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2011/09

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RECON Online Working Paper 2011/09
March 2011

URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html

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RECON Online Working Paper Series | ISSN 1504-6907

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Issued by ARENA
Centre for European Studies
University of Oslo
P.O.Box 1143 Blindern | 0318 Oslo | Norway
Tel: +47 22 85 87 00 | Fax +47 22 85 87 10
www.arena.uio.no

Abstract

Cosmopolitanism has a long history. Yet there is a great difference between classical and modern cosmopolitanism. Whereas the latter is an ideology of the classical empire that is grounded in a hierarchical society, modern cosmopolitanism is based on egalitarian and individualistic premises, and is related closely to the constitutional law *and* the ideological justification of the nation state and its imperial cravings. Whereas the modern nation state in a way has solved the fundamental religious, political and socio-economic crises of modernity within its boarders (at least in the western hemisphere), its greatest advance, the exclusion of inequalities, was at the price of the exclusion of the internal other: of blacks, workers, women, etc., and the other that stemmed from the non-European world that furthermore was under European colonial rule or other forms of European, North-American, or Japanese imperial control. Yet, the wars and revolutions of the 20th century led to a complete reconstruction, new foundation and globalization of all national and international law. The evolutionary advances of the 20th century consisted in the emergence of world law, and this finally enabled the normative (not necessarily factual) construction of international and national welfarism. Nevertheless the dialectic of enlightenment came back again and led to new forms of postnational domination, hegemony, oppression and exclusion, and the emergence of a new formation of transnational class rule. In the final section the possibilities of a democratic '*Reform nach Prinzipien*' (Kant) are considered.

Keywords

Cosmopolitanism — Differentiation — Globalization — Internationalism — International Law — Legal Culture — Supranationalism

I

Cosmopolitanism can be defined as the global extension of the *polis* or *res publica* (Cicero, Seneca), the construction of a *civitas maxima* (Wolff, Kelsen), the constitution of a cosmopolitan citizenship or *Weltbürgerschaft* (Kant, Parsons), or the unlimited inclusion of the other (Dewey, Habermas). In ancient political theory this idea was based on a universal idea of man as being a rational and political animal (*zoon politicon*), and 'universal' did not only mean to extend the human *res publica* to a *human* cosmopolis but also to reunite the human *civil society* and *civic law* with *nature* and *natural* (and *divine*) *law*. This idea of a unification of the *polis* with the whole *cosmos* in a single *cosmopolis* was at least the reason why Kant called it a *sublime* idea.[1]

Yet, different from Kant, in classical political philosophy (Plato, Aristotle, Cicero) all men are designed with a *potential* to perform a *rational life plan within a political community*, whereas Kant only presupposed that all men are born with *equal rights of freedom*, and that everybody any time (without exception) *can* form a *good will* only, if he or she wants it, and try to *act* in accordance with morally universal claims.[2] The crucial difference between classical and modern political philosophy, between Aristotle and Kant, Plato and Hegel, Cicero and Marx is that in classical (or old-European) theory only the human *potentia* or competence to perform a rational and political life is universal and a competence of *all* men (including women, children, slaves, strangers, peasants, etc.) but not its *actual* performance. Some are born without the ability to actualise their *potentia*, others prove in the course of their life that they cannot realize it (because they are living on the country side in small villages, lost their leadership over a household or *oikos*, are not virtuous and rich enough, are barbarians from the east, are women, non-residents, passive homosexuals, handicapped people, etc.).[3]

The *realization* of the universal competence of all men was already *logically* (or conceptually) restricted to the happy few. Although everybody *can be* perfect, only a few *can realize* this competence because only a few *are* — by birth or socialization — perfect enough for true citizenship or nobility. It belongs to the *meaning* of words like 'perfection' or 'virtue' that they are related to a hierarchy of more or less perfect, more or less virtuous persons, groups, classes, people(s), cities, kingdoms, etc. The *Gattungswesen* (or idea) that *potentially* exists within *any* individual *actually* comes to existence if *some* perform it with perfection, and only the most perfect ones come close enough to the ideal form of the *zoon politikon*. If (for sake of the argument) all others would be kept as slaves, this would change nothing because the *Gattungswesen* cannot be damaged by its bad (slavish) performance. Hence, the *conceptual dualism* of essence and appearance, *Gattungswesen* and its performance is deeply obliged to *social stratification* and *class-rule*.[4]

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[1] Immanuel Kant, *Die Religion innerhalb der Grenzen der bloßen Vernunft*, in: Werke VIII, Frankfurt am Main: Suhrkamp, 1977, 873. Kant here calls the 'Vereinigung aller Menschen' (the *unification of all men),* which is the very meaning of the ritual of public adresses to God, a 'erhabene Idee', a *sublime idea*.

[2] Kant, *Grundlegung zur Metaphysik der Sitten*, Werke VII, Frankfurt am Main: Suhrkamp 1974; Kant, *Metaphysik der Sitten*, Werke Bd. VIII, Frankfurt am Main: Suhrkamp, 1977, 345.

[3] Robert Fine, *Cosmopolitanism*, London: Routledge, 2007, 110.

[4] This is criticism originally goes back to John Dewey and Max Horkheimer, see Hauke Brunkhorst, 'Rorty, Putnam and the Frankfurt School', *Philosophy & Social Criticism* 5, 1996, 1-

The universal idea of a political and rational man functioned as an *ideology* for the self-justification of class-rule, which was reinforced and stabilized by the *societal structure* of stratified societies. Even if we counterfactually suppose that the ruling classes originally came to power by virtue and perfection, reality is that once they were in power they tried — and *had* to try if they did not want to loose their power — to preserve it for themselves and their families and children by *any* means that worked for self-preservation of the power of the new ruling class, be it by virtuous means or not. On penalty of decline they were bound to the logic of the *symbolically differentiated medium of power* that does not care for perfection and virtue.[5] Consequently, virtue became an ideology, and the intellectuals of the ruling classes experimented with the teleology of happiness, which in its most sophisticated version became a philosophy of *eudaemonia* and the good life.[6]

The structurally stabilized aristocratic ideology of *virtue and perfection* was closely related to the idea of *representation*.[7] Only the most perfect political animals should represent the true rational and political essence of all people of a polity, and even more universal of the political and rational essence of all men. Hence, *representation was structurally coupled with perfection, stratification and centralization*. Only the best at the *top* (kings/nobles/high-ranked citizens) of the societal hierarchy and in the (*urban*) *centre* of the world (Rome as the one and only city: *urbs*) or a specific world region should represent not only their subjects essence but also the substantial essence (or the universal ideas) of the whole cosmos. In this already classical political thinking, and only in this elitist and ideological way, was inherently cosmopolitan. Hence, classical cosmopolitanism was 'cosmopolitanism of the few'.[8]

The social structure of old European stratified societies, like the Roman Empire, consisted of a tremendous number of social, political, economic and cultural inequalities, not only *between* classes but also *within* the social classes and sub-classes; this kind of inequality has today become nearly incomprehensible.[9] Even the idea of a

16; Brunkhorst, 'Dialectical Positivism of Happiness: Horkheimer's Materialist Deconstruction of Philosophy', in: S. Benhabib, W. Bonß and J. McColle (eds), *On Max Horkheimer: New Perspectives*, Cambridge, MA, and London: MIT Press, 1993, 67 – 99.

[5] Paradigmatic: Nicolo Macchiavelli, *Il Principe,* 1532; from a modern functionalist perspective, see Niklas Luhmann, *Macht*, Stuttgart: Enke 1988.

[6] Max Weber, *Religionssoziologie I*, Tübingen: Mohr, 1978 (1920), 246.

[7] On the history of the idea of *representation*, see Hasso Hofmann, *Repräsentation, vierte Aufl. mit einer neuen Einleitung*, Berlin: Duncker & Humblot 2003; excellent in particular on the turn to modernity, see Harvey C. Mansfield, 'Modern and Medieval Representation', in: J. Roland Pennock and J. W. Chapman (eds), *Representation*, New York: Atherton Press, 1968.

