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Dialectical snares: human rights and democracy in the world society

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Abstract

The paper starts with a thesis on the dialectical structure of modern law that goes back to the European revolutionary tradition and constitutes a legal structure that is at once emancipatory and repressive. Once it became democratic, the modern nation state has solved more or less successfully the crises that have emerged in modern Europe since the 16th Century. Yet, this state did not escape the dialectical snares of modern law and modern legal regimes. Its greatest advance, the exclusion of inequalities, presupposed 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 advance of the 20th Century was the emergence of world law, and this enabled the construction of international and national welfarism and the global expansion of the exclusion of inequalities. Nevertheless, the dialectic of enlightenment returned and led to new forms of post-national domination, hegemony, oppression, and exclusion. The final section of the paper tries to detect some ideas and principles for how to overcome the crisis.

Keywords: *crisis; dialectic of legalization; exclusion of inequalities; world society; world law; world culture; decentering of Eurocentrism; global legal revolution; Reform nach Prinzipien; critique of dualism*

In the following paper I begin with a general definition of the specific character of the western legal tradition, which is *dialectical* in at least two respects. Modern law is not only related to a general function of modern society, but also ought to be interpreted as the respectively concrete existence of the universal idea of freedom. The emancipatory character of the concrete existence of law now can be *in accordance or in contradiction* with the functional requirements of a society that is not only functionally differentiated but still (and depending on functional imperatives) has a hegemonic structure of power, class, and other relations of dependency and exploitation. On the other hand, there exists ample empirical evidence that the respective concretization of the idea of equal and universal freedom by processes of

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legislation and jurisdiction *regularly* leads to new and more sophisticated forms of exclusion and oppression, even if this is not a conceptual necessity, as it seems to be in the legal philosophical work of Derrida's or Adorno's analysis of the antinomy of freedom that is modern (I). The development of the modern idea of law today must be related to a single global or *world society* (II) which is the product of the *revolutionary* changes of the 20th Century. The 20th Century, therefore, cannot be reduced to a totalitarian century, but was more precisely the *age of extremes* (Hobsbawm), and not *only* for the worst (III). Following this general definition is a brief analysis of the ambivalent (or dialectical) structure of public international and world law (IV). Finally, I will try to develop the basic contradiction of present world law a bit further in the direction of probable change by reform (V).

Before I begin, let me provide one remark on *dialectics*: The thesis on the dialectical structure of law here is meant historically and sociologically (empirically) and not—as in Derrida, Adorno, or Kant and Hegel—logically or conceptually. There is no inescapable antinomy or paradoxical structure of law or the legal system, and if there appears to be a paradoxical or contradictory constellation in legal history or within the legal system, it can become productive and the contradiction overcome, or it can lead to self-destruction and an evolutionary dead-end would be reached, or a turn in another direction or revolutionary change will follow. If a contradictory structure (which can be observed by a sociological or philosophical observer, such as Marx, Luhmann, or Derrida) is overcome or repressed, it always can come back because the meaning of contradiction or dialectic here (as in classical Greek philosophy) is *dialogical*, and that means it has to be *perceived, articulated, and expressed* as a contradiction by social subjects (persons, groups, classes). It will come back the moment someone refers to the contradiction *to contradict* an unbearable social structure of domination, oppression, or exclusion. Therefore, a dialectical contradiction *exists* only if it is *performed* and *articulated* by social actors, social movements, or at least a single individual person. A whole past of repressive silencing comes to existence only once it is made explicit as such by communicative speech acts.

I

If there is anything specifically characteristic of the 'Western legal tradition' (Berman), it is the dialectical dual structure of law, which is on one hand a *medium of repression and stabilization of expectations* (the Luhmanian *immunity system* of society), and on the other hand an instrument made to *change the world*, and a Habermasian *medium of emancipation*, which is why Kant and Hegel even identified law with egalitarian freedom, or defined law as the 'existence of freedom' (*Dasein der Freiheit*).¹ The Declaration of Independence is a medium of *emancipation* which declares that *all men are created equal*, and (against the King of Great Britain) it claims open access for all emigrants. Rawls is right when he reminds us that the democratic revolutions of the 18th Century have triggered an impressive process of social and

institutional learning, which has regularly led to the inclusion of formerly excluded voices, persons, groups, classes, sexes, races, countries, regions, etc.: ‘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.’² Yet, at the same time, the Declaration is a document of bloody *oppression* that legalizes the genocide of the aboriginal population of America—not only the British King but also his supposed allies, *the merciless Indian Savages* are declared to be public enemies of *civilized nations*, or illegal fighters.

What is now so specifically characteristic of Western constitutional law is the fact that the deep tensions, and even the contradiction, between these two faces of repression and emancipation have been ‘reconciled’ by legal institutions which have learned to *coordinate conflicting powers*, and to make use of the always risky and fragile ‘productivity of the antinomy.’³ Harold Berman speaks in this regard of a *dialectical reconciliation of opposites*,⁴ but we should also add that it is a dialectical (or procedural) reconciliation of *lasting* opposites, of *lasting* conflicts, differences, and contradictions.⁵ The very point here is that the Western legal tradition emerged from the terror and fanaticism of the Revolution. But the constitutional regimes which were the final outcome of all great and successful European Revolutions established legal conditions for a struggle *for* equal rights *within* the right.

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. These include the Arendtian face of *violence*, the Habermasian face of *administrative power*, the Foucaultian face of *surveillance and punishment*, the faces of imperialism, colonialism, war-on-terror, and so on. However, the nation state, once it became democratic, possessed, not only the *administrative power of oppression and control*, but at the same time the *administrative power to exclude inequality* with respect to *individual rights, political participation, and equal access to social welfare and opportunities*.⁶ The nation state has reconciled the crises of early modernity which came to the fore in political revolutions, economic class fights and religious war, and it has solved these crises by introducing the freedom *of* political participation together with the freedom *from* state control, the freedom *of* religion together with the freedom *from* religion, the freedom *of* markets together with the freedom *from* its negative externalities. However, the modern nation state was not only under the claim by the normative *idea* of freedom and equality, but also based on the administrative *power* to implement that idea. Up to the present all advances in the reluctant *inclusion of the other*, and so also all advances of cosmopolitanism, are, to a greater or lesser degree, advances that have been accomplished by the modern nation state. Despite this, however, the impressive normative *and* functional advances of the Western democratic nation state were obtained at the price of its original cosmopolitan claims.

The classical paradigm case, a *locus classicus* of the dialectic of enlightenment, here is the case of the declarations of rights by the French or the American Revolutions of the 18th Century. In the beginning, the rights of declarations and amendments were *mere declarations* without any specific legal meaning, and at least in the French case

they had an undoubtedly *universal* character, including all men, and equating semantically even the extension of civic and human rights (human rights were rights men already possessed in the state of nature, and they became civic rights and were completed with other civic rights once the population of the state of nature entered the societal state and natural men under law of the nature became a post-natural citizens under positive law). But in the course of the 19th and 20th Centuries these rights were increasingly understood as legislative programs or (in the American case) even as legally binding basic norms. Human rights now became legally equated with their concretization by normal legislation and jurisdiction. This made them hard law, but once they had become hard law the exclusion of foreigners, prisoners, bad citizens, women, blacks, and others from civic and human rights, and in some cases from humanity as such, became hard law and with every step of concretization of rights the status of those excluded non-bearers of rights was also concretized. Hence, the more the normative promise of the nation state to exclude inequalities was realized, the more stable and real the legal exclusion and legal oppression of the non-bearers of rights became. In the end, the exclusion was so stable that in some cases it required bloody wars and revolutions to change it.

