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Cosmopolitanism and Democratic Freedom

(RECON-Workshop "Global Transnationalisation and Democratisation Compared", Firenze, European University Institute 16-17th May 2008)

I

Cosmopolitanism 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 ides 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

[1] Immanuel Kant, Die Religion innerhalb der Grenzen der bloßen Vernunft, in: Werke VIII, Frankfurt: 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: Suhrkamp 1974; Kant, Metaphysik der Sitten, Werke Bd. VIII, Frankfurt: Suhrkamp 1977, 345.

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 etc).[3]

The *realization* of the universal competence of all men already *logically* (or conceptually) was 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]

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 originally the ruling classes came to power by virtue and perfection, once they were in power they tried – and *had* to try if they

[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", in: Philosophy & Social Criticism 5/ 1996, 1-16; Brunkhorst, Dialectical Positivism of Happiness: Horkheimer's Materialist Deconstruction of Philosophy, in: S. Benhabib/ W. Bonß/ J. McColle (ed.): On Max Horkheimer. New Perspectives, Cambridge, Mass/ London: MIT, 67 – 99.

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 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 became in its most sophisticated version a philosophy of *eudaemonia* and the good life.[6]

The structurally stabilized aristocratic ideology of *virtue and perfection* was closely related with 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, and only in this elitist and ideological way, already classical political thinking 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 in a tremendous number of social, political, economic and cultural inequalities not only *between*

[5] Paradigmatic: Macchiavelli, Principe; from a modern functionalist perspective: 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*: Hasso Hofmann, Repräsentation, vierte Aufl. mit einer neuen Einleitung, Berlin: Duncker & Humblot 2003; excellent in particular on the turn to modernity: Harvey C. Mansfield, „Modern and Medieval Representation", in: J. Roland Pennock/ John W. Chapman, Hg., 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: Calhoun, "'Belonging' in the cosmopolitan imaginary," *Ethnicities* 3 (4), 531-553. Further: Calhoun, Nations Matter. Culture, History, and the Cosmopolitan Dream, London: Routledge 2007, and my critical review in: American Sociological Review 2008.

classes but also *within* the social classes and sub-classes, and this was a kind of inequality which today nearly has become incomprehensible.[9] Even the idea of a political *isonomia* (of the best!) was conceived not as an order of equal rights but as an order of competion (*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 fictious global community of philosophers that did hardly represent 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 ("…erveryone would be born free by the natural

[9] Michael Stolleis, "Diebstahl an sich selbst", in: Frankfurter Allgemeine Zeitung 120/ 24. Mai 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: Stolleis, "Historische und ideengeschichtliche Entwicklung des Gleichheitssatzes", in: Rüdiger Wolfrum, Hrsg., Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz, Heidelberg 2003, 7-22.

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

[11] On the Protestant Revolution see now: Harold Berman, Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition, Cambridge MA 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." (Veyne, "The Roman Empire," in: Veyne, History of Private Life, 42f.

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 even was 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, mass 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 century.[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." Kants point is strictly anti-hierarchical and egalitarian. The "right to visit" is

[13] For a different of Ulpian natural right of freedom in the more narrowed context of *lex mercatoria*: Otfried Höffe, Demokratie im Zeitalter der Globalisierung, München: Beck 1999, 236.
[14] See also Alexander Demandt, *Der ideale Staat* (Cologne: Böhlau, 1993), 263f; Luciano Canfora, "Der Bürger", in: Jean-Pierre Vernant, Ed: Der Mensch der griechischen Antike, Frankfurt: Campus 1993; Egon Flaig, „Europa begann bei Salamis", in: 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 *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. J. Bohman and M. Lutz-Bachmann (Cambridge: MIT Press, 1997).

an equal entitlement to unhindered and free movement of citizens, and *not of their rulers and the armies they commanded*, in order to be able to enter into a "possible commerce [*Verkehr*]" with any human being at all, hence, gives "no one more right than another to be on a place on the earth".[16] The right to hospitality for Kant is a basic right that legally constitutes a (rudimentary) *global civil society* and *cosmopolitan citizenship*. It is no longer only a human right but becomes by its use a civic right.

This idea was very familiar in the philosophy of European Enlightenment. Francois Quesnay already had suggested, to complete the new and border transcending freedom of markets, 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* from 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. Transformed from the state of nature into 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"[18] was not only an ideology.