[8] Craig Calhoun, 'The Class Consciousness of Frequent Travelers: Toward a Critique of Actually existing Cosmopolitanism', *The South Atlantic Quarterly* 1001, 4/2002, 869-897; see also: Craig Calhoun, '"Belonging" in the cosmopolitan imaginary', *Ethnicities* 3(4), 531-553. Further: Craig Calhoun, *Nations Matter: Culture, History, and the Cosmopolitan Dream*, London: Routledge 2007, and my critical review in *American Sociological Review* 2008.

[9] Michael Stolleis, 'Diebstahl an sich selbst', *Frankfurter Allgemeine Zeitung* 120, 24 May 2006, N3: 'Bezieht man noch die halbfreien Kolonen, Hörigen, Zinsbauern und die Freigelassenen in das Bild ein, dann sieht man eine vielfältig gestaffelte Gesellschaft vor sich. *Ungleichheit war ihr Zeichen*, selbst unter den Sklaven.' (My emphasis). More comprehensive: Michael Stolleis, 'Historische und ideengeschichtliche Entwicklung des Gleichheitssatzes', in: R. Wolfrum (ed.), *Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz*, Heidelberg, 2003, 7-22.

political *isonomia* (of the best!) was not conceived as an order of equal rights, but as an order of competition (*agonia*) for *privileges*. A good and stable political or civil society (*koinia politike*, *societas civile*) was conceived as a system of asymmetric and hierarchical social relations, and symmetric relations between equals (*inter pares*) were regarded as deviant or unstable, even among lovers and friends.[10] The same was true of 'international' relations between cities or between princes. Equal legal sovereignty of princes or states was a late invention, not earlier than the 16th Century, the time of the first Protestant Revolution.[11]

Even if Roman cosmopolitanism was much more universal and individualized than Greek cosmopolitanism, the price of this double progress was a complete de-politicization of the cosmopolis into a mere *bios theoreticos*, a fictitious global community of philosophers that hardly represented anything more than an ideological glorification of a superstructure suitable for the Roman Empire.[12] Roman cosmopolitanism transformed all human beings into free members of the cosmopolitan order of nature, and Roman *ius naturale* for the first time described all men as born free and equal ('…everyone would be born free by the natural law…', Ulpian, Dig I, 1,4; '…with regard to the natural law, all men are equal…', Dig 50, 17, 32), but the free and equal nature of all men (including all animals) was not at all in contradiction with slavery (or eating animals) and all the other social inequalities, regulated by *ius gentium* and *ius civile* in all its brutal details. Natural law was even the last justification to treat slaves like animals, pets or – as in Roman law – things (*res*).[13]

Classical Roman cosmopolitanism functioned as a method of ruling through agreement only in the fictitious cosmopolis, while in the real *Imperium Romanum* the usual methods of *leges pacis imponere* supervene: execution, deportation and mass

[10] Michel Foucault, *Der Gebrauch der Lüste: Sexualität und Wahrheit 2*, Frankfurt am Main: Suhrkamp 1986; Paul Veyne (ed.), *History of Private Life: From Pagan Rome to Byzantium*, Cambridge, MA: Harvard University Press, 1992.

[11] On the Protestant Revolution see: Harold Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition*, Cambridge, MA: Harvard University Press, 2006; John Witte, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation*, Cambridge UK: Cambridge University Press, 2002.

[12] Women certainly fared better with the Roman Stoics than with the Greeks, but even there the real value of the new ideals of the loving couple were hardly higher than the 'edifying style' of its philosophical and poetic champions: 'When Seneca and Pliny speak of their married lives, they do so in a sentimental style that exudes virtue and deliberately aims to be exemplary. One consequence was that the place of the wife ceased to be what it had been. Under the old moral code she had been classed among the servants, who were placed in her charge by delegation of her husband's authority. Under the new code she was raised to the same status as her husband's friends […]. For Seneca the marriage bond was comparable in every way to the pact of friendship. What were the practical consequences of this? I doubt there were many. What changed was more than likely the manner in which husbands spoke of their wives in general conversation or addressed them in the presence of others.' (Paul Veyne, 'The Roman Empire', in: id., *History of Private Life*, 42f.)

[13] For a different perspective on Ulpian natural right of freedom in the more narrowed context of *lex mercatoria*, see Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, München: Beck, 1999, 236.

enslavement.[14] On the other hand, one must admit that even these natural laws, which were designed as a *description* of nature (and not as a prescriptive legal rule) and had no *normative* meaning within the Roman Empires positive law, set off an extraordinarily progressive 'effective history' [*Wirkungsgeschichte*]. Its *symbolic* meaning in the course of a long history of *legal and political revolutions* and *radical reinterpretations* was transformed into normative constitutional meaning in particular during the Enlightenment and the Constitutional Revolutions of the 18th and 19th centuries.[15]

II

For Kant, the 'cosmopolitan right' (*Weltbürgerrecht*) 'of universal hospitality' should constitute a world citizenship and a rudimentary international legal subjectivity of individual human beings. Kant's *supranational,* universal hospitality is a matter of 'right', not 'philanthropy'. Kant's point is strictly anti-hierarchical and egalitarian. The 'right to visit' is an equal entitlement to unhindered and free movement of citizens, and *not of their rulers and the armies they commanded*, in order for them to be able to enter into a 'possible commerce' [*Verkehr*] with any human being; hence it gives 'no one more right than another to be on a place on the earth'.[16] The right to hospitality is, for Kant, a basic right that legally constitutes a (rudimentary) *global civil society* and *cosmopolitan citizenship*. It is no longer only a human right — through its use it becomes a civic right.

This idea was very familiar in the philosophy of the European Enlightenment. François Quesnay had already suggested that the new and border-transcending freedom of markets should be completed through the uniting of the freedom of *laissez-faire* with the other border-transcending freedom of *laissez-passer*.[17] A similar radical move was taken in the famous French *Declaration of Human and Civic Rights* of August 1789. Different from the later constitutional text books, the Declaration refers to the universal idea of an original social contract and, consequently, makes *no difference* between the universal extension of men as bearers of human rights and citizens as bearers of civic rights. In the transformation from the state of nature to the state of society, only the *meaning*, not the *extension,* of rights is changing. Men are becoming citizens and human rights are replaced by civic rights. The idealism of the Declaration, which Hannah Arendt strikingly has called 'Jacobin patriotism of human rights', was not only an ideology.[18]

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[14] See also Alexander Demandt, *Der ideale Staat,* Cologne: Böhlau, 1993, 263f; Luciano Canfora, 'Der Bürger', in: J.-P. Vernant (ed.), *Der Mensch der griechischen Antike*, Frankfurt am Main: Campus, 1993; Egon Flaig, 'Europa begann bei Salamis', *Rechtshistorisches Journal* 13, 1994; Moses I. Finley, *Das politische Leben in der antiken Welt*, München: Beck, 1991.

[15] See Martha Nussbaum, 'Kant and Cosmopolitanism', in: J. Bohman and M. Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, Cambridge: MIT Press, 1997.

[16] Immanuel Kant, 'Toward Perpetual Peace', in: M. Gregor (ed.), *Immanuel Kant: Practical Philosophy*, Cambridge: Cambridge University Press, 1996, 328f.

[17] Quesnay quoted from Paul Streeten, *Globalisation – Threat or Opportunity?,* Copenhagen: Business School Press, 2001, 25.

[18] Hannah Arendt, *Elemente und Ursprünge totaler Herrschaft*, München: Beck, 1991, 170.

Since the democratic revolutions of the 18th century we can observe an impressive progress of social and institutional learning, which has regularly led to the inclusion of formerly excluded voices, persons, groups, classes, sexes, races, countries, regions, etc. In the words of John Rawls: 'The same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women.'[19] The experience of a successful learning-process of social inclusion can be, and has been, stretched to former silenced voices of the western societies as well as to the oppressed voices of non-western cultures.