II

The modern nation state up to 1945 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-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 a serious or legal demand for a *global* exclusion of inequality. When Kant proposed the ‘cosmopolitan condition’ of linking nations together on the grounds that in modern times ‘a violation of rights in one part of the world is felt everywhere,’ his notion of *world* (concerning the political world in difference to *globe* which for Kant was only a transcendental schema) was more or less reduced to Europe and the European system of states. Twenty-five years later, Hegel mentioned the ‘infinite importance’ that ‘a human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc.’⁷ Yet, at the same time, Hegel reduces the legal meaning of human rights to male citizens, biblical religions, and European nations. He further explicitly limits human rights to national civic law (of the *bürgerliche Gesellschaft* and its *lex mercatoria*), and this law loses its validity once it comes to the essential concerns of the executive administration of the state and its particular relations of power (which short time later in German statist law were called: *besondere Gewaltverhältnisse, justizfreie Hoheitsakte*). Therefore, Hegel condemns any ‘*cosmopolitanism*’ that opposes the concrete *Sittlichkeit* of the state. 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, he did not foresee

a 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*,’ and he also saw no contradiction to his latently racist thesis that all law is Aryan. The liberal cosmopolitanism of the ‘men of 1873’ who founded in the same year the *Institut de droit international* and invented a cosmopolitan international law, was completely Eurocentric, relying on the basic distinction between (Christian) *civilized nations* and *barbarian people*, the rough states of the 19th and early 20th Centuries.⁸ The generous tolerance of the men of 1873 was from the very beginning paternalistic and repressive. Hence, it is no surprise that the liberal cosmopolitan humanists who wanted to found a humane world order became in no time apologists of Imperialism,⁹ who defended King Leopold’s private measure state (Fraenkels *Maßnahmestaat*) in the ‘heart of darkness’¹⁰ by drawing a strict legal distinction between *club-members* on one side, and *outlaws* on the other. Following this line of argumentation, Article 35 of the Berlin Conference on the Future of Africa (1884–1885) offers ‘jurisdiction’ for *us* civilized nations of Europa, ‘authority’ for *them* in the heart of darkness.¹¹ The global world order, in particular during the 19th and (early) 20th Centuries was a universal *Doppelstaat* (double state). Guantanamo has a long Western pre-history.

Although this does not mean, as Agamben would argue, that Guantanamo is a sphere of exclusion from *any* law or from the legal system as such. What happens in Guantanamo happened and happens within the law, and the American actions in Guantanamo are *not* constituting a state of exception but simply do break the law. There are several and important positive national (USA) and international norms which were and are broken in Guantanamo, and that means that the USA even in Guantanamo operates *within the legal system* because their actions are identifiable and recognizable with the instrument of the legal code as either legal or illegal, and there is no place left beyond the law. The same is true with the last American Iraq War. Sometimes illegality cannot be sanctioned because nobody is successful in causing a process that leads to effective sanctions.¹² This happens sometimes, and not only beyond state borders. Even the actions of the Berlin Conference on Africa 1885 were operating within the then valid law that discriminated between jurisdiction and authority, and by doing so constituted a sphere of exception *legally*, and even then authority was not simply compatible with crimes against mankind as the Belgian genocide in Congo, and the murder of one million people (even if there were enough lawyers then, to do the job of sorry comforters).

Yet, the legal world changed in the second half of the 20th Century. Most important was the abolishment of the *legal* distinction between jurisdiction for us (civilized nations) and authority for them, the barbarian tribes. Most recently, in the second half of the 20th Century the reduction of legal Persons to “*bare life* (Agamben)” —and that means the total exclusion from the legal order as such—was no longer possible (see next chapter III).¹³ After 1945 colonialism and classical imperialism vanished¹⁴ and Eurocentrism was decentered completely.¹⁵ Western rationalism, functional differentiation, legal formalism, and moral universalism are *no longer something specifically Western*. The deep structural and conceptual change

that this decentering of Eurocentrism has brought about, is not yet been sufficiently understood. For better *and* for worse, everybody, every single human being today, has to conduct his or her life under the more or less brutal conditions of the selective and disciplinary machinery of markets, schools, kindergartens, universities, life-long learning, traffic rules, jails, hospitals, and military barracks.

At the same time state sovereignty was legally equalized, the state went global. The last square meter of the globe became state-territory (at least legally¹⁶), and even the moon became an object of international treaties between states.¹⁷ In conjunction with the globalization of the modern constitutional nation state, therefore, all functional sub-systems, 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*.

Political Sociologists rightly and successfully have criticized the ‘methodological nationalism’ (Beck) of their own discipline, and have started to replace the pluralism of *national societies* by the singular concept of a *global social system* (Parsons) or a *world society* (Luhmann) which (a) includes all communications (Luhmann),¹⁸ is (b) normatively integrated (Parsons, Habermas, Stichweh),¹⁹ and has (c) transformed all political, legal, economic, cultural differences, and all differences of class, region, center and periphery or of functional spheres into *internal differences* of the one and only world society, and these differences now depend totally on the global societal basic structure of the world society and its cultural constituents alone.²⁰ They are *internal* because they now are constrained, constituted, shaped, and invented by a ‘basic structure’ of functional systems and a ‘superstructure’ of a common cultural background that is global. The transformation of a plurality of societies (first a huge number of archaic, segmentary, and egalitarian societies, then a small number of ‘high cultural,’ stratified, and hierarchical societies) into a single modern, functionally differentiated, and legally egalitarian world society during the course of social evolution has not unified but pluralized the one world, and engendered more and more differentiations every day, differentiations of individuals, groups, classes, states, organizations, beliefs, religions, cultures, histories, traditions, and so on. Whereas the (more or less brutal) function of the *basic structure* primarily is *selective and constraining*, the function of the *superstructure* of the global secular culture (or the background of global knowledge, the global *Lebenswelt*) is *shaping and constituting* for the behavior and the subjectivity of everybody everywhere on the globe, and allows no exception. Everybody (whether he or she wants it or not) is shaped by the *individualism and rationality* of a single *global culture* which includes Rorty’s ‘human rights culture’ as well as the culture of individualized suicide bombing.²¹ All the deep cultural differences and conflicts are now differences and conflicts of *the same society* and of *individualized persons* who *have to* organize and reorganize, construct and reconstruct their ego and their personal and collective identity lifelong, and to do that they only can rely on the (weak or strong) means of *their own autonomy*. Sartre was right: Everybody now is *condemned to be free*, yet, not looking with Sartre into the abyss of nothingness but acting before a dense and common background of relatively abstract, highly general and formal, through and through secular, nevertheless

substantial global knowledge that is implicit (global social life-world with a growing global common ground). This is so, simply because traditional identity formations no longer and nowhere are available *without* a permanently growing and changing variety of alternative offers, in Teheran as well as in New York, in the Alps of Switzerland as well as in the mountain regions of Afghanistan, Pakistan, or Tibet.²²

These developments now are reflected more and more by the scientific superstructure, not only in social sciences but also in history and philosophy. In history, for more than 20 years we have been able to observe a strong turn from *national* to *European* and *world history*, and in philosophy suddenly Kant's essay *On Eternal Peace* is in the center of the discussion, no longer a marginal subject of his theory, best be used by students who need a philosophical degree in a subsidiary subject. Even jurists recently have started to follow Hans Kelsen's insight from the 1920s that there is no dualistic gap between national and international law but only a continuum.²³ During the last decade, there was a mushrooming of national–international hybrids and new branches of legal disciplines like transnational administrative law.

