Rescue Region in the Southern Mediterranean. This, once more, leads to accountability being diffused to the degree of being well-nigh intractable. In relation to denying access to law for those concerned, the assemblage of policies and practices outsourcing migration control operate in multifarious ways that are not coordinated but in effect produce a hermetic sealing off of the European legal sphere for migrants: they cannot access asylum law because they never reach the shores on which they can claim asylum. The question is further complicated by the fact that law comes with distinct kinds of authority that can be amplified when different "types" of law are combined in strategic ways. For example, in the Mediterranean the criminalization of rescue which takes place through domestic channels combined with international law used to justify and enable certain kinds of governance makes for a kind of "empowered" law.

[5] It is approved intergovernmentally but administered by the EU Commission.

The force of law is amplified because of its duality: it is the legal architecture that enables bordering processes, but law itself also becomes a mobile border.

The "dialectics of transnationalism" (Mann 2013) which push *both* the policies and their judicial review into the transnational realm enable the skilful reorganization not just of material law but its sphere of validity and applicability. In the end, state responsibility disappears in the dynamic assemblages of international governance in today's world.

3.4 The Seemingly Benevolent Mode: The Tribunalization of Conflicts

Our third example is more subtle, ambiguous in its implications, and benign in its legitimation. It comes from the broad field of regulation of contemporary global capitalism and focuses on the settlement of disputes between multinational corporations and the states that host their activities, and the people who are negatively affected by their activities and sue the multinational corporations. Legal battles against multinational corporations are usually settled out of court if they are not dismissed beforehand. Procedures such as out-of-court settlements and alternative dispute resolution appear to be a broader trend in dispute resolution. They aim to reach agreement between the parties, focusing on the particular circumstances of an individual case and the unique constellation of the parties involved. It is generally argued that such alternative forms of dispute resolution primarily benefit plaintiffs who cannot afford lengthy and expensive litigation. Settlements reduce litigation costs, make reparations more accessible to victims, and can alleviate suffering more effectively by avoiding the need to deal with apportioning blame.

While the procedural norms governing these practices are becoming more and more convergent, and the forms of conciliation and mediation are becoming standardized and subject to increasing professionalization (see Bolay 2021[6]), cases are treated in their uniqueness, or what I have called elsewhere: "singularization" (Eckert 2021). Instead of finding solutions according to a general norm and seeing the general norm in the individual case, individual solutions are sought for a particular dispute. Settlements do not focus on the specifics of a case and how those specifics can be related to a general norm. Rather, cases are treated as singular

[6] M. Bolay, 2021. Arbitraging Extraction (Arbitrex): Arbitral Reasoning and New Legal Topographies of Extraction. Manuscript on file with the author.

because they involve a unique relationship between the parties involved; they need not have aspects comparable to others, and if they do, they need not be addressed in the negotiations that lead to a settlement.

For many claimants, justice is closely linked to the attribution of "fault" (see Lindt 2020; Loher 2020). It is the public verdict and its condemnation of a wrong that is central to the understanding of justice of many claimants. However, the settlements, which often take the place of litigation in transnational corporate responsibility disputes, usually do not result in a judgment; they do not assign fault. Such settlements do not require a judgment of fact, a verdict of fault, or an adjudication of guilt. They usually dispense with judgment and substitute both judgment and punishment with conflict resolution.

Because the settlement makes unnecessary a decision on whether a company is actually at fault and thus legally responsible, it cannot be used as precedent in similar cases (see also Robinson & Lazarus 2008). This prevention of precedent is aided by the fact that settlements are made *in camera* and under private contract law. The parties are free to agree on which standards apply to the settlement. If the parties involved are obliged to keep the outcome secret, settlements and the norms activated in them are completely removed from public view. Even if it is learned under what conditions the settlement was reached, that is, what arguments about duties and responsibilities went into it, it has no relevance to other cases because it is a private agreement that applies only to that specific constellation of actors and their claims against each other. The "case" in question is therefore unrepeatable, that is *singular*. Thus, claims are no longer treated as "cases" but as singular "incidents," and references to standards applicable in similar cases that might be relevant become irrelevant.