Yet, the reality of western democracies often looks different. The story of impressive normative learning is not the whole story. If we tell the whole story, then we have to accept that in many cases (and in some way in all cases) the *expansion of social inclusion was achieved at the price of new exclusion*, or new forms of latent or manifest oppression. The history of western civilization and western democracy is not only a Rawlsian success story of *expansion through the inclusion of the other*. It is at the same time a Foucaultian or Anghien story of *expansion through imperialism*, a story from the 'heart of darkness'.[20] Since the first European division of the world in the Treaty of Tordesillas 1494 between Spain and Portugal imperialism vanished and reappeared with ever new means, and under ever new covers and labels, even anti-imperialist labels.[21] Even the present state of inclusion of the other within an emerging cosmopolitan civil society sometimes appears to be nothing else than the expression of a highly exclusive 'class consciousness of frequent travelers'.[22]

III

But the reproduction of social structures of class rule and relations of domination, exclusion and silencing does not change the *normative facticity* (Christian Joerges) that all modern democratic constitutions since the 18th century are relying on the universal

[19] John Rawls, *Political Liberalism*, New York: Columbia, 1993, XXIX.

[20] Joseph Conrad, *Heart of Darkness* (Norton Critical Edition), New York, NY: W. W. Norton & Company, 2005.

[21] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, MA: Harvard University Press, 2004.

[22] Craig Calhoun, 'The Class Consciousness of Frequent Travelers', *The South Atlantic Quarterly* 4, 2002, 869-897; Craig Calhoun, '"Belonging" in the Cosmopolitan Imaginary', *Ethnicities* 3(4), 531-553; Craig Calhoun, 'Cosmopolitism and Belonging', presentation at the 37th World Congress of the International Institute of Sociology, Stockholm, 2005. Yet as true as it is, in many other cases one must be very careful with criticism of cosmopolitanism. Hegel once wrote that the 'hatred of law is the shibboleth whereby fanatism, imbecility and hypocritical good intentions manifestly reveals themselves.' (Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, Cambridge, MA: Cambridge University Press, 1991, § 258, fn) This is even more true of the hatred of the idea of cosmopolitan law (from which Hegel himself was not completely free). In the 20th century this hatred was closely related to the disastrous ideologies of fascism and other totalitarian (e. g. Stalinist) movements. It was the 'rootless cosmopolitan Jew' who heated the killing fantasies of all right-wing nationalists. Anti-semitic criticism of cosmopolitanism, at least until the end of the Second World War, had a strong backing in nearly all kinds of conservative and neoconservative thinking (Fine, *Cosmopolitanism*, 21).

legal principle of the *inclusion of all human beings* and the *exclusion of inequality*.[23] The normative meaning of these two principles becomes manifest when communicative power appears as the (deeply ambivalent) 'power of revenge', as *rächende Gewalt* (Habermas). To take only relatively harmless examples: Woken up in Seattle.[24] 'Voi G8, Noi 6 000 000 000'. Yet, also with less noise: People, who are listed as terrorists by the United Nations Security Council (SC) on a more than doubtful legal basis, are deprived of nearly all their rights and legal remedies, but some years later some of them try successfully to apply to a regional court in Luxemburg, and things begin to change. Even the SC seems to come under legal pressure now.[25] Legal text books, in particular constitutional text books, are not only talk, they are 'objective spirit' (Hegel), hence 'can strike back'.[26]

If there is anything specific with the 'Western legal tradition'[27] then it is this dialectical double structure of law that is, on the one hand, a *medium of repression* and *stabilization of* (counterfactual) *expectations* (Luhmann) but, on the other hand, an instrument to *change the world*, to 'begin with the establishment of the *civitas dei* on earth' (Berman), or in more secular terms: Law as a *medium of emancipation*. Hence Kant and Hegel have even identified law with egalitarian freedom or defined law as the 'existence of freedom' (*Dasein der Freiheit*).[28] What is so specific with Western constitutional law now is that the deep tensions, even contradictions between these two faces of repression and emancipation (Habermas speaks of a *Janus*-face), have been 'reconciled' by legal institutions, which have learned to *coordinate conflicting powers*. Harold Berman speaks of a *dialectical reconciliation of opposites*[29], but one must add that it is a dialectical (and procedural) reconciliation of *lasting* opposites, of *lasting* conflicts, differences and contradictions.[30]

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[23] Thomas H. Marshall, *Bürgerrechte und soziale Klassen*: *Zur Soziologie des Wohlfahrtsstaates,* Frankfurt am Main: Campus, 1992, 33ff; Rudolf Stichweh, *Die Weltgesellschaft*, Frankfurt am Main: Suhrkamp, 2000, 52.

[24] Michael Byers, 'Woken up in Seattle', *London Review of Books,* 1, 2000, 16-17.

[25] Jochen von Bernstorf, 'Procedures of Decision-Making and the Role of Law in International Organizations', e-manuscript (draft version), Heidelberg: MPI Völkerrecht, 2008, 16f; Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights', *European Journal of International Law* 15(5), 2004; Iain Cameron, 'European Union Anti-Terrorist Blacklisting', *Human Rights Law Review* 2, 2003, 225-256.

[26] Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie* VI, Berlin: Duncker & Humblot, 1997, 54.

[27] Berman, *Recht und Revolution*, Frankfurt am Main: Suhrkamp, 1991.

[28] Immanuel Kant, *Metaphysik der Sitten*, Rechtslehre 345, 434, 464; Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts § 4*, Werke 7, Frankfurt am Main: Suhrkamp, 1970, 46; Georg Wilhelm Friedrich Hegel, *Philosophie des Rechts, lecture-course 1819*, 20, Frankfurt am Main: Suhrkamp, 1983, 52; Karl Marx, 'Verhandlungen des 6. Rheinischen Landtags: Debatten über das Holzdiebstahlsgesetz (Oktober 1842)', *Marx-Engels Werke 1*, Berlin: Dietz, 1972, 109-147, 58.

[29] Berman, *Law and Revolution II*, 5f.

[30] *Law of collision* or '*Kollisionsrecht*' (Joerges, Teubner, Fischer-Lescano) has deep roots in Western constitutional law. One can, using Chantal Mouffe, discribe this also as transformation from *antagonism to agonism* – if one keeps in mind (against Mouffe) the constitutive role of constitutional law in this transformational process.

The constitutional *spirit* of the revolutions of the 18th century became *objective* for the first time within the borders of the modern nation state. This state always had many faces, including the Arendtian face of violence, the Habermasian face of administrative power, the Foucauldian face of surveillance and punishment, the faces of imperialism, colonialism, war on terror, and so on. But the nation state, once it became democratic, had not only the *administrative power of oppression and control* but also the the *administrative power to exclude inequality* with respect to *individual rights*, *political participation* and *equal access to social welfare and opportunities*.[31] Only the modern nation state did not only have the normative *idea* but also the administrative *power* to do that. From the very beginning, this was the hard core of the Enlightenment's utopia. Up to now, all advances in the reluctant *inclusion of the other*, and hence all advances of cosmopolitanism, are more or less advances of the modern nation state. National constitutional regimes have solved the *three basic conflicts* of the modern capitalist and functionally differentiated society. Putting it in a historically very rough way that leaves a lot of empirical questions open, we can say that the formation and the democratic development of the nation state has solved:

1. The (motivational) *crises of religious civil war* (protestant revolutions) of the 16th and 17th centuries by the *constitutional reconciliation of lasting conflicts* between religious, agnostic and anti-religious belief systems.[32] This was — very schematically — the result of a two-step-development, in a way that was (a) *functionally* and (b) *normatively* universal.
    a. The *functional* effect of the formation of a territorial system of states consisted of the transformation of the uncontrolled atomic explosion of religious freedom into a controlled chain reaction that kept the productive forces of religious fundamentalism alive and its destructive forces (more or less) under control.[33] In the beginning this was the repressive effect of the *confessionalization* of the territorial state.[34]
    b. Yet during the long and reluctant process of *democratization* of the nation state, repressive confessionalization was replaced by *emancipatory legislation,* which finally lead to the implementation of the

[31] Marshall, *Bürgerrechte und soziale Klassen*, 33ff.

[32] This was the very achievement and the specific advance of the Western legal tradition since the 11th and 12th century papal revolution: Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Cambridge: Harvard University Press, 1983. On the distinction of different types of crises (motivational, legitimisation, etc.) see Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus*, Frankfurt am Main.: Suhrkamp, 1973.

[33] In this way Max Weber tells the story in his *Protestant Ethics* (Max Weber, *Die protestantische Ethik und der Geist des Kapitalismus*, 1905).