III

The 20th Century strikingly has been called an 'Age of Extremes' (Hobsbawm), and every attempt to bridge the abyss that separates these extremes, would be 'false reconciliation' (Adorno). This century was, at the very least the catastrophe that has incurably 'damaged life' (Adorno). But it was *also* the century of a great legal revolution, which transformed not only law but society as a whole; a revolution that triggered experimental-communicative productivity in new social and cultural practices, political and legal institutions, and scientific and philosophical discourse. If we call the 20th Century the *totalitarian century*, then this is right *and* wrong at the same time. In the end, after disastrous revolutionary and counter-revolutionary world-wide wars, after battles for materials and battles of attrition, bombing wars and civil wars, pogroms, genocides, concentration and death camps, national uprisings, racist excesses, terrorism and counter-terrorism, the destruction and founding of states and fascist, socialist, and—not to forget—democratic grand experiments—totalitarianism was not the winner but the loser. In particular, the World Wars, based on their winners, were not only fought for national interest alone but also for democracy, global peace, and human rights. At the end of the day, the 20th Century was not only the century of state-organized mass terror (which could not, on this scale, have been organized any other way than by state)²⁴; it was *also* the century of ground-shaking *normative progress*, through which democracy was universalized and *constitutional law* transformed into *global law*, national *human rights* into *global civil rights*, the *constitutional state sovereignty* into *democratic sovereignty*, and *the state of the bourgeoisie* into *a social welfare state*. Between Europeans and Non-Europeans there always existed for hundreds of years the *formal* and *legal* unequal distribution of rights: *jurisdiction* for us, *authority* for the others.²⁵ Now, for the first time in history, *rights are* at least *formally equal*. Admittedly, the massive human-rights

violations, social exclusion, and outrageous, unequal treatment of entire world regions have not disappeared. But only now are human-rights violations, lawlessness, and political and social disparity considered as *our own problem*—a problem that concerns *every single* actor in this global society. Only now are there serious and *legally binding* claims to the *global* (and not any longer just national) *exclusion of inequality*.

The world law and the ‘human rights culture’ (Rorty) of the late 20th Century was not only the result of the negative insight gained from 1945 that Auschwitz, and that war, should never happen again, but was also the positive result of a great and successful *legal revolution*, which began at the end of the First World War with the American intervention in the war (and not to forget the tragic Russian Revolution) in 1917, and was fought *for* progressive, new, and supposedly more inclusive *rights*, and more and expanded individual and political *freedom*.²⁶ In 1917, President Wilson forced the reluctant Western allies to claim revolutionary war objectives, and from this moment on the war (and later the Second World War, again as a result of 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 leader of the October Revolution, the religious Marxist and social revolutionist Lenin, and the Calvinist Kantian Wilson, who believed in the social gospel and God’s personal mandate, both understood the World War—from very different perspectives—as the beginning of a global revolution and as a revolutionary war against war.

Both Lenin and Wilson were fierce opponents of the then still powerful monarchies and the existing pluralism of monarchist and democratic, imperialistic, federate, and nationalistic constitutional regimes. This negative objective was achieved first: The constitutional monarchy—re-invented in every new, great revolution since the pontifical revolution of the 12th Century—was so thoroughly abolished that hardly anyone remembers it today.²⁷

While Wilson wanted to transform international law according to Kant’s plan in his writings on peace and to unite the nations in a *great federation of democratic nations*,²⁸ Lenin was trying to revolutionize *social conditions* and build up a *socialist and Soviet world empire*. According to Kelsen, the Treaty of Versailles and the concomitant founding of the League of Nations were events as revolutionary as the Russian Revolution.²⁹ While the success of the October Revolution made possible the drastic reform of property law in an entire world region for the first time and subsumed the entire legal system under socio-political and socio-pedagogical goals, the Treaty of Versailles, the ‘Covenant of the League of Nations [supplanted] the *ius publicum europaeum*.’³⁰

Both sides of this revolutionary pincer movement that laid siege to Europe and put pressure on its center, Russia and America, were brothers hostile to each other from the beginning, but who had to respond to each other in a manner mutually beneficial. The West felt compelled to turn the attack on property law and the powerful, global and social-revolutionary impulse of the Russian Revolution into a

‘peaceful revolution,’ and thus open a way toward socialism that was in conformance with constitutionality.

At the end of World War II, the Soviet Union had to get on board with international politics, found the United Nations *together* with the USA, their European allies, and some representatives of the then emerging and later so-called Third World. From this point of time the Soviet Union was in the web of international law and human rights. Up until the Conference on Security and Cooperation (KSZE), they had to sign human rights declarations and pacts that contributed a lot to swallow (or made it implode) in the end. The radical changes in the 20th Century lead to—in the East, pre-constitutional and pseudo-democratic, and, in the West, democratic-constitutional—variants of the *same* legal reforms.³¹ They

- repealed the bourgeois centering of equality rights around property and turned these rights into a *comprehensive system of anti-discrimination norms*.³² Franklin D. Roosevelt’s famous ‘Second Bill of Rights’ from January 1944 is the beginning of a *rights revolution* whose waves of anti-discrimination legislation continued way into the 1970s and 1980s, extending rights of equality to other spheres. In his address to Congress, Roosevelt declared the existing ‘inalienable political rights’ of the constitution to be valid but insufficient for dealing with a complex society. Rather, he says, we need to ‘assure us equality in the pursuit of happiness’ within this society through social rights (a list of which he presents directly after that). In this speech—and this ‘absence’ (Kracauer) is the most significant aspect of the text—he mentions ‘free speech,’ ‘free press,’ ‘free worship,’ ‘trial by jury,’ and ‘freedom from unreasonable searches and seizure’ but does not refer to property rights with a single word. The revolutionary reforms further
- changed the legislation from *conditional to final programming*.³³ The classical legal form of what Hegel in the 19th Century has called the *bürgerliche Gesellschaft* (and which is both *civil* and *bourgeois society*) was the law that in principle works like a simple engine. I have a legal claim, and then I know that there are two possibilities only. If I go to court then the court has only to check *if* I have it according with the law, and *then* I will get my money or not. Yet, within social welfare regimes with a lot of statist interventionism and highly regulated economies (which even the neo-liberal economy is) this kind of classical civic law is more and more marginalized, reduced to the core of criminal law, and replaced by final programming and impact assessment. Judges are now obliged by law to take interest conflicts into account, impacts on basic rights, prospects of realization and success, and other deliberation on the concrete case which cannot be deduced by the law. Even criminal law is—for better or for worse—no longer pure conditional programming, whereby I *know in advance* that for crime x I will get y years in jail. Now (and again for better or for worse) in a lot of cases social adjustment and general security with quickly changing standards (which are not written in the legal textbooks) play an increasingly important role. Law is no longer based on the principle of

computability which is not at all univocal progress.³⁴ The switch from primarily conditional to primarily final programming is reinforced in particular by the