Since the democratic revolutions of the 18th century we can observe an impressive progress of social and institutional learning which regularly led to the inclusion of formerly excluded voices, persons, groups, classes, sexes, races, countries, regions etc. In the words of Rawls: "The same equality of the Declaration of Independence which Lincoln invoked to condemn

[16] Kant, Kant, "Toward Perpetual Peace," in *Immanuel Kant: Practical Philosophy*, ed. Mary Gregor, 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.

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 with 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

[19] John Rawls, *Political Liberalism*, (New York: Columbia 1993), XXIX.
[20] Joseph Conrad, Heart of Darkness, Norton Critical Edition, New York 2005.
[21] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Harvard Univ. Press 2004).
[22] Craig Calhoun, The Class Consciousness of Frequent Travelers, in: The South Atlantic Quarterly 4/ 2002, 869-897; Calhoun, 'Belonging' in the cosmopolitan imaginary, in: Ethnicities 3 (4), 531-553; Calhoun, Cosmopolitism and Belonging, Vortrag 37. World Congress Int. Inst. 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: Univ. 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 it was this hatred related closely to the dasastrous 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).

But the reproduction of social structures of class rule and relations of domination, exclusion and silencing does not change the *normative facticity* (Joerges) that all modern democratic constitutions since the 18th Century are relying on the universal 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 Security Council 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 before an regional court in Luxemburg, and things begin to change. Even the SC now seems to come under legal pressure.[25] Legal text books, and 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 is 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 even have identified law with egalitarian freedom or defined law as the "existence of freedom" (*Dasein der*

[23] Thomas H. Marshall, Bürgerrechte und soziale Klassen, (Frankfurt: Campus 1992), 33ff; Rudolf. Stichweh, *Die Weltgesellschaft*, (Frankfurt: Suhrkamp 2000), 52.
[24] Michael Byers, „Woken up in Seattle", in: 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-man (draft version), Heidelberg: MPI Völkerrecht 2008, 16f; Colin Warbrick, " The European Response to Terrorism in an Age of Human Rights", in: European Journal of International Law Vol. 15, 5/ 2004; Iain Cameron, "European Union Anti-Terrorist Blacklisting", in: 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: Suhrkamp 1991.

Freiheit).[28] What now is so specific with Western constitutional law 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]

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, and they include 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 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*.[31] Only the modern nation state had not only the normative *idea* but also the administrative *power* to do that. This from the very beginning was the hard core of Enlightenments utopia. Up to now all advances in the reluctant *inclusion of the other*, 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. If we put it in a historically very rough way that leaves

[28] Kant, Metaphysik der Sitten, Rechtslehre 345, 434, 464; Hegel, Grundlinien der Philosophie des Rechts § 4, Werke 7, Frankfurt: Suhrkamp 1970, 46; Hegel, Philosophie des Rechts (lecture-course 1819/ 20, Frankfurt: Suhrkamp 1983, 52; dem folgend: Karl Marx, „Verhandlungen des 6. Rheinischen Landtags. Debatten über das Holzdiebstahlsgesetz (Oktober 1842)", MEW 1, 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 discribe 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.
[31] Thomas H. Marshall, Citizenship and Social Class, 33ff.

a lot of empirical questions open, then 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 century 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 in 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 equal freedom *of* together with the equal freedom *from* religious and other belief systems.[35]

The emerging nation state also has 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

[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/M.: Suhrkamp 1973.
[33] In this way Max Weber tells the story in his *Protestant Ethics*.
[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: Georg Siebeck, Ed.: Artibus ingenius, Tübingen: Mohr Siebeck, 133-169: M. Stolleis, "Konfessionalisierung" oder "Säkularisierung" bei der Entstehung des frühmodernen Staates, in: Ius Commune XX (1993), S.l ff. (7); W.Reinhard/H.Schilling (Hrsg.), Die katholische Konfessionalisierung, 1995: H. Schilling, Die neue Zeit. Vom Christenheitseuropa zum Europa der Staaten. 1250 bis 1750, 1999.
[35] *Talcott Parsons*, The System of Modern Societies, Englewood Cliffs: Prentice Hall 1972.

and 19th Centuries. Constitutions have transformed *antagonistic class fights into agonistic political fights between political parties, unions and entrepreneurs, civic associations etc*.[36] Bloody Constitutional Revolutions became in the (better) course(s) of (Western) history *permanent and legal revolutions*.[37] 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[38] 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[39]) 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[40], and the violent social revolution became a legally organized "educational revolution".[41]