[34] Wolfgang Reinhard, *Geschichte der Staatsgewalt*, München: Beck, 1999; Heinz Schilling, Die neue Zeit, Berlin: Siedler, 1999; Horst Dreier, 'Kanonistik und Konfessionalisierung: Marksteine auf dem Weg zum Staat', in: G. Siebeck (ed.), *Artibus ingenius*, Tübingen: Mohr Siebeck, 2001, 133-169: Michael Stolleis, '"Konfessionalisierung" oder "Säkularisierung" bei der Entstehung des frühmodernen Staates', *Ius Commune* XX, 1993, l ff. (7); Wolfgang Reinhard and Heinz Schilling (eds), *Die katholische Konfessionalisierung*, Gutersloh: Gutersloher Verlagshaus, 1995; Heinz Schilling, *Die neue Zeit: Vom Christenheitseuropa zum Europa der Staaten: 1250 bis 1750*, Berlin: Siedler, 1999.

equal freedom *of,* together with the equal freedom *from,* religion and other belief systems.[35]

The emerging nation state has also solved:

2. The (legitimisation and) *constitutional crisis* of the public sphere, of public law and public power of the old European *Ancient Regime* (constitutional revolutions) of the 18th and 19th centuries. Constitutions have transformed *antagonistic class fights into agonistic political fights between political parties, unions and entrepreneurs, civic associations, etc*. Bloody constitutional revolutions became in the (better) course(s) of (Western) history *permanent and legal revolutions*.[36] Again the effect was twofold:
    a. A *functional* transformation of the destructive and oppressive potential of a highly specialized politics of accumulation of power for powers sake into a (more or less) controlled explosion of all the productive forces of public *and* administrative power[37] was accompanied by;
    b. *democratic emancipatory legislation,* which finally led to the implementation of the freedom *of* public power together with the freedom *from* public power.

At least even the:

3. *Social class conflicts* (social revolutions[38]) of the 19th und 20th centuries could be solved through the emergence of a regulatory social welfare state, which transformed the elitist bourgeois parliamentarism of the 19th century into egalitarian mass-democracy. The social class fight was institutionalized[39], and the violent social revolution became a legally organized 'educational revolution'.[40]
    a. It was the great *functional* advance of social democracy to keep most of the productive, and get (more or less) rid of the destructive forces of the exploding free markets of money, real estate and labour[41] by overcoming the fundamentalist bourgeois dualism of private and

[35] Talcott Parsons, *The System of Modern Societies*, Englewood Cliffs: Prentice Hall, 1972.

[36] Justus Fröbel, quoted from: Habermas, 'Ist der Herzschlag der Revolution zum Stillstand gekommen?', in: Forum für Philosophie Bad Homburg (ed.), *Die Ideen von 1789 in der deutschen Rezeption*, Suhrkamp: Frankfurt am Main, 1989.

[37] In this respect three very different approaches, the one historical, the other power-theoretical the third from systems theory comply: Alf Lüdtke, 'Genesis und Durchssetzung des modernen Staates', in : *Archiv für Sozialgeschichte*, 20, 1980, 470-491; Foucault, *Überwachen und Strafen*; Luhmann, *Verfassung als evolutionäre Errungenschaft*.

[38] Usually the narrative of the social revolutions is told as a gradual transformation of the nation state (Marshall, *Bürgerrechte und soziale Klassen*; Parsons, *The System of Modern Societies*). This seems evident, but the story can also be told as part of the global, legal revolution of the 20th century (see below).

[39] Dietrich Hoss, *Der institutionalisierte Klassenkampf,* Frankfurt am Main: EVA, 1972.

[40] Parsons, *System of Modern Societies*.

[41] Karl Polanyi, *The Great Transformation*, Frankfurt am Main: Suhrkamp, 1997.

public law.[42] In the first decades of social welfare regimes, this was more or less an achievement of *administrative law* and *bureaucratic rule* in a regime of *low-intense democracy*.[43]

b. The ongoing *democratic* rights revolution[44] that was directed against low-intense democracy, finally led to the implementation of the freedom *of* markets together with the freedom *from* markets, and transformed the system of individual rights, which was based on the freedom of property, into a comprehensive system of welfare *and* anti-discrimination norms.[45]

Yet, the impressive normative *and* functional advances of the western democratic nation state were with the price of its original cosmopolitan claims.

IV

Until 1945, the modern nation state was the state of the regional societies of Europe, America and Japan, and the rest of the world was either under their imperial control or kept outside. The *exclusion of inequality* until the mid of the 20th century meant internal equity for the citizens of the state, and external inequality for those who did not belong to the regional system of states. There was not even any serious or legal claim for a *global* exclusion of inequality.

When Kant proposed the 'cosmopolitan condition' of linking nations together on the grounds that 'a violation of rights in one part of the world is felt everywhere'[46] in modern times, his notion of (political) *world* (in difference to *globe*) was more or less reduced to Europe and the European system of states.[47] When Hegel wrote of the 'infinite importance' that 'a human being counts as such because he is a human being,

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[42] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts 1920*, zit. n. d. Nachdruck: Aalen, 1981; Hans Kelsen, *Reine Rechtslehre,* Wien: Scientia Verlag, 1967 (1934); Hans Kelsen, *Demokratie und Sozialismus: Ausgewählte Aufsätze*, Darmstadt: Verlag der Wiener Volksbuchhandlung, 1967.

[43] On low intense democracy, see Susan Marks, *The Riddle of All Constitutions*, Oxford: Oxford University Press 2000.

[44] Cass Sunstein, *After the Rights Revolution*, Cambridge, MA: Harvard University Press, 1993.

[45] On the emergence of anti-discrimination norms during the legal revolution of the 20th Century, see Berman, *Recht und Revolution*, 46ff, 51f, 57, 63f, 66f, 69f; Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition*, 16ff; Harold Berman, *Justice in the USSR*, Cambridge, MA: Harvard University Press, 1963. On the dialectic of anti-discrimination norms in particular if they are dissolved from the social welfare state (as it is the case with the EU), see Alexander Somek, 'Das europäische Sozialmodell: Die Kompatibilitätsthese', e-manuscript, Berlin, 2008.

[46] Kant, *Toward Perpetual Peace*.

[47] Whereas the *Globe* for Kant was not much more than a logical or transcendental category that limited in particular our practical reason (Reinhard Brandt, 'Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre', in R. Brandt (ed.), *Rechtsphilosophie der Aufklärung*, Berlin: de Gruyter 1982) the *world* (*mundus*) was the historically existing world order, and that in political term for Kant did mean the world of European states and the European ruling class (Höffe, *Gerechtigkeit - Eine philosophische Einführung*, München: Beck 2001, 53f.).

not because he is a Jew, Catholic, Protestant, German, Italian, etc.', Hegel at the same time, and already with the same words, reduces the legal meaning of human rights to male citizens, biblical religions and European nations.[48] He further explicitly limits human rights to national civic law (of the *bürgerliche Gesellschaft* and its *lex mercatoria*) that looses its validity when it comes to the essential concerns of the executive administration of the state (*der Staat*) and its particular relations of power (*besondere Gewaltverhältnisse*, *justizfreie Hoheitsakte*). Therefore Hegel condemns any '*cosmopolitanism*' that opposes the concrete *Sittlichkeit* of the state.[49] Some decades later, when one of the 'gentle civilizers of nations' (Koskenniemi) – Johann Caspar Bluntschli – declared the implementation of a 'humane world order' (*menschliche Weltordnung*) to be the main end of international law[50], he never saw any contradiction between this noble aim and his (and his colleagues') identification of the modern state with a male dominated civilization: '*Der Staat ist der Mann*'[51]. He also saw no contradiction to his latently racist thesis that all law is Aryan.[52] The liberal cosmopolitanism of the 'men of 1873', who founded the *Institut de droit international* in the same year and invented a cosmopolitan international law, was completely Eurocentric, relying on the basic distinction between (Christian) *civilized nations* and *barbarian people* and the rough states of the 19th and early 20th centuries.[53] The generous tolerance of the men of 1873 was from the very beginning paternalistic and repressive.[54] Hence, it is no surprise that the liberal cosmopolitan humanists, who wanted to found a humane world order, became, in no time, apologists for Imperialism,[55] who defended King Leopold's private-measure state in the heart of darkness by drawing a strict legal distinction between *club-members* on the one side, and *outlaws* (Bluntschli) on the other.[56] Following this line of argumentation, article 35 of the Berlin Conference on the future of Africas (1884-85) offers 'jurisdiction' for *us* civilized nations of Europa, 'authority' for *them* in the heart of darkness.[57] Guantámano has a long Western pre-history.