- development of comprehensive administrative *planning law* (tried and tested in the World Wars),³⁵ and accompanied by the
- introduction of a new system of regulative *family, socialization, and conduct law*. To phrase it with Luhmann, one could call it ‘*alteration of persons’ law* (‘*Persönänderungsrecht*’); with Berman, ‘parental law’ and speak of a ‘nurturing’ or ‘educational role of law’; and with Foucault one could speak of the law of discourse police and bio-power.³⁶

The legal revolution ended in 1945 with the constitution of the United Nations in San Francisco. A new system of basic human rights norms, coupled with a completely new system of inter, trans, and supranational institutions and organizations, was created during the short period from 1941 to 1951. This system in fact included international welfarism, which was invented *before* the great triumph of national welfare states.³⁷

The development of international law has changed deeply since the revolutionary founding of the United Nations. It has witnessed a turn from a law of coexistence of states to a law of cooperation,³⁸ the founding of the European Union, the Human Rights Treaties from the 1960s, the Vienna Convention on the law of the Treaties, and 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 (for better or for worse) became subject to International Law; democracy became an emerging right or a legal principle that can also be made valid against sovereign states; and the right to have rights, whose absence Arendt lamented in the 1940s, is now a legal norm that binds the international community.³⁹ All these legal rules are of course broken again and again. However, this is not a specific feature of international law: it happens with national law as well (and also a lot of national law is soft, symbolic, or dead law). What is new today is *that international and cosmopolitan equal rights have become binding legal norms*, and they can thus be taken seriously. There is no longer any space for any actions outside the law or outside the legal system.⁴⁰ Every single action by every kind of actor, individuals, states, and organizations is either legal or illegal—*tertium non datur*. In consequence, if there once was any difference in principle between national and international law, there is no longer any such difference. This is in fact what Hans Kelsen, Alfred Verdross, and other cosmopolitan international lawyers had already claimed during the First World War. If people argue that international law is different from national law as it has only some kind of formal (International Labor Organization (ILO), European Parliament, United Nations Assembly) or informal (Basel Bank Committee, G 8 or 20, Bologna-process) legislative bodies and a now dense and widespread court-system *but nearly no real administrative or even police power*, then it *does not matter* because international law mostly and in the *overwhelming number of cases is implemented and enforced by national legal bodies*, and in particular national (or now

even more and more transnational) administrations and national police and military officers (including international coalitions).

IV

Nonetheless, the international (and national) legal and revolutionary progress is as deeply ambivalent and fragile as all other things in a highly accelerated and complex modern society.⁴¹ There exist now, on one hand, the basic legal principles of the *global inclusion of the other* and the *global exclusion of inequality*. Yet, on the other hand there exist global functional systems, global actors, and global spheres of value, which emerge with great rapidity, and which *tear themselves off from the constitutional bonds of the nation state*. This is a double-edged process that has caused a *new* dialectic of enlightenment, and I mean with that a new appearance or *Gestalt* of the dialectic of enlightenment that continues to rely on the dialectical structure of the legal system explained in the introduction and the first section of this paper. Again an evolutionary advance in rule of law and constitutionalization has been enforced by emancipatory and revolutionary movements and now enables new and expanded equality, freedom and inclusion but at the same time and primarily leads new forms of class rule, hegemony, and oppression. The most dramatic effect of this process of the formation of the global society, and the institutionalization of a working and self-referentially closed global legal system, is the decline of the ability of the nation state to exclude inequalities effectively—even within the highly privileged the world-region of the Organization for Economic Cooperation and Development (OECD). This has three very significant consequences.

These consequences are observable, first of all, in the *economic system*. In this respect, we can observe the complete transformation of the *state-embedded markets of regional late capitalism* into the *market-embedded states of global Turbo-capitalism*.⁴² The negative effect of economic globalization on our rights is that the freedom of markets explodes globally, and again at the cost of the freedom from the negative externalities of disembedded markets, and it is combined with heavy, sometimes war-like competition, in particular about the oil and energy resources of the earth, and now even combined with a global economic crisis.⁴³

Surprisingly enough, in questions regarding the *religious sphere of values* we can make a similar observation and identify similar consequences. Global society makes the proposition that is true for the capitalist economy equally true for the autonomous development of the religious sphere of values. In consequence, second, we are now confronted with the transformation of the *state-embedded religions of Western regional society* into the *religion-embedded states of the global society*.⁴⁴ Since the 1970s, religious communities have crossed borders and have been able to escape from state control. Again the negative effect of this on our rights is that the freedom of religions explodes whereas the freedom from religion comes under pressure. At the same time the fragmented legal and administrative means of states, inter, trans,

and supranational organizations, do not seem to be sufficient enough to get the unleashed destructive potential of religious fundamentalism under control.

Last but not least, the (internally fragmented) executive branches of the state have decoupled themselves from the state-based separation, coordination, and unification of powers under the democratic rule of law, and they too have gone global.⁴⁵ The more they are decoupled from national control and judicial review, the more they are coordinated and associated on regional and global levels, where they constitute a group of loosely connected transnational executive bodies. Post-national ('good' or 'bad') governance without (democratic) government is performed at one and the same time through a partly formal and egalitarian *rule of law*, through an elitist *rule through law*, and through an informal *bypassing of (constitutional) law and democratic public* by means of a new regime of soft-law legislation. This law as yet has no normatively binding force. Empirically, however, it has a strong binding effect.⁴⁶ It therefore resembles the old Roman *senatus consultum*, which had no legally binding force, but every official was well advised to follow it.⁴⁷ As a result of this, the new globalized executive power seems to be undergoing the same transformation as markets and religious belief systems, and it is thus transformed, third, 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.⁴⁸ The effect of this is an accelerating process of a global *original accumulation of power beyond national and representative government*.

The three great transformations of the world society have turned the democratically elected and legally organized political power within the nation state into the power of a transnational politico-economic-professional ruling class—including high-ranked journalists and media stars who function as a by-pass system, which are implemented to remove the core of political decision-making from any spontaneous formation of communicative power through an untamed and anarchic public sphere. It seems now as if, in a new transformation of the public sphere, the filters of dissemination media and arenas, supposed to transform public opinion into political decision-making,⁴⁹ are working the other way round, and are closing the doors on public opinion. White-Paper-Democracy is the outcome.⁵⁰ The new transnational ruling class hardly relies any longer on egalitarian will-formation. This class is (like the *national bourgeoisie* of the 19th Century) highly heterogeneous and characterized by multiple conflicts of interest. Yet, it has a certain number of common class interests: for instance, it seeks to increase its room for maneuver by withdrawing itself from democratic control and, as a comfortable side-effect of this, it aims to preserve and increase its enormously enlarged, individual and collective opportunities for private profit generation.⁵¹ This is the new cosmopolitanism of the few.⁵² Instead of global democratic government we now are approaching some kind of directorial global Bonapartist governance: that is, soft Bonapartist governance for *us* of the North West, and hard Bonapartist governance for *them* of the South East, the failed and outlaw states and regions of the globe.⁵³