(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

[36] Chantal Mouffe, Laclau.
[37] Justus Fröbel, quoted from: Habermas, "Ist der Herzschlag der Revolution zum Stillstand gekommen?", in: *Die Ideen von 1789*, Frankfurt 1989.
[38] 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.
[39] Usually the narrative of the social revolutions is told as a gradual transformation of the nation state (Marshall, Citizenship and Social Class; Talcott Parsons, The System of Modern Societies, Englewood Cliffs: Prentice Hall 1972). This seems evident, but the story can also be told as part of the global legal revolution of the 20th century (see below).
[40] Dietrich Hoss, Der institutionalisierte Klassenkampf, Frankfurt: EVA 1972.
[41] Parsons, System of Modern Societies.

exploding free markets of money, real estate and labour[42] by overcoming the fundamentalist bourgeois dualism of private and public law.[43] This in the first decades of social welfare regimes was more or less an achievement of *administrative law* and *bureaucratic rule* in a regime of *low intense democracy*.[44]

(b) The ongoing *democratic* Rights Revolution[45] 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.[46]

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

IV

The modern nation state until 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 of the 20th century did mean 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 even no serious or legal claim for a *global* exclusion of inequality.

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[42] Karl Polanyi, The Great Transformation, Frankfurt: Suhrkamp 1997.

[43] Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts 1920, zit. n. d. Nachdruck: Aalen 1981.; Kelsen, Reine Rechtslehre (1934) Wien 1967; Kelsen, Demokratie und Sozialismus, Darmstadt 1967.

[44] On low intense democracy: Susan Marks, The Riddle of all Constitutions, Oxford: Oxford Univ. Press 2000.

[45] Cass Sunstein, After the Rights Revolution, Cambridge: Harvard 1993.

[46] On the emergence of anti-discrimination norms during the legal revolution of the 20th Century: 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, Cambridge MA 2006, 16ff; Berman, Justice in the USSR, Cambridge MA: Harvard Univ. 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): Alexander Somek, "Das europäische Sozialmodell: Die Kompatibilitätsthese", e-man., Berlin 2008.

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"[47], his notion of (political) *world* (in difference to *globe*) was more or less reduced to Europe and the European system of states.[48] When Hegel wrote of 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.", 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.[49] 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.[50] 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[51], 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*"[52], and he also saw no contradiction to his latently racist thesis that all law is Aryan.[53] The liberal cosmopolitanism of the „men of

[47] Kant, Perpetual Peace.
[48] 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 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.).
[49] Hegel, Philosophy of Right, § 209
[50] 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.
[51] Johann Caspar Buntschli, Das moderne Völkerrecht 1878, 59. Compare: Andreas Fischer-Lescano/Philip Liste, „Völkerrechtspolitik", in: zeitschrift für internationale Beziehungen 27 2005, 209-249, 213f.
[52] Johan Caspar Bluntschli, „Der Staat ist der Mann", in: Gesammelte kleine Schriften 1, 284, zit. n. Martti Koskenniemi, The Gentle Civilizer of Nations, Cambridge MA 2001, 80.
[53] Koskenniemi, Gentle Civilizer, 77ff.

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 Century.[54] The generous tolerance of the men of 1873 was from the very beginning paternalistic and repressive.[55] 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,[56] 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, *outlaws* (Bluntschli) on the other.[57] 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.[58] Guantámano has a long Western pre-history.

Yet, during the time from 1945 to the present day, classical imperialism (not a more and more de-territorialized and flexible kind of hegemony[59]) 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[60]), and even the moon became an

[54] Nathaniel Bermann, „Bosnien, Spanien und das Völkerrecht - Zwischen 'Allianz' und 'Lokalisierung'“, in: Brunkhorst, Hg., Einmischung erwünscht? Menschenrechte und bewaffnete Intervention, Frankfurt: Fischer 1998, 117-140.
[55] Koskenniemi, Gentle Civilizer, 69; on repressive tolerance: Herbert Marcuse, „Repressive Toleranz“, in: Robert Paul Wolf/ Barrington Moore/ Herbert Marcuse, Kritik der reinen Toleranz, Frankfurt: Suhrkamp 1973.
[56] Koskenniemi, Gentle Civilizer, 168f.
[57] Koskenniemi, Gentle Civilizer, 83.
[58] Koskenniemi, Gentle Civilizer, 126.
[59] The best point of a poor book: Hardt of Negri on Empire. For a much better account the systemic transformation of hegemony: Andreas Fischer-Lescano/ Gunther Teubner, Regime-Kollisionen, Frankfurt: Suhrkamp 2005; Sonja Buckel, Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts, Weilerswist: Velbrück Wissenschaft 2007.
[60] Stefan Oeter, “Prekäre Staatlichkeot und die Grenzen internationaler Verrechtlichung”, in: Regina Kreide/Andreas Niederberger, Hg., Verrechtlichung internationaler Politik. Ende oder Neubeginn der Demokratie? Frankfurt: Campus 2008, 90-114.