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[48] Hegel, *Philosophy of Right*, § 209.

[49] Hegel, § 209. For a more differenciated reading in particular of Hegel: R. Fine, 'Kant's theory of cosmopolitanism and Hegels critique', in: *Philosophy of Social Criticism* 6/ 2003, 611-632.

[50] Johann Caspar Buntschli, *Das moderne Völkerrecht* 1878, 59. Compare: Andreas Fischer-Lescano and Philip Liste, 'Völkerrechtspolitik', in: *Zeitschrift für internationale Beziehungen* 27 2005, 209-249, 213f.

[51] Johan Caspar Bluntschli, 'Der Staat ist der Mann', in: *Gesammelte kleine Schriften* 1, 284, quoted from: Martti Koskenniemi, *The Gentle Civilizer of Nations*, Cambridge MA 2001, 80.

[52] Koskenniemi, Gentle Civilizer, 77ff.

[53] Nathaniel Bermann, 'Bosnien, Spanien und das Völkerrecht - Zwischen 'Allianz' und 'Lokalisierung'', in: H. Brunkhorst (ed.), *Einmischung erwünscht? Menschenrechte und bewaffnete Intervention*, Frankfurt am Main: Fischer, 1998, 117-140.

[54] Koskenniemi, *Gentle Civilizer of Nations*, 69; on repressive tolerance see Herbert Marcuse, 'Repressive Toleranz', in: R. P. Wolf, B. Moore and H. Marcuse, *Kritik der reinen Toleranz*, Frankfurt am Main: Suhrkamp, 1973.

[55] Koskenniemi, *Gentle Civilizer of Nations*, 168f.

[56] Koskenniemi, *Gentle Civilizer of Nations*, 83.

[57] Koskenniemi, *Gentle Civilizer of Nations*, 126.

Yet, during the time from 1945 to the present day, classical imperialism (not a more and more deterritorialized and flexible kind of hegemony[58]) vanished, euro-centrism was completely decentred, state sovereignty was legally equalized, the state went global, and, together with the globalization of the modern constitutional nation state, all functional subsystems, which — from the 16th century until 1945 —were bound to state power and to the international order of the regional societies of Europe, America and Japan, became global systems. The last square meter of the globe became state-territory (at least legally[59]), and even the moon became an object of international treaties between states.[60] The rational and secular *regional culture,* which originally was the specific *occidental rationality* (Weber) of Europe and North America, has become a rational and secular *culture of the world*; it constitutes the basic orientations of all main actors of the global society – of states, organizations and human individuals.[61] The not yet sufficiently understood consequence is that now Western rationalism, functional differentiation, legal formalism and moral universalism *are no longer something specifically western*, and Eurocentrism has been *completely decentred*.[62]

At the end of the 20th century, human rights violations, social exclusion of global and local regions and tremendous inequalities, hegemony and imperialism (that still divide the North-West from the rest of the world) did not disappear. But now (and this is a major difference between the beginning of the 20th and the beginning of the 21st centuries) they are perceived as *our own* problems; they are perceived not only politically and economically, but also from the point of view of *universal equal rights* as a problem that concerns every citizen of the world. These rights never existed before the mid-20th century as a *global system of positive legal norms*. We now *have* serious and legally binding claims for a *global exclusion of inequality*.

Maybe one should describe this development, and at the same time re-describe the history of the 20th century — the time of extremes (Hobsbawn) — as the result of a great and successful *legal revolution* which began at the end of the First World War with the American onset of war (and not to forget the tragic Russian Revolution) in 1917.[63] President Wilson forced the Western allies to claim revolutionary war

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[58] The best point of a poor book: Michael Hardt and Antonio Negri, *Empire,* Cambridge, MA: Harvard University Press, 2000. For a much better account of the systemic transformation of hegemony, see Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen*, Frankfurt am Main: Suhrkamp, 2005; Sonja Buckel, *Subjektivierung und Kohäsion: Zur Rekonstruktion einer materialistischen Theorie des Rechts*, Weilerswist: Velbrück Wissenschaft, 2007.

[59] Stefan Oeter, 'Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung', in: R. Kreide and A. Niederberger (eds), *Verrechtlichung internationaler Politik: Ende oder Neubeginn der Demokratie?* Frankfurt am Main: Campus, 2008, 90-114.

[60] Petra Dobner, *Konstitutionalismus als Politikform*, Baden-Baden: Nomos, 2002.

[61] On global culture, see John W. Meyer, 'World Society and the Nation-State', *American Journal of Sociology* 103(1), 1997, 144-181; John W. Meyer, *Weltkultur*, Frankfurt am Main: Suhrkamp, 2005.

[62] Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community*, Cambridge, MA: MIT-Press, 2005, 107-113.

[63] For a first account of this thesis:, see Hauke Brunkhorst, 'Die Globale Rechtsrevolution: Von der Evolution der Verfassungsrevolution zur Revolution der Verfassungsevolution?', in: R. Christensen and B. Pieroth (eds), *Rechtstheorie in rechtspraktischer Absicht*, FS Müller, Berlin: Dunker & Humbolt, 2008, 9-34; Hauke Brunkhorst, 'Kritik am Dualismus des internationalen

objectives, and from this moment the war (and later the Second World War, again after the American intervention) was fought not only for self-preservation and national interest, but also for global democracy and global legal peace: 'To make the world safe for democracy' (Wilson). The legal revolution ended in 1945 or — in a less Western perspective — with the decolonization of the 1950s and the 1960s. It resulted in the constitution of the United Nations in San Francisco, a new system of system of basic human rights norms, declared in 1948 and implemented in the Treaties of 1966, together with a completely new system of inter-, trans- and supranational institutions and –organisations, which were created during the short period from 1941 to 1951 — including international welfarism which was invented *before* the great triumph of national welfare states in the period between 1945 and 1967.[64]

The development of international law has deeply changed since the founding of the United Nations: The turn from a law of coordination to a law of cooperation[65], the European Union, the Human Rights Treaties of the 1960s, the Vienna Convention on the law of the Treaties, the emergence of international *ius cogens,* etc. The old rule of equal sovereignty of states became the 'sovereign equality' *under* international law (Art. 2 par. 1 UN), individual human beings became subject to international law, democracy became an emerging right or a legal principle that is valid also against sovereign states, and the right to have rights, which Arendt missed in the 1940s, is now a legal norm that binds the international community.[66]

All these legal rules are broken again and again. However, this is not specific for international law but happens with national law as well. What is new today is *that international and cosmopolitan equal rights have become binding legal norms*, and hence, can be taken seriously. There is no longer any space open for any actions outside the law or the legal system.[67] Hence, if there once was a difference in principle between national and international law, there no longer exists any such difference. This is what Hans Kelsen, Alfred Verdross and other cosmopolitan international lawyers claimed already during the First World War.

V

Yet, the international (and national) legal and revolutionary progress is deeply ambivalent and fragile, as everything is in a highly accelerated and complex modern society.[68] There are now the basic legal principles of the *global inclusion of the other* and the *global exclusion of inequality*, on the one hand, but on the other hand there are

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Recht: Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts', in: R. Kreide and A. Niederberger, *Verrechtlichung internationaler Politik*, Frankfurt am Main: Campus, 2008, 30-63.

[64] Lutz Leisering, 'Gibt es einen Weltwohlfahrtsstaat?', in: M. Albert and R. Stichweh (eds), *Weltstaat und Weltstaatlichkeit*, Wiesbaden: VS, 2007, 185-205.

[65] Wolfgang Friedmann, *The Changing Structure of International Law*, London: Stevens & Sons, 1964, 60-61, 65.

[66] For a more comprehensive overview, see Brunkhorst, 'Die Globale Rechtsrevolution: Von der Evolution der verfasungsrevolution zur Revolution der Verfassungsevolution?'.