Such "singularization" thus occurs in several ways: by avoiding a judgment of fault that associates the case with a general norm, by private agreement between the parties involved, and by secrecy. All of this prevents the case from becoming a precedent or simply an example or model for others. Because the absence of a judgment assigning guilt also prevents the establishment of precedent, the two central concerns of plaintiffs in litigation – justice and the prevention of future harm – remain unfulfilled.

Singularization decouples cases from the systematic nature of law and directs hopes once directed toward "justice" toward individual remedies. This new logic affects the very idea of law. Law no longer functions by subsuming specific cases under a general principle that is valid beyond

the specific parties to a dispute; rather, it becomes an instrument of mediation. A different logic emerges that develops neither systematics nor forms of dealing with normative pluralism, but leads to a radical singularization in which commonalities can at best be found in procedural norms. Singularization proceeds by rendering comparability irrelevant and relationality obsolete; the idea of normative coherence that drives aspirations in law is circumvented, and cases claimed to be equal to others are dissolved in the singular relations between the parties to the individual agreement. This diminishes access to law in a complex manner, not only by eliminating precedent and thus also potential alliances across cases; it thereby also forecloses the entangled hopes in law (Eckert 2021; Krisch 2021) that create what Susanne Baer (1998) has called "legal trouble," that is, the multitudinous engagements of legal norms that incrementally reshape their meaning, opening up the possibility to claim what does not – yet – exist in dominant legal discourse and hence think and speak it into being.[7]

3.5 Effects: A Conclusion

These three processes can be seen as ways to limit what Schwöbel (2010) has called "organic global constitutionalism," and which Santos and Rodrigues-Garavito have described as "Law and Globalization from below" (Santos & Rodriguez-Garavito 2006; see also Eckert et al. 2012). Such "organic" constitutionalism "from below" puts the definitional emphasis on the participative practice that constitutionalism must embody: Santos & Rodriguez-Garavito (2005: 11) assert that [S]ubaltern actors are a critical part of processes whereby global legal rules are defined." Forefronting processuality rather than stabilization, the participative and political reappropriations and usages of legal equality are always *striving* toward the normative "better," which is still to come. In that way, constitutionalism is a tool for change, for transforming the limitations of the current social order (Schwöbel 2010; Eckert 2018, 2021). It allows for plurality, both in terms of representation through the recognition of cultural difference within the national body

[7] See the arguments of Maksymilian del Mar (2017: 51) on how legal imagination in legal fictions and other forms of legal reasoning provide new possibilities of interpretation "hinting at the possibility, perhaps even desirability ... of introducing, more explicitly, a new rule in the future."

politic, and in terms of forms of participation through the use of formal and informal political processes.[8]

The modalities of law outlined above foreclose such openness of "organic" constitutionality. They do not put an end to constitutionalism, or turn away from law, not even as an instrument of politics, but rather limit and shape it in specific ways.

This becomes visible if we are to trace the effects of the different processes of legal domination described in this text. In the first example, the amendment brought to citizenship law in India is a further step in the exclusion of some citizens from the body politic and the solidification of majority rule announcing a more fundamental denial of the legitimacy of political conflict. The derecognition of minority groups as legitimate members of the body politic, and their increasing social and legal definition as alien others, with no political rights in and to the body politic, is, in the case of India, easily expanded to other collective action, in particular that of groups with ascriptive identity markers such as tribals and Dalits. Thus, possibilities for participation in the national body politic becomes ever more conditional on the majoritarian identification of legitimate belonging. This is also the case for access to the protections of the law: restrictions on law being used as an expression of antagonistic claims on the state are increasingly treated as a matter of security laws.

In the "sophisticated mode" the "cutting" of noncitizens' links to European jurisdiction – even though they are subjected to it – heavily skews European supranational constitutionalism in favor of European subjects. In the benevolent mode, law is no longer a claims-making instrument and becomes a way to avoid the staging of antagonistic relations of power in the public sphere, thus limiting the possibilities of attaining justice through the public attribution of fault. Law becomes in this way an instrument of rule, since the possibilities of appeal are ruled out by the written procedures of arbitration themselves.