object of international treaties between states.[61] 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*, and it constitutes the basic orientations of all main actors of the global society – of states, organizations and human individuals.[62] The not yet sufficiently understood consequence is that now Western rationalism, functional differentiation, legal formalism and moral universalism *no longer are something specific western*, and Eurocentrism has been *completely decentred*.[63]

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 21s Century) they are perceived as *our own* problems, and 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 of the 20th Century as a *global system of positive legal norms*. We now *have* serious and legally binding claims for a *global exclusion of inequality*.

May be, 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.[64] President Wilson forced the

[61] Petra Dobner, Konstitutionalismus als Politikform, Baden-Baden: Nomos 2002.
[62] On global culture: John W. Meyer, "World Society and the Nation-State," *American Journal of Sociology* Vol. 103, 1/ 1997, 144-181; Meyer, *Weltkultur*, (Frankfurt: Suhrkamp 2005).
[63] Brunkhorst, Solidarity. From Civic Friendship to a Global Legal Community, Cambridge: MIT-Press 2005, 107-113.
[64] For a first account of this thesis: Brunkhorst, "Die Globale Rechtsrevolution. Von der Evolution der Verfassungsrevolution zur Revolution der Verfassungsevolution?, in: Ralph Christensen/ Bodo Pieroth, Hg.: Rechtstheorie in rechtspraktischer Absicht, FS Müller, Berlin: Dunker & Humblot 9-34; Brunkhorst, „Kritik am

Western allies to claim revolutionary war 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 with the constitution of the United Nations in San Francisco. A new system of system of basic human rights norms together a completely new system of inter-, trans- and supranational institutions and organisations were created during the short period from 1941 to 1951 – including international welfarism which was invented *before* the great triumph of national welfare states.[65]

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[66], the European Union, the Human Rights Treaties from 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.[67] All these legal rules are broken again and again, but this is not specific for international law but happens with national law as well. What today is new is *that international and cosmopolitan equal rights have become binding legal norms*, and hence, can be taken seriously. There is no

Dualismus des internationalen Recht – Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts", in: Kreide/ Niederberger, Verrechtlichung internationaler Politik, 30-63.

[65] Lutz Leisering, „Gibt es einen Weltwohlfahrtsstaat?" in: Matthias Albert/ Rudolf Stichweh, Hg., Weltstaat und Weltstaatlichkeit, Wiesbaden: VS 2007, 185-205.

[66] Jürgen Bast, "Das Demokratiedefizit fragmentierter Internationalisierung", in: Brunkhorst, Ed.: Demokratie in der Weltgesellschaft, Soziale Welt Sonderheft 2008 (forthcoming).

[67] For a more comprehensive overview: Brunkhorst, „Die Globale Rechtsrevolution. Von der Evolution der verfasungsrevolution zur Revolution der Verfassungsevolution?", in: Ralph Christensen/ Bodo Pieroth, Hg.: Rechtstheorie in rechtspraktischer Absicht, FS Müller, Berlin: Dunker & Humblot 2008, 9-34.

longer any space open for any actions outside the law or the legal system.[68] Hence, if there was once any difference in principle between national and international law, there is no such a difference any longer, and this is what Hans Kelsen, Alfred Verdross and other cosmopolitan international lawyers already had claimed during the First World War.

V

Yet, the international (and national) legal and revolutionary progress is deeply ambivalent and fragile as everything in a highly accelerated and complex modern society.[69] There are now on the one hand the basic legal principles of the *global inclusion of the other* and the *global exclusion of inequality*, but on the other hand there are global functional systems, a global public and global spheres of value emerging expeditiously 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*. The most dramatic effect of this process of the formation of the global 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 with 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*.[70] The negative effect of economic globalization on our rights is that the freedom *of* markets explodes globally, and together with heavy,

[68] Byers, Preemptive Self-Defense in: The Journal of Political Philosophy, 2/ 2003, 171-190, hier: 189.
[69] Hartmut Rosa, „The universal underneath the multiple: Social acceleration as the key to understanding modernity", in: Sérgio Costa/ J. M. Domingues/ W. Knöbel/ J. P. da Silva, eds., The Plurality of modernity: Decentering Sociology, München: Hampp 2006, 22-42.
[70] Fritz Scharpf, …in: Offe; 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 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.