[67] Byers, 'Preemptive Self-Defense', *Journal of Political Philosophy* 2, 2003, 171-190, at 189.

[68] Hartmut Rosa, 'The Universal Underneath the Multiple: Social Acceleration as the Key to Understanding Modernity', in: S. Costa, J. M. Domingues, W. Knöbel and J. P. da Silva (eds), *The Plurality of Modernity: Decentering Sociology*, München: Hampp, 2006, 22-42.

global functional systems, a global public and global spheres of value, which *tear themselves off from the constitutional bonds of the nation state*, emerging expeditiously. This is a double-edged process that has caused a *new dialectic of enlightenment*. The most dramatic effect of this process of the formation of the world society is the decay of the ability of the nation state to exclude inequalities effectively — even within the highly privileged OECD-world. This becomes very significant first in the *economic system*. Here we can observe the complete transformation of the:

1. *State-embedded markets of regional late capitalism* into the *market-embedded states of global turbo-capitalism*.[69] The negative effect of economic globalization on our rights is that the freedom *of* markets explodes globally, and together with heavy, sometimes war-like competition: *There will be Blood*.[70] At the same time the freedom *from* the negative externalities of markets decays rapidly.

Surprisingly enough, when it comes to the religious sphere of values, we can make a similar observation. The global society makes the same proposition that is true for the capitalist economy, true for the autonomous development of the religious sphere of values. We now are confronted with the transformation of:

2. *State-embedded religions of the western regional society* into the *religion embedded states of the global society*.[71] Since the 1970s, religious communities everywhere crossed borders and escaped state control. Again the negative effect on our rights is that the freedom *of* religions explodes, even sometimes so much that it leads to religious war: *There will be Blood*. Yet, at the same time the freedom *from* religion everywhere comes under pressure from religious fundamentalism and from (neo-conservative) public and administrative power.

Last but not least, the (internally fragmented) executive bodies of the state have decoupled themselves from the state-based separation, coordination and unification of powers under the democratic rule of law, and went global.[72] The more they are

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[69] Wolfgang Streek, 'Sectoral Specialization: Politics and the Nation State in a Global Economy', paper presented on the 37th World Congress of the International Institute of Sociology, Stockholm, 2005. As we now can see, the talk about *late* capitalism was not wrong but has to be restricted to state-embedded capitalism, and state-embedded capitalism is indeed over. But what then came was not socialism but global disembedded capitalism, which seems to be as far from the state-embedded capitalism of the old days as from socialism.

[70] One-sided, but in this point striking the neo-Pashukanian, analysis of international law: China Mieville, *Between Equal Rights: A Marxist Theory Of International Law*, London: Haymarket, 2005.

[71] Hauke Brunkhorst, 'Globalizing Solidarity: The Destiny of Democratic Solidarity in the Times of Global Capitalism, Global Religion, and the Global Public', *Journal of Social Philosophy* 1, 2007, 93-111.

[72] On transnational administrative during the last few years a whole industry of research emerged, see mainly Christian Tietje, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes', *Deutsches Verwaltungsblatt* 17, 2003, 1081-1164; Christoph Möllers, 'Transnationale Behördenkooperation', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 65, 2005, 351-389; Nico Krisch and Benedict Kingsbury, Symposium: Global Governance, *European Journal of International Law* 1, 2006; Benedict Kingsbury, Nico Krisch and Richard B. Steward, 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, 68(15), 2005, 15-61. Available at: <http://law.duke.edu/journals/lcp>. Christoph

decoupled from national control and judicial review, the more they coordinate and associate themselves on regional and global levels where they constitute a couple of loosely connected transnational executive bodies. Postnational ('good' or 'bad') governance without (democratic) government is performed through partly formal and egalitarian *rule of law*, elitist *rule through law*, and informal *bypassing of (constitutional) law and democratic public* by a new regime of soft law legislation, which although it normatively has no binding force yet, empirically has a strong binding effect[73], a bit like the old Roman *senatus consultum* which had no legally binding force but every official was well adviced to follow it.[74] Hence, the executive power seems to undergo the same transformation as markets and religious belief systems, which goes:

3. From *state embedded power to power-embedded states*. This leads to a new *privileging of the globally more flexible second branch of power vis-à-vis the first and third one*, which jeopardizes the achievements of the modern constitutional state.[75] The effect is an accelerating process of a global *original accumulation of power beyond national and representative government*. Some examples: the Basel Bank Committee,[76] the so called Bologna process of the European reform of the university system,[77] the work of the Council of Europe's presidents, prime- and foreign-ministers, who (except from the one voice of the president of the *European Commission*) have a clear democratic mandate only for national foreign policies but not for what they are doing primarily: European domestic politics.[78]

The three great transformations of the world society have turned the democratically chosen and legally organized political power within the nation state into the power of a *transnational politico-economic-professional ruling class* — including high ranked TV- and BILD/SUN/etc.-journalists and media stars, who function as a system of *bypasses* implemented to prevent the heart of political decision-making from *any spontaneous formation of communicative power of an untamed and anarchic public sphere*. It seems as if the Habermasian filters that should transform public opinion into political decision-

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Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationalisierung des Verwaltungsrecht,* Tübingen: Mohr Siebeck, 2007; Andreas Fischer-Lescano, 'Transnationales Verwaltungsecht', *Juristen-Zeitung* 8, 2008, 373-383. On the globalization of executive power, see Klaus Dieter Wolf, *Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft*, Baden-Baden: Nomos, 2000; Petra Dobner, 'Did the state fail? Zur Transnationalisierung und Privatisierung der öffentlichen Daseinsvorsorge: Die Reform der globalen Trinkwasserpolitik', in: K. D. Wolf (ed.), *Staat und Gesellschaft - fähig zur Reform?,* Baden-Baden: Nomos, 2006, .247-261; Gertrude Lübbe-Wolf, 'Die Internationalisierung der Politik und der Machtverlust der Parlamente', in: H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft*, *Sozialen Welt,* special issue 18, 2009.

[73] Bernstorf, *Procedures of Decision-Making*, 22; Möllers, *Transnationale Behördenkooperation*.

[74] Uwe Wesel, *Geschichte des Rechts*, München: Beck 1997, S.163.

[75] Wolf, *Neue Staatsräson*.

[76] Möllers, *Transnationale Behördenkooperation*.

[77] Brunkhorst, 'Unbezähmbare Öffentlichkeit. Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung', in: *Leviathan* 1/ 2007.

[78] Brunkhorst, *Unbezähmbare Öffentlichkeit*; Phillip Dann, Looking through the federal lens: the Semi-parliamentary Democracy of the EU, *Jean-Monnet working paper* 5/ 02.

making[79] now are working the other way round, closing the doors for public opinion. White-Paper-Democracy. The new transnational ruling class hardly relies on egalitarian will-formation anymore. This class is (not so different from the *national* bourgeoisie of the 19th century) highly heterogeneous and characterized by multiple conflicts of interest. It does, however, have a certain amount of *common class interests*, such as to increase its room for maneuver by withdrawing from democratic control, and, as a comfortable side effect, to preserve and increase the enormously expanded individual and collective opportunities for private profit-generation.[80] This is the new *cosmopolitism of the few*: Instead of global *democratic government* we now are approaching some kind of directorial global *bonapartist governance* — soft bonapartist governance for *us* of the north-west, hard bonapartist governance for *them* of the south-east, the failed and outlaw states and regions of the globe.[81]

The deep divide of the contemporary world — segretating people into two classes: people with good passports and people with bad passports — is mirrored by the constitutional structure of the world society. Today, there already exists a certain kind of global constitutionalism: one constituted by the lasting results of the revolutionary changes from the first half of the 20th century. But the existing global constitutional order is far away from being democratic.[82] All post-national constitutional regimes are characterized by the *disproportion between legal declarations of egalitarian rights and democracy* and *its legal implementation by the international constitutional law of check and balances*.[83] Hence, the legal revolution of the 20th century was successful, but remains unfinished. The one or many global constitutions are in bad shape, based on a constitutional compromise (Franz Neumann) that mirrors the hegemonic power structure and the new relations of domination in the world society, as Inger Johanne Sand recently has described it:

> The treaties and the law-making are increasingly comprehensive, and the courts and dispute-settlement bodies are increasingly judicially organized and operatively effective. They are however still different than the similar forms of nation-state organized institutions in a number of ways. The treaties and the law-making is comprehensive, but fragmented and asymmetrical. Each treaty

[79] Bernhard Peters, *Öffentlichkeit*, Frankfturt: Suhrkamp 2008.