The deep division of the contemporary world into two classes of people—those with good passports and those with bad ones⁵⁴—is mirrored by the constitutional structure of the world society. Today, there already exists a certain kind of global constitutionalism, which is one of the lasting results of the revolutionary change that began in the 1940s, and observed already by Talcott Parsons in 1960, a sociologist who never was under suspicion of being an idealist.⁵⁵ However, existing global constitutions are far from being democratic.⁵⁶ All post-national constitutional regimes are characterized by a disproportion between legal declarations of egalitarian rights and democracy and its legal implementation by the international constitutional law of checks and balances. Hence, the legal revolution of the 20th Century was successful, but it was unfinished. The one or many global constitutions are in bad shape, based on a constitutional compromise that mirrors the hegemonic power structure and the new relations of domination in the world society.⁵⁷

Scientific and technical expertise again has become an ideology⁵⁸ which obscures the social fact that ‘most regulatory decisions involve normative assumptions and trigger redistributive outcomes that cannot be reduced to seemingly objective scientific inquiries; each time someone wins and someone loses.’⁵⁹ Hence, what seems to be necessary and out of reach in the present situation of pre-democratic global constitutionalism is a Kantian *Reform nach Prinzipien* (Kant),⁶⁰ or ‘radical reformism’ (Habermas), or a new ‘democratic experimentalism’ (Dewey) that operates on the same level as the power of the emerging transnational ruling class: that is, beyond representative government and national government.⁶¹

V

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 conceptually they fail to recognize 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 already has 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 Heidegger, late Wittgenstein, or W.v.O. Quine.⁶² Yet, representational thinking that is deeply based on dualism still prevails in political and legal theory. In particular, in international law and international relations dualism covers a broad mainstream of opposing paradigms. From international relations realism to critical legal studies, from German *Staatsrecht* to critical theory, from liberalism to neo-conservatism, state-centered dualism is tacitly accepted—that is, the dualism between *Staatenbund* and *Bundesstaat*, international law and national law, constitution and treaty, public law and private contract, state and society, politics (or ‘*the political*’) and law, law-making and law-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 prevent us from constructing European and global democracy adequately and, finally, to join 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 Merkl's paradigm case was the legal hierarchy of steps (*Stufenbau des Rechts*).⁶³ The doctrine of *Stufenbau* transforms 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*.⁶⁴ Hence, if on all levels of the continuum of legal norm concretization are politically created, then the principle of democracy is fulfilled only if those who are affected by these norms are included fairly and equally on all levels of their creation.

Moreover, if we follow Jochen von Bernstorff one step further than Kelsen and drop the transcendental foundation of a legal hierarchy and the *Grundnorm*,⁶⁵ 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.⁶⁶ Only then could democracy replace the last (highly transcendentalized and formalized) remains of the old-European *legal-hierarchy* and *natural law* that is higher than democratic legitimization, and that means getting rid of the last inherited burden of dualism which 'weighs heavily like a nightmare on our brains' (Marx). We should read Kelsen's theory no longer primarily as a scientific theory of pure legal doctrine, but as a practically orientated theory that anticipates the global legal revolution of the 20th Century. It should also be read as a hopeful message—an attempt to change our worldview and vocabulary to fit a praxis that emancipates us from ideological blindness and helps us to get rid of the old international law of 'sorry comforters' (Kant).

Post-representation, democratic institutions should be designed to enable the expression of political and individual self-determination in a great variety of different governmental bodies at all levels, and through a variety of procedures of egalitarian will-formation: participatory, deliberative, representative, or direct. Although Kelsen is sometimes read as a strong defender of representational democracy and parliamentary supremacy, this reading is wrong because Kelsen, like Dewey, made a powerful criticism of representation and replaced it with the idea of a continuum of different practical methods to express political opinions and make egalitarian decisions.⁶⁷ Radical criticism of representational democracy is not directed at parliamentary democracy. It leads, first, to a re-interpretation of parliamentary democracy as one (possible⁶⁸) part of a comprehensive procedural method of egalitarian will-formation, deliberation, and decision-making,⁶⁹ and, secondly, to a relativization of parliamentary legislation. Parliaments no longer can be interpreted

as the highest organs of the state, or as the one and only true representative of the general will of the people, or as the expression of the essential, higher or refined will of the better self of the people (the one that better fits with the ideas of intellectuals), or as the representation of the *Gemeinwohl* or commonwealth (whatever that is). Although parliaments may be the best method of achieving democratic will-formation in a given historical situation, this is contingent.

To conclude: the double criticism of dualism and representation has far-reaching implications for theories of democracy and constitutional design which are Kelsenian but go far beyond Kelsen's advocacy of parliamentary democracy:

- (1) If all levels of the continuum of legal norm concretization are politically created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fairly and equally on all levels of their creation (local, national, regional, and global), and in all institutions (political, economic, social, and cultural levels; hence, the whole Parsonian AGIL-schema (A=Adaption, G=Goalattainment, I=Integration, L=Latency) is open for democratization⁷⁰ as far as it does not destroy either private or public autonomy⁷¹).
- (2) The different institutions (public and private) and procedures of legislation, administration, and jurisdiction are all in equal distance to the people, and no institution or procedure is taken 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.'⁷² Instead of one substantial sovereign democracy, the regime must express itself in '*subjektlosen Kommunikationskreisläufen*' (circulations of communication without a subject).⁷³
- (3) Whereas the concept of the higher legitimacy of a ruling subject (the king, or the state as *Staatswillenssubjekt*) is as fundamental for power limiting constitutionalism as it was for medieval regimes of 'the king's two bodies,'⁷⁴ democratic and power founding constitutionalism replaces legitimacy completely by a legally organized procedure of egalitarian and inclusive legitimization.⁷⁵ The procedures of legitimization become nothing other than the products of democratic legislation; legitimization is therefore circular in the sense of an open, socially inclusive hermeneutic circle, or loop of *legitimization without legitimacy*.⁷⁶
- (4) Democracy is not, as the young Marx once wrote, the 'solved riddle of all constitutions' but, as Susan Marks has objected, the 'unsolved riddle of all constitutions.'⁷⁷ Hence, a constitution that is democratic has to keep the riddle open. It belongs to the necessary modern meaning of democracy that the 'meaning' of 'democratic self-rule and equity' never can be 'reduced to any particular set of institutions and practices.'⁷⁸ Without the normative surplus of democratic meaning which always already transcends any set of legal procedures of democratic legitimization, the people as the 'subject' of democracy would no

longer be a self-determined group of citizens, or a self-determined group of ‘all men’⁷⁹ who are affected by a given set of binding decisions.