States and international institutions of governance, as well as powerful economic actors, rely on law to carry out their activities of governing or of accumulation. Law provides them with a language for the justification of operations. The idea of law as a form of global architecture that should guarantee some forms of participation has to simultaneously be

[8] Organic global constitutionalism recognizes that the division between the public and private spheres of action have historically favored "'masculine' ethical orientations" through the division between justice and rights as "public" issues and care and responsibility as constricted to the private sphere (Schwöbel 2010: 536).

downplayed (e.g., with out-of-court settlement which are supposedly better for the victims, or when law is dispersed to create zones of nonjurisdiction) whilst being upheld at the same time (governance through legal means and emphasis on repressive processes having taken place through democratic means, the language of rights being used by states to legitimate their operations).

The emerging constitutional order we have sketched out is marked by "dual governance." Matters continue to be subject to law both national and international but can be turned into matters of governance measures by various actors at their expediency. Worryingly, these developments could be seen to thereby complete (and transform) what neoliberalism could not entirely accomplish despite its diminishment of human rights to a notion of sufficiency (Moyn 2018). Neoliberal reason did not eclipse *Homo politicus* as Wendy Brown (2015) would have it. The rationale of *Homo economicus* has not erased citizenship's "distinctly political morphology" (Brown 2015: 109). Instead, when faced with the effectiveness of organic constitutionalism, repressive governments and powerful economic actors are redoubling their efforts to reshape law as a tool of political participation and moving it toward an instrument of rule alone.

Law as a space, institution, but especially as a field of participation seems to pose specific threats to current political and economic orders, not as demand overload, but as – not necessarily effective, but nevertheless visible and audible – critique, in which visions of alternatives are expressed in a language that is intelligible to the powers that be. The three pathways clarify in different ways the fact that in the current globalized world, democratic participation in legal struggles poses a real threat to different kinds of power. Empirically, it would be difficult to trace the causal trigger of the juristocratic reckoning from above that we describe; to argue that juristocratic reckoning systematically happens in direct reaction to organic constitutionalism would be untenable. There are fundamental differences between the pathways we outline in terms of the dialectics of reckoning at play; still, we make the following propositions to consider how the relation between the mobilization of law against the powers that be, and the reckoning from above, unfolds. Out-of-court settlements are perhaps the clearest response to social movements mobilizing law to defend their rights. Corporate actors are concerned by the reputational damage that a conviction against their activities would create. In this example, the targeted "doer of harm" is not a state, hence the stakes of maintaining the outward promise of legal participation are lower. Corporate actors are more concerned about

reputational damage than they are about maintaining legitimacy in a situation of rule. In the Central Mediterranean, the relation between legal interventions that have sought to constrain executive power and the subsequent reaction of states is more ambiguous, if only from the perspective of time; almost ten years separate the state behavior condemned in the *Hirsi* judgement and the development of the Libyan SRR. In between, an international NATO-led intervention participated in the ousting of the Libyan leader Muammar Gaddafi, which affected the geopolitical stability of the region, prompting new challenges for the control of the external border from the perspective of European authorities. Arguably though, the jurisprudence of the ECHR shapes the possibilities for the types of extra-territorial policies that the EU and its member states develop in terms of border control. The relation between litigation "from below" and state behavior in this case is sinuous and not a causal reaction. However, the fact that governments feel it necessary to ever-diminish the legal possibilities of migrants classified as noneligible by limiting Asylum law, by proliferating classificatory distinctions between groups of migrants in law, and by sharpening regulation for all classes of migrants, is evidence of its influence. In India there is considerable evidence that laws have been reformulated in a way that expands the possibilities of quenching litigation against state agencies (Eckert et al. 2012). Security laws, in particular, have been regularly employed to punish protest, both protest that employs law and that which employs more overtly political tactics. Thereby, the possibilities for the traditionally prolific mobilization of law by Indian citizens are effectively limited.

The advent of juristocracy has seen struggles for and through law. In today's world though, the pushback against these struggles appears to manifest in several ingenious ways in which new obstacles are erected to limit the participative potentiality of law. If a waning of juristocracy is taking place, it seems not to be shaped by less law. Rather, emerging limitations to constitutionalism are achieved by way of and at the same time with the aim of preserving (legal) privilege. Although the three dynamics that we have described operate in vastly different manners and transform law and legality in seemingly divergent ways, they all in effect diminish the legal remedies available to "the have nots" (Galanter 1974), and particular the legal remedies they can muster to contest government rule.

Taken together, the three cases point toward the emergence of a constitutional order that is averse to political conflict being carried out through law; political orders are authoritatively institutionalized through law, but cannot be contested through it anymore.

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