[80] Klaus Dieter Wolf, Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft, Baden-Baden: Nomos 2000.

[81] Anghie, Imperialism, Sovereignty and the Making of International Law.

[82] For the thesis that the UN-Charter is the one and only constitution of the global legal and political order, see: Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', in: *Columbia Journal of Transnational Law* 1998, 529-619. Different approaches in: Arnim von Bogdandy, *Europäisches Verfassungsrecht*, Berlin, 2003; Matthias Albert/ Rudolf Stichweh, *Weltstaat und Weltstaatlichkeit*, Wiesbaden: VS 2007; *Arnim v Bogdandy*, Constitutionalism in International Law, in: *Harvard International Law Journal*, 47, 1/ 2006, 223-242; Hauke Brunkhorst, 'Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism', *Millenium: Journal of International Studies,* 31(3), 2002, 675-690; Hauke Brunkhorst, 'Demokratie in der globalen Rechtsgenossenschaft', *Zeitschrift für Soziologie*, special issue on the Global Society, Weltgesellschaft, 2005, 330-348. For the thesis of constitutional pluralism, see Gunther Teubner, 'Globale Zivilverfassungen', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 63(1), 2003, 1-28.

[83] For the original version of this thesis, see Brunkhorst, *Globalising Democracy Without a State*; Brunkhorst, *Demokratie in der globalen Rechtsgenossenschaft*.

> dealing with one set of problems or purposes — without the abilities of seeing the different types of problems in relation to each other. The organizations are not democratic in relation to citizens. They are generally based on states as members and many of them are dominated by internal secretariats and experts. They are set up as top-down tools for dealing with separate issues and areas of problems. They are dominated by different elites.[84]

Scientific and technical expertise have again become an ideology[85], which obscures the social fact that 'most regulatory decisions involve normative assumptions and trigger redistributive outcomes that can not be reduced to seemingly objective scientific inquiries; each time someone wins and someone looses'.[86] Hence, what seems to be necessary and out of reach in the present situation of, pessimistically speaking post-, optimistically speaking, pre-democratic global constitutionalism is a Kantian *Reform nach Prinzipien*[87] or 'radical reformism' (Habermas) as well as a new 'democratic experimentalism' (Dewey) that operates on the same level as the power of the emerging transnational ruling class: Beyond representative government and national government.[88]

VI

What could radical reformism or *Reform nach Prinzipien* mean today? I don't know. But before posing the hard questions of constitutional change and institutional design, which often fail because they conceptually miss the level of complexity of modern society, we should start again with concepts and principles, and that means with a critique of *dualism* and *representation* in legal and political theory.

Dualistic and representational thinking has already been deconstructed completely by the revolutionary philosophy (and scientific praxis) of the 20th century, in particular by philosophers like John Dewey, Ernst Cassirer (after his symbolic turn), early Martin Heidegger, late Ludwig Wittgenstein, or Willard van Orman Quine.[89] Yet, representational thinking, deeply based on dualism, still prevails in political and legal theory. In particular in international law and international relations (IR), dualism covers a broad mainstream of opposing paradigms. From IR-realism to critical legal studies, from German *Staatsrecht* to critical theory, from liberalism to neo-conservatism, the state-centred dualism is tacit consent – dualism between

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[84] Inger Johanne Sand, 'A Sociological Critique of the Possibilities of Applying Legitimacy in Global and International Law', paper presented at Onati-School for Socilogy of Law, Onati, Spain, 2008.

[85] Herbert Marcuse, 'On Science and Phenomenology', *Boston Studies in Philosophy of Science,* 2, 1965, 279-291; Jürgen Habermas, *Technik und Wissenschaft als 'Ideologie'*, Frankfurt am Main: Suhrkamp, 1968.

[86] Bernstorf, *Procedures of Decision-Making and the Role of Law in International Organizations*, 8.

[87] Claudia Langer, *Reform nach Prinzipien: Untersuchungen zur politischen Theorie Immanuel Kants*, Stuttgart: Klett-Cotta, 1986.

[88] Marks, *Riddle of all Constitutions*, 2f.

[89] A paradigmatic account is Richard Rorty, *Der Spiegel der Natur*, Frankfurt am Main: Suhrkamp, 1981. For recent developments, see Robert Brandom, *Making It Explicit: Reasoning, Representing & Discursive Commitment*, Cambridge, MA: Harvard University Press, 1994.; Jürgen Habermas, *Wahrheit und Rechtfertigung*, Frankfurt am Main: Suhrkamp, 1997.

Staatenbund and *Bundesstaat*, international and national law, constitution and treaty, public law and private contract, state and society, politics (or '*the* political') and law, law-making and -application, sovereign and subject, people and representatives, (action-free) legislative will formation and (weak-willed) executive action, legitimacy and legality, heterogenous population and (relatively) homogenous people, *pouvoir constituant* and *pouvoir constitué,* etc. All these dualisms already conceptually hinder us from constructing European and global democracy adequately and finally, from joining the *civitas maxima*.

Yet, what Dewey and the pragmatists did with classical idealistic and metaphysical dualisms in philosophy, Kelsen and his students did with the dualisms in political, legal and constitutional theory. They have replaced each of them by a *continuum*. Kelsen's and Merkle's paradigm case was the legal hierarchy of steps (*Stufenbau des Rechts*).[90] The doctrine of *Stufenbau* does transform the dualisms of legislative will and executive performance, of political generation and professional application of legal norms, of general law and specific judgment, and last but not least of international and national law into a *continuum of concretization*.[91] Hence, if on all levels or steps of the continuum of concretization, legal norms are (politically) created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fair and equally on all levels of their creation (in this or that, and to be sure, very different ways).

Moreover, if we go (with Jochen von Bernstorff[92]) one step further than Kelsen, and drop the transcendental foundation of a legal hierarchy and the *Grundnorm*, then we are left with an enlarging or contracting circle of legal and political communication which has no beginning and no end *outside* positive law *and* democratic will-formation.[93] Only then could democracy replace the last (highly transcendentalized and formalized) remains of the old European *leges-hierarchy* and *natural law* that are higher than democratic legitimization, and that means to get rid of the last inherited burden of dualism, which 'weights heavily like a nightmare on our brains' (Marx). Moreover, we should read Kelsen's theory no longer primarily as a scientific theory of pure legal doctrine, but as a practical oriented theory (and anticipation) of the global legal revolution of the 20th century, and as a hopeful message, as an attempt to change our worldview and our vocabulary in a way that fits to a praxis that emancipates us from ideological blindness, and helps us to get rid of the old international law of 'sorry comforters' (Kant).[94]

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[90] Adolf Merkl, *Allgemeines Verwaltungsrecht*, Wien and Berlin: Julius Springer, 1927, 160, 169; Adolf Merkl, 'Prolegomena zu einer Theorie des rechtlichen Stufenbaus', in: H. Klecatsky, R. Marcic and H. Schambeck (eds), *Die Wiener rechtstheoretische Schule*, Wien: Europa Verlag, 1931; Festschrift Kelsen, 1352ff.

[91] Bernstorff, 'Kelsen und das Völkerrecht', in: H. Brunkhorst and R. Voigt (eds), *Rechts-Staat*, Baden-Baden: Nomos 2008, 181.

[92] Bernstorff, *Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler*, Baden-Baden: Nomos 2001.

[93] This comes close to Habermas' normatively strong or Luhmann's normatively neutralized idea of circulations of communication without a subject (*subjektlose Kommunikationskreiläufe*). Jürgen Habermas, *Faktizität und Geltung*, Frankfurt am Main: Suhrkamp, 1992; Niklas Luhmann, *Legitimation durch Verfahren*, Frankfurt am Main: Suhrkamp, 1983; combined by Marcelo Neves, *Zwischen Themis und Leviathan*, Baden-Baden: Nomos, 2000.