NOTES

1. Kant, *Metaphysik der Sitten, Rechtslehre*, 345, 434, 464; Hegel, *Grundlinien der Philosophie des Rechts* § 4, Werke VIII (Frankfurt: Suhrkamp, 1977), 46; Hegel, *Philosophie des Rechts* (Lecture-course 1819/1820, Frankfurt: Suhrkamp, 1983), 52; dem folgend: Karl Marx, *Verhandlungen des 6. Rheinischen Landtags. Debatten über das Holzdiebstahlsgesetz (Oktober 1842)*, MEW 1 (1972), (Berlin: Dietz, 1988), 58 and 109–47.
2. John Rawls, *Political Liberalism* (New York: Columbia, 1993), XXIX.
3. On the latter: Thomas Kesselring, *Die Produktivität der Antinomie* (Frankfurt: Suhrkamp, 1984).
4. Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2006), 5f.
5. Law of collision or ‘Kollisionsrecht’ (Joerges, Teubner, Fischer-Lescano) has deep roots in Western constitutional law. One can describe this with Chantal Mouffe also as transformation from antagonism to agonism—if one keeps in mind (against Mouffe) the constitutive role of constitutional law in this transformational process.
6. Thomas H. Marshall, *Citizenship and Social Class* (London: Pluto Press, 1992), 33ff. On the exclusion of inequalities as a condition of a successful nation state see: Rudolf Stichweh, *Die Weltgesellschaft* (Frankfurt: Suhrkamp, 2000), 52.
7. Hegel, *Philosophy of Right*, § 209.
8. Nathaniel Bermann, ‘Bosnien, Spanien und das Völkerrecht-Zwischen ‘Allianz’ und ‘Lokalisierung’’, in *Einmischung erwünscht? Menschenrechte und bewaffnete Intervention*, ed. Brunkhorst (Frankfurt: Fischer, 1998), 117–40; see further the brilliant book of Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, MA: Harvard University Press, 2004).
9. Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, MA: Cambridge University Press, 2001), 80, 168f.
10. Joseph Conrad, *Heart of Darkness* (New York: Norton Critical Edition, 2005).
11. Martti Koskenniemi, *Gentle Civilizer*, 126.
12. By the way there were never no sanctions at all in the cases of Guantanamo or Iraq, and they consisted in the not inefficient legal instruments of *diplomacy* and *international contempt*.
13. Agambens argument that the exclusion of the other, called the *bare life*, is *constitutive* for the very concept of (western or occidental?) law (one could call this with Hegel) *der existierende/wirkliche Begriff*—the existing or real concept) makes sense then and only then if we presuppose on the political or legislative side of law an absolute or *sovereign power* (see: Giorgio Agamben, *Sovereign Power and Bare Life* (Stanford, Aalen: University Press, 1998)). This is, as already Kelsen has shown, a completely inconsistent concept (Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* [1920] (Aalen, Germany: Scientia, 1981). There was no sovereign power, never, and since a long time, in Europe since the time of the Papal Revolution of the 12th Century, all rulership in one or another way is bound by law (see only: Bracton, *On the laws and customs of England* (Cambridge, MA: Cambridge University Press, 1968), f. 5b; Note Book, I 29–33).
14. The best point of a poor book is the thesis that neither old nor new notions of imperialism with a territorial center make sense in a functionally differentiated world society and have to be replaced by a more and more de-territorialized and flexible kind of (systemic) hegemony: Hardt and Negri on Empire. For a much better account the systemic transformation of hegemony: Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen* (Frankfurt:

- Suhrkamp, 2005); Sonja Buckel, *Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts* (Weilerswist, Germany: Velbrück Wissenschaft, 2007); for an interesting thesis on the emergence of a new and imperial world state see: Bhupinder S. Chimni, 'International institutions today: An imperial global state in the making', *European Journal of International Law* 15, no. 1 (2004): 1–37.
15. Hauke Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community* (Cambridge, MA: MIT Press, 2005).
 16. Stefan Oeter, 'Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung', in *Verrechtlichung internationaler Politik. Ende oder Neubeginn der Demokratie?*, ed. Regina Kreide and Andreas Niederberger (Frankfurt: Campus, 2008), 90–114.
 17. Petra Dobner, *Konstitutionalismus als Politikform* (Baden-Baden, Germany: Nomos, 2002).
 18. Ulrich Beck, *Macht und Gegenmacht im globalen Zeitalter* (Frankfurt am Main: Suhrkamp, 2002); Niklas Luhmann, 'Die Weltgesellschaft', in *Luhmann, Soziologische Aufklärung 2*, (Opladen: Westdeutscher Verlag, 1975), 51–71; Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1997), at 145ff.
 19. Talcott Parsons, 'Order and Community in the International Social System', in *International Politics and Foreign Policy*, ed. James N. Rosenau (Glencoe, IL: The Free Press, 1961), 120–9; Rudolf Stichweh, 'Der Zusammenhalt der Weltgesellschaft: Nicht-normative Integrationstheorien in der Soziologie', in *Transnationale Solidarität. Chancen und Grenzen*, ed. Jens Becker, Julia Eckert, Martin Kohli, and Wolfgang Streeck (Frankfurt am Main: Campus, 2004), 236–45.
 20. John W. Meyer, 'World Society and the Nation-State', *American Journal of Sociology* 103 (1997): 144–81; John W. Meyer, *Weltkultur. Wie die Westlichen Prinzipien die Welt Durchdringen* (Frankfurt: Suhrkamp, 2005).
 21. Richard Rorty, 'Human Rights, Rationality, and Sentimentality', in *On Human Rights, Oxford Amnesty Lectures*, ed. Steven Shute and Susan L. Hurley (New York: Basic Books, 1993), 111–20; Olivier Roy, *Der islamistische Weg nach Westen. Globalisierung, Entwurzelung und Radikalisierung* (München, Germany: Pantheon, 2006).
 22. Talcot Parsons, *Order and Community*, 17; Parsons and Gerald M. Platt, *Die amerikanische Universität* (Frankfurt am Main: Suhrkamp, 1990); Rainer Döbert, Jürgen Habermas, and Gertrud Nunner-Winkler, eds., *Entwicklung des Ichs* (Königstein, Germany: Anton Hain, 1980).
 23. Hauke Brunkhorst, 'Kritik am Dualismus des internationalen Recht—Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts', in *Verrechtlichung internationaler Politik. Ende oder Neubeginn der Demokratie?*, ed. Kreide and Niederberger (Frankfurt am Main: Campus, 2008), 30–63 and 37.
 24. Wolfgang Reinhard, *Geschichte der Staatsgewalt* (München, Germany: Beck, 1999).
 25. Article 35 of the concluding protocol of the Berlin Conference on West Africa on West Africa in 1884/1885.
 26. For a first account of this thesis: Hauke Brunkhorst, 'Die Globale Rechtsrevolution. Von der Evolution der Verfassungsrevolution zur Revolution der Verfassungsevolution?', in *Rechtstheorie in rechtspraktischer Absicht*, ed. Ralph Christensen and Bodo Pieroeth (FS Müller, Berlin: Dunker & Humblot), 9–34; Hauke Brunkhorst, 'Kritik am Dualismus des internationalen Recht—Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts', *Verrechtlichung Internationaler Politik* (Frankfurt am Main: Campus, 2008), 30–63.
 27. 'Der alte Offizier konnte es bis zum letzten Augenblick (...) nicht für möglich halten, dass ein vielhundertjähriges Reich einfach vom Schauplatz der Geschichte verschwinden könne', Kelsen, *Autobiographie*, 51.
 28. On Wilson and Kant: Gerhard Beestermöller, *Die Völkerbundidee. Leistungsfähigkeit und Grenzen der Kriegsächtung durch Staatensolidarität* (Stuttgart, Germany: Kohlhammer, 1995); Oliver Eberl, *Demokratie und Frieden. Kants Friedensschrift in den Kontroversen über die Gestaltung globaler Ordnung* (Baden-Baden, Germany: Nomos, 2008).