sometimes war-like competition: *There will be Blood*.[71] 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*.[72] Since the 1970s, everywhere religious communities crossed borders and were escaping from 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.[73] The more they are decoupled from national control

[71] One-sided but in this point striking the neo-Pashukanian analysis of international law by China Mieville, Between Equal Rights: A Marxist Theory Of International Law, London: Haymarket 2005.
[72] Brunkhorst, Globalizing Solidarity: The Destiny of Democratic Solidarity in the Times of Global Capitalism, Global Religion, and the Global Public, in: Journal of Social Philosophy 1/ 2007, 93-111.
[73] 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, in: Deutsches Verwaltungsblatt 17/ 2003, 1081-1164; Möllers, Transnationale Behördenkooperation, ZaöRV 65/ 2005, 351-389; Nico Krisch/ Benedict Kingsbury, Symposium: Global Governance, EJIL 1/ 2006; Kingsbury/ Krisch/ Richard B. Steward, The Emergence of Global Administrative Law, http://law.duke.edu/journals/lcp. Christoph Möllers/Andreas Voßkuhle/Christian Walter (Hrsg.), Internationalisierung des Verwaltungsrecht 2007; Andreas Fischer-Lescano, „Transnationales Verwaltungsecht", in: Juristen-Zeitung 8/ 2008, 373-383. On the globalization of executive power: 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, unter: http://www.dvpw.de/dummy/fileadmin/docs/2006xDobner.pdf.; Gertrude Lübbe-Wolf, Die Internationalisierung

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 normatively has no binding force yet, empirically it has a strong binding effect[74], a bit like the old Roman *senatus consultum* which had no legally binding force but every official was well adviced to follow it.[75] 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.[76] The effect is an accelerating process of a global *original accumulation of power beyond national and representative government*. Some examples: the Basel-Bank-Committee,[77] the so called Bologna process of the European reform of the university system,[78] 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.[79]

der Politik und der Machtverlust der Parlamente, erscheint in: Brunkhorst (Hg.), Demokratie in der Weltgesellschaft, Sonderheft der Sozialen Welt 2008.

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

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

[76] Wolf, Neue Staatsräson.

[77] Möllers, Transnationale Behördenkooperation.

[78] Brunkhorst, „Unbezähmbare Öffentlichkeit. Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung", in: Leviathan 1/ 2007.

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

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 making[80] now are working the other way round, to close the doors for public opinion. White-Paper-Democracy.[81] The new transnational ruling class hardly relies on egalitarian will-formation anymore. This class is (not so much different from the *national* bourgeoisie of the 19th Century) highly heterogeneous and characterized by multiple conflicts of interest, but it has 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 grown, individual and collective opportunities for private profit generation.[82] 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.[83]

The deep divide of the contemporary world into two classes of people: people with good passports and people with bad passports, is mirrored by the constitutional structure of the world society. Today there exists already a certain kind of global constitutionalism, one of the lasting results of the revolutionary change from the 1940th. But the existing global

[80] Bernhard Peters, Öffentlichkeit, Frankfturt: Suhrkamp 2008.
[81] European Commission, White Paper...
[82] Klaus Dieter Wolf, Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft, Baden-Baden: Nomos 2000.
[83] Anghie, Imperialism, Sovereignty and the Making of International Law.

constitution(s) is (are) far away from being democratic.[84] 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*.[85] Hence, the legal revolution of the 20th Century was successful but 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 Johanna 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 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."[86]

Scientific and technical expertise, again have become an ideology[87] which obscure 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."[88] Hence, what seems to be necessary and out of reach in the present situation of, pessimistically speaking post-, optimistically speaking pre-democratic

[84] 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; Brunkhorst, "Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism", in: Millenium: Journal of International Studies" Vol. 31, No. 3, 2002, 675-690; Brunkhorst, Demokratie in der globalen Rechtsgenossenschaft, in: Zeitschrift für Soziologie. Sonderheft Weltgesellschaft 2005, 330-348; For the thesis of constitutional pluralism see: Gunther Teubner, Globale Zivilverfassungen, in: ZaöRV Bd. 63, Nr. 1/ 2003, 1-28.

[85] For the original version of this thesis: Brunkhorst, "Globalising Democracy Without a State; Brunkhorst, Demokratie in der globalen Rechtsgenossenschaft.

[86] Inger Johanna 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.