[94] Brunkhorst, *Dualismus des internationalen Recht*.

After the mirror of natur and the mirror of the true nature of the people are broken, hence, after *representation,* democratic institutions in general should be designed to enable the *expression* of political and individual self-determination in a great variety of different organs or legal bodies, like parliaments, courts, governments, administrations, federal, inter-, trans- and supranational regimes, and in different forms and procedures of egalitarian will-formation like 'participatory', 'deliberative' 'representational' or 'direct' democracy (or…) which can be combined or replaced by one another. Even if Kelsen is today sometimes read as a strong defender of representational democracy and parliamentary supremacy (or at least priority), this reading is wrong because Kelsen like Dewey made a sharp and knock out criticism of the whole idea of representation and replaced it with the idea of a continuum of different *practical methods* to express political opinions and to make decisions that are egalitarian.[95] To avoid an obstinate misunderstanding: Radical criticism of *representational* democracy must not at all be critical with *parliamentary* democracy but leads:

1. To a re-interpretation of parliamentary democracy as one (possible[96]) *part* of a comprehensive (procedural) *method* of egalitarian will formation, deliberation and decision making;[97]

2. To a relativization of parliamentary legislation. Parliaments no longer can be interpreted as the highest organs of the state, the one and only true representative of the general will of the people or even the essential, higher or refined will of the better self of the people (the one that fits better to the ideas of intellectuals), or the representation of the *Gemeinwohl* or commonwealth (whatever that is). Hence, for pragmatic reasons parliaments may be the best method, of democratic will formation in a given historical situation, but this depends and may change.

To conclude: The double criticism of dualism *and* representation has far reaching implications for theories of democracy and constitutional design which are Kelsian but go far beyond Kelsen's partisanship with parliamentary democracy:

1. If on all levels or steps of a continuum of concretization, legal norms are (politically) created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fair and equally:
   a. On all levels of their creation – local, national, regional and global levels (in this or that, and to be sure, very different ways);
   b. In courts as well as in administrations and parliaments, in state organs and political associations as well as in the societal community, cultural

[95] Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd ed., Aalen: Scientia, 1981 (1929); Hans Kelsen, *Allgemeine Staatslehre*, Berlin: Steiner, 1925; Hans Kelsen, *Reine Rechtslehre,* 2nd ed., Wien: Scientia, 1967 (1934).

[96] Nothing is neccessary in a democratic legal regime except the normative idea of equal freedom: Immanuel Kant, *Metaphysik der Sitten: Metaphysische Anfangsgründe der Rechtslehre*, 1797, 345; Ingeborg Maus, *Zur Aufklärung der Demokratietheorie*, Frankfurt am Main: Suhrkamp 1992; Brunkhorst, *Solidarity*, 67-77; Christoph Möllers, *Demokratie*, Berlin: Wagenbach, 2008, 13f, 16.

[97] Kelsen, *Vom Wesen und Wert der Demokratie*.

institutions and economic enterprises (hence, the whole Parsonian AGIL-schema is open for democratization[98] as far as it does not destroy either private or public autonomy[99]).

2. The different (public and private) organs, forms and procedures of legislation, administration and jurisdiction are *all in equal distance to the people*, and no organ, and no procedure is left to represent the people as a whole: 'No branch of power is closer to the people than the other. All are in equal distance. It is meaningless to take one organ of democratic order and confront it as the *representative* organ to all others. There exists no democratic priority (or supremacy) of the legislative branch.'[100] Instead of any substantial sovereign, democracy only allows procedural sovereignty that must express itself in '*subjektlosen Kommunikationskreisläufen*' (circulations of communication without a subject).[101]

3. Whereas the concept of the (higher) *legitimacy* of a ruling substantial subject (the king or the state as '*Staatswillenssubjekt*'[102]) is as fundamental for *power limiting constitutionalism* as it was for medieval Christian, Papist or later absolutist regimes with its 'two bodies of the king'[103] – *democratic and power founding constitutionalism* replaces *legitimacy* completely by a legally organized procedure of egalitarian and inclusive *legitimization*.[104] The procedures of legitimization have no longer any higher legitimacy. They are themselves nothing else than products of democratic legislation. Hence legitimization is circular, but not in the sense of a closed and *vitiosus* circle but in the sense of an open, socially inclusive hermeneutic circle or loop of *legitimization without legitimacy*.[105]

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[98] Christoph Möllers, *Staat als Argument*, München: Beck, 2001, 423 (*Staat* vs. *Gesellschaft* as a dualistic distinction *excludes* democracy, and in particular fort he order of the *Grundgesetz*: 'Auch jenseits des Staats ist Demokratie möglich' because 'Art. 20 Abs. 2 Satz 1 GG den auf Demokratie verpflichteten Staat als *bestimmbaren* Teil der Gesellschaft behandelt.'), 424 (democracy as a dynamic, border transgressing concept: 'die Symbiose von Staat und Demokratie ist …keine notwendige').

[99] Maus, *Aufklärung der Demokratietheorie*; Habermas, *Faktizität und Geltung*.

[100] Christoph Möllers, 'Expressive vs. repräsentative Demokratie', in: R. Kreide and A. Niederberger (eds), *Internationale Verrechtlichung: Nationale Demokratien im Zeitalter globaler Politik,* Frankfurt am Main and New York, NY: Campus, 2008.

[101] Habermas, *Faktizität und Geltung*, 170, 492f.

[102] Hauke Brunkhorst, 'Der lange Schatten des Staatswillenpositivismus: Parlamentarismus zwischen Untertanenrepräsentation und Volkssouveränität', in: M. Gangl (ed.) *Linke Juristen in der Weimarer Republik*, Frankfurt am Main: Peter Lang, 2003.

[103] Ernst H. Kantorowicz, *The King's Two Bodies*, Princeton, NJ: Princeton University Press, 1957.

[104] Habermas, *Faktizität und Geltung*; Christoph Möllers, *Gewaltengliederung*, Tübingen: Mohr, 2005.

[105] Democratic legitimization is inclusive because it governed by the one and only constitutional principle of democracy, and that is the principle of self-legislation or autonomy. This principle is socially inclusive because it presupposes that a procedure of legitimization that is democratic has to include everybody who is concerned by legislation and jurisdiction, therefore all exceptions (e. g. babies) have to be justified publicly and need compensation

4. Democracy is not, as the young Marx once wrote, the 'solved riddle of all constitutions' but, as Susan Marks has objected, democracy is the 'unsolved riddle of all constitutions'[106], hence a constitution that is democratic has to keep the riddle open. It belongs to the *necessary meaning of democracy that is modern* that the 'meaning' of 'democratic self-rule and equity' never can be 'reduced to any particular set of institutions and practices'.[107] Without the 'normative surplus'[108] of *democratic meaning* or the *meaning of democracy* which always already transcends any set of *legal procedures of democratic legitimization*,[109] the people, the 'subject' of democracy no longer would be a self-determined group of citizens, or a self-determined group of all men[110] who are affected by a given set of binding decisions. If they are not able to exhaust the meaning of democracy, and to experiment within an unlimited meaning-variance of key-words like equality, equity, freedom, constitution, rights or rule of law, if we the people are not able to determine, discover, construct or disclose new meanings of democracy (input-legitimization), then there is no democracy at all but only a heteronomous people of — maybe happy — slaves (output-legitimization).

through human rights. Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie*, Berlin 1997; Brunkhorst, *Solidarity*, Ch. 3; Marks, *Riddle of all Constitutions*.

[106] Marks, *Riddle of all Constitutions*.

[107] Marks, *Riddle of all Constitutions*, 103, 149f.

[108] Tom McCarthy, *Philosophy and Critical Theory*, 21.

[109] ÜR 188 etc.

[110] 'All men' can mean a lot of things, e. g. all men in a bus, all men on German territory, all men with US passports (that is far less than all US citizens), all men on the globe, all men in the universe, all men who are French citizens, all men who are addressed by a certain legal norm. Democracy and democratic legitimization is only concerned with the last two meanings (and the possible tension between them).

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RECON is an Integrated Project financed by the European Commission's Sixth Framework Programme for Research, Priority 7 – Citizens and Governance in a Knowledge-based Society. Project No.: CIT4-CT-2006-028698.

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