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29. Hans Kelsen, 'La Théorie générale du Droit International Public', in *Recueil des cours* (de l'Académie de droit international) 1932, vol. 42, 117–35, here: 141 ff; see further: Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*; Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Wien/Berlin: Springer, 1926).
30. Eberl, *Demokratie und Frieden*, 75.
31. Cf. Harold J. Berman, *Law and Revolution II*, 16f.
32. See only: Cass Sunstein, *After the Rights Revolution. Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1993); Roosevelt, cited in Sunstein 1993, XI. On the development of social anti-discrimination rights in the Soviet Union, see Berman, *Justice in the USSR* (Cambridge, MA: Harvard University Press, 1963).
33. Dieter Grimm, ed., *Wachsende Staatsaufgaben—sinkende Steuerungsfähigkeit des Rechts* (Baden-Baden, Germany: Nomos, 1990); Dieter Grimm, 'Der Wandel der Staatsaufgaben und die Krise des Rechtsstaats', in *Die Zukunft der Verfassung*, ed. Dieter Grimm (Frankfurt am Main: Suhrkamp, 1991), 159–75; Niklas Luhmann, *Politische Theorie im Wohlfahrtsstaat* (München, Germany: Olzog, 1981); Franz Neumann, 'Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft', *Zeitschrift für Sozialforschung* 6 (1937): 542–96.
34. Ingeborg Maus, *Rechtstheorie und politische Theorie im Industriekapitalismus* (München, Germany: Fink, 1980).
35. Seagle William, *The Quest of Law*, New York 1941; Hartmut Maurer, *Allgemeines Verwaltungsrecht*, 17th ed. (Munich: Beck, 2009).
36. Niklas Luhmann, *Politische Theorie im Wohlfahrtsstaat* (München, Germany: Olzog 1981), 227f; Berman, *Justice in the USSR* (Cambridge, MA: Harvard University Press, 1963), 227f; see: Berman, *Recht und Revolution* (Frankfurt: Suhrkamp, 1991) 64f; Christian Joerges and Navraj Singh Ghaleigh, eds., *Darker Legacies of Law in Europe. The Shadow of National Socialism and Facism over Europe and its Legal Traditions* (Oxford: Hart, 2003).
37. Lutz Leisering, 'Gibt es einen Weltwohlfahrtsstaat?', in *Weltstaat und Weltstaatlichkeit*, ed. Matthias Albert and Rudolf Stichweh (Wiesbaden, Germany: VS, 2007), 185–205.
38. Jürgen Bast, 'Das Demokratiedefizit fragmentierter Internationalisierung', in *Demokratie in der Weltgesellschaft, Soziale Welt Sonderheft 18*, ed. Hauke Brunhorst (Baden-Baden, Germany: Nomos, 2009), 185–93.
39. For a more comprehensive overview: Hauke Brunkhorst, 'Die Globale Rechtsrevolution. Von der Evolution der verfassungsrevolution zur Revolution der Verfassungsevolution?', in *Rechtstheorie in rechtspraktischer Absicht*, ed. Ralph Christensen and Bodo Pieroth (FS Müller, Berlin: Dunker & Humblot, 2008), 9–34.
40. Byers, 'Preemptive Self-Defense', *The Journal of Political Philosophy* 2 (2003): 171–90 and 189.
41. Hartmut Rosa, 'The Universal Underneath the Multiple: Social Acceleration as the Key to Understanding Modernity', in *The Plurality of modernity: Decentering Sociology*, ed. Sérgio Costa, J.M. Domingues, W. Knöbel, and J.P. da Silva (München: Hampp, 2006), 22–42.
42. 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 should be restricted to state-embedded capitalism, and state embedded capitalism indeed is over. But what then came was not socialism but global disembedded capitalism which seems to be as far from state embedded capitalism of the old days as from socialism.
43. To be sure there was some good reason for the states to *enable* the abolishment of late capitalism. The state system, and in particular the rich democracies during the 1980s tried to solve the fiscal (O'Connor) and the legitimization (Habermas) crises of the 1970s by a renunciation of their power to control and keep the economy within national borders, and the international system, in particular the Bretton Woods system was designed to enable this basic political and economic strategy of the social welfare state. The effect was the globalization of a newly liberal capitalism and the dominance of the global markets. The

- prize for this elegant solution of the fiscal crisis was a serious damage of state-power to control the economy, and now, in the middle of a global economic crisis (caused by the far too limited means of the capitalist economy to organize itself without serious crises and permanently growing social differences including growing social exclusion) the states *together* have tried to get this power back. If this works the state could loose the rest of its power of action by transforming the financial into a fiscal crisis of an extend never reached before. If it does not work things will be even worse.
44. Hauke Brunkhorst, 'Democratic Solidarity under Pressure of Global Forces: Religion, Capitalism and Public Power', *Distinktion. Skandinavian Journal of Social Theory* 17 (2008): 167–88.
 45. On transnational administrative during the last few years a whole industry of research emerged, see only: Christian Tietje, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes', *Deutsches Verwaltungsblatt* 17 (2003): 1081–164; Möllers, 'Transnationale Behördenkooperation', *ZaöRV* 65 (2005): 351–89; Nico Krisch and Benedict Kingsbury, 'Symposium: Global Governance', *EJIL* 1/2006; Kingsbury, Krisch, and Richard B. Steward, 'The Emergence of Global Administrative Law', <http://law.duke.edu/journals/lcp>, (accessed 2005). Christoph Möllers, Andreas Voßkuhle, Christian Walter (eds.), *Internationalisierung des Verwaltungsrecht. Eine Analyse anhand von Referenzgebieten* (Tübingen, Germany: Mohr Siebeck, 2007); Andreas Fischer-Lescano, 'Transnationales Verwaltungsrecht', *Juristen-Zeitung* 8 (2008): 373–83. On the globalization of executive power: Klaus Dieter Wolf, *Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft* (Baden-Baden, Germany: Nomos, 2000); Petra Dobner, 'Did the state fail? Zur Transnationalisierung und Privatisierung der öffentlichen Daseinsvorsorge: Die Reform der globalen Trinkwasserpolitik', in *Staat und Gesellschaft - fähig zur Reform? Der 23. wissenschaftliche Kongress der Deutschen Vereinigung für Politikwissenschaft*, ed. Klaus-Dieter Wolf (Baden-Baden, Germany: Nomos, 2007), 247–61; Gertrude Lübke-Wolf, 'Die Internationalisierung der Politik und der Machtverlust der Parlamente', in: *Demokratie in der Weltgesellschaft, Soziale Welt Sonderband 18*, ed. Hauke Brunkhorst (Baden-Baden, Germany: Nomos 2009), 127–42.
 46. Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' (draft paper Heidelberg: MPI, 2008), 22; Möllers, 'Transnationale Behördenkooperation', 71.
 47. Uwe Wesel, *Geschichte des Rechts* (München, Germany: Beck, 1997), S.163.
 48. Klaus-Dieter Wolf, *Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft* (Baden-Baden, Germany: Nomos, 2000); Petra Dobner, 'Did the state fail? Zur Transnationalisierung und Privatisierung der öffentlichen Daseinsvorsorge: Die Reform der globalen Trinkwasserpolitik', in *Staat und Gesellschaft-fähig zur Reform? Der 23. wissenschaftliche Kongress der Deutschen Vereinigung für Politikwissenschaft*, ed. Klaus-Dieter Wolf (Baden-Baden, Germany: Nomos, 2007), 247–61; Gertrude Lübke-Wolf, 'Die Internationalisierung der Politik und der Machtverlust der Parlamente', in *Demokratie in der Weltgesellschaft*, ed. Hauke Brunkhorst, 64 and 127–42.
 49. Bernhard Peters, *Öffentlichkeit* (Frankfurt: Suhrkamp, 2008).
 50. European Commission, European Governance: A White Paper, COM (2001) 428 final of 25.07.01, OJ C 287/2001, http://europa.eu.int/comm/governance/index_en.htm (accessed 2001)
 51. Klaus- Dieter Wolf, *Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft* (Baden-Baden, Germany: Nomos, 2000).
 52. Craig Calhoun, 'The Class Consciousness of Frequent Travelers', in: *South Atlantic Quarterly* 101, no. 4 (Fall 2002): 869–97.
 53. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, MA: Harvard University Press, 2004).
 54. Craig Calhoun, *South Atlantic Quarterly*, 869–97.

55. Talcot Parsons, *Order and Community*, 42, 126.
56. 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', *Columbia Journal of Transnational Law* (1998): 529–619; Armin von Bogdandy, *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge* (Berlin: Springer, 2003); Armin von Bogdandy, 'Constitutionalism in International Law', *Harvard International Law Journal* 47 (2006): 223–42; Matthias Albert and Rudolf Stichweh, *Weltstaat und Weltstaatlichkeit* (Wiesbaden: VS, 2007); Hauke Brunkhorst, 'Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism', *Millennium: Journal of International Studies* 31 (2002): 675–90; Hauke Brunkhorst, 'Demokratie in der globalen Rechtsgenossenschaft', *Zeitschrift für Soziologie. Sonderheft Weltgesellschaft* (2005): 330–48. For the thesis of constitutional pluralism see: Gunther Teubner, 'Globale Zivilverfassungen', *ZaöRV* 63 (2003): 1–28.
57. '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 are comprehensive, but fragmented and asymmetrical. Each treaty 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.' (Inger Johanna Sand, 'A Sociological Critique of the possibilities of applying Legitimacy in Global and International Law' (paper presented at Onati School for Sociology of Law, Onati, Spain, 2008), Forthcoming).
58. Herbert Marcuse, 'On Science and Phenomenology', in *Boston Studies in Philosophy of Science*, vol. 2 (New York: Proceedings of the Boston Colloquium for the Philosophy of Science 1965), 279–91; Jürgen Habermas, *Technik und Wissenschaft als 'Ideologie'* (Frankfurt am Main: Suhrkamp, 1968).
59. Bernstorff, 'Procedures of Decision-Making', 8, 72.
60. Claudia Langer, *Reform nach Prinzipien. Untersuchung zur politischen Theorie Immanuel Kants* (Stuttgart, Germany: Klett-Cotta, 1986).
61. Susan Marks, *The Riddle of all Constitutions* (Oxford: Oxford University Press, 2000), 2–3.
62. A paradigmatic account is: Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton, NJ: Princeton University Press, 1980). For recent developments cf. 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).
63. Adolf Merkl, *Allgemeines Verwaltungsrecht* (Wien, Austria: Springer, 1927), 160, 169; Adolf Merkl, 'Prolegomena zu einer Theorie des rechtlichen Stufenbaus', in *Adolf Merkl und die Wiener rechtstheoretische Schule*, ed. Hans Klecatsky, René Marcic and Herbert Schambeck (Wien, Austria: Europa Verlag, 1968), 252–94.
64. Jochen von Bernstorff, 'Kelsen und das Völkerrecht', in *Rechts-Staat. Staat, internationale Gemeinschaft und Völkerrecht bei Hans Kelsen*, ed. Hauke Brunkhorst and Rüdiger Voigt (Baden-Baden, Germany: Nomos, 2008), 167–90, at 181.
65. Jochen von Bernstorff, *Der Glaube an das universale Recht: zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Baden-Baden, Germany: Nomos, 2001).
66. This comes close to Habermas' normatively strong or Luhmann's normatively neutralized idea of circulations of communication without a subject (*subjektlose Kommunikationskreisläufe*). Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992); Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main: Suhrkamp, 1983); in conjunc-

- tion with: Marcelo Neves, *Zwischen Themis und Leviathan* (Baden-Baden, Germany: Nomos, 2000).
67. Hans Kelsen, *Vom Wert der Demokratie* [1920] (Aalen, Germany: Scientia, 1981); Hans Kelsen, *Allgemeine Staatslehre* [1925] (Wien, Austria: Österreichische Staatsdruckerei, 1993); Hans Kelsen, *Reine Rechtslehre* [1934] (Wien, Austria: Österreichische Staatsdruckerei, 1967).
 68. Nothing is necessary in a democratic legal regime except the normative idea of equal freedom: Kant, *Metaphysik der Sitten, Rechtslehre*, 8, 345; Ingeborg Maus, *Zur Aufklärung der Demokratietheorie* (Frankfurt am Main: Suhrkamp, 1992); Brunkhorst, *Solidarity*, 37 and 67–77; Christoph Möllers, *Demokratie—Zumutungen und Versprechen* (Berlin: Wagenbach, 2008), 13–14 and 16.
 69. Hans Kelsen, *Vom Wert der Demokratie* [1920] (Aalen, Germany: Scientia, 1981).
 70. Christoph Möllers, *Staat als Argument* (München, Germany: Beck, 2001), 423.
 71. Ingeborg Maus, *Zur Aufklärung der Demokratietheorie* (Frankfurt am Main: Suhrkamp, 1992); Jürgen Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992).
 72. Christoph Möllers, 'Expressive vs. repräsentative Demokratie', in *Verrechtlichung transnationaler politik. Nationale Demokratie in kontext globaler politik* ed. Regina Kreide and Andreas Niederberger (Frankfurt am main: Campus, 2008), 160–82.
 73. Jürgen Habermas, *Faktizität und Geltung*, 170 and 492–3.
 74. Ernst H. Kantorowicz, *The King's Two Bodies* (Princeton, NJ: University Press, 1957).
 75. Jürgen Habermas, *Faktizität und Geltung*, 170 and 492–3; Christoph Möllers, *Gewaltengliederung: Legitimation und Dogmatik im internationalen Rechtsvergleich* (Tübingen, Germany: Mohr, 2005).
 76. 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. Consequently, all exceptions (e.g. babies) have to be justified publicly and need compensation through human rights; cf.; Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie VI* (Berlin: Duncker & Humblot 1997), 76; Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community* (Cambridge, MA: MIT Press, 2005); Susan Marks, *The Riddle of all Constitutions* (Oxford: Oxford University Press, 2000).
 77. Susan Marks, *The Riddle of all Constitutions*.
 78. *Ibid.*, 103, 149.
 79. 'All men' can mean many different things, e.g. all men in a bus, all men on German territory, all men with US passports (which 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.