[87] Marcuse, "On Science and Phenomenology", in: Boston Studies in Philosophy of Science Vol. 2, New York 1965, 279-291; Habermas, Technik und Wissenschaft als 'Ideologie', Frankfurt: Suhrkamp 1968.

[88] Bernstorf, Procedures of Decision-Making, 8.

global constitutionalism is a Kantian *Reform nach Prinzipien*[89] or "radical reformism" (Habermas) as well as a new "democratic experimentalism" (Dewey/ Möllers) that operates on the same level as the power of the emerging transnational ruling class: Beyond representative government and national government.[90]

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 miss conceptually 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.[91] 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 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 *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 law-application, sovereign and subject, people and representatives, (action-free) legislative will formation and (weak-willed) executive action, legitimacy and legality, heterogenous

[89] Claudia Langer, Reform nach Prinzipien, Stuttgart 1986.
[90] Marks, Riddle of all Constitutions, 2f.
[91] A paradigmatic account is: Richard Rorty, Der Spiegel der Natur, Frankfurt: Suhrkamp 1981; for recent developments: Robert Brandom, Making It Explicit. Reasoning, Representing & Discursive Commitment, Cambridge: Harvard Univ. Press 1994.; J. Habermas, Wahrheit und Rechtfertigung, Frankfurt: Suhrkamp 1997.

population and (relatively) homogenous people, *pouvoir constituant* and *pouvoir constitué* etc. All these dualisms hinder us already conceptually to construct 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 Merkle's paradigm case was the legal hierarchy of steps (*Stufenbau des Rechts*).[92] 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*.[93] 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[94]) 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.[95] Democracy only then could replace the last (highly transcendentalized and formalized) remains of the old-European *leges-hierarchy* and *natural law* that is higher than democratic legitimization, and that means to get

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[92] Adolf Merkl, Allgemeines Verwaltungsrecht, Wien/ Berlin: Julius Springer 1927, 160, 169; Merkl, „Prolegomena zu einer Theorie des rechtlichen Stufenbaus, in: Hans Klecatsky/ René Marcic/ Herbert Schambeck, Hg.: Die Wiener rechtstheoretische Schule, Wien: Europa Verlag, (Ursprünglich 1931: Festschrift Kelsen), 1352ff.

[93] Bernstorff, „Kelsen und das Völkerrecht", in: Brunkhorst/ Rüdiger Voigt, Hg.: Rechts-Staat, Baden-Baden: Nomos 2008, 181.

[94] Bernstorff, Der Glaube an das universale Recht: zur Völkerrechtstheorie Hans Kelsens und seiner Schüler, Baden.Baden: Nomos 2001.

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

rid of the last inherited burden of dualism which "weights heavily like a nightmare on our brains" (Marx). Moreover, we should read Kelsens 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).[96]

After the mirror of nature, 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 today sometimes is 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.[97] To avoid an obstinate misunderstanding: Radical criticism of *representational* democracy must not at all be critical with *parliamentary* democracy but leads

[96] Brunkhorst, Dualismus des internationalen Recht.
[97] Kelsen, Vom Wert der Demokratie, Tübingen 1929 (Erste Auflage 1920), zit. n. d. Nachdruck: Aalen 1981; Kelsen, Allgemeine Staatslehre, 1925; Kelsen, Reine Rechtslehre (1934) Wien 1967.

1. To a re-interpretation of parliamentary democracy as one (possible[98]) *part* of a comprehensive (procedural) *method* of egalitarian will formation, deliberation and decision making;[99]
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 Kelsens 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

- On all levels of their creation – local, national, regional and global levels (in this or that, and to be sure, very different ways)
- In courts as well as in administrations and parliaments, in state organs and political associations as well as in the societal community, cultural institutions and economic enterprises (hence, the whole Parsonian AGIL-schema is open

[98] Nothing is neccessary in a democratic legal regime except the normative idea of equal freedom: Kant, Kant, Metaphysik der Sitten, Rechtslehre 345; Ingeborg Maus, Zur Aufklärung der Demokratietheorie, Frankfurt: Suhrkamp 1992; Brunkhorst, Solidarity, 67-77; Möllers, Demokratie, Berlin: Wagenbach 2008, 13f, 16.
[99] Kelsen, Wesen und Wert.

for democratization[100] as far as it does not destroy either private or public autonomy[101]).

(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."[102] Instead of any substantial sovereign, democracy only allows procedural sovereignty that must express itself in "*subjektlosen Kommunikationskreisläufen*" (circulations of communication without a subject).[103]

(3) Whereas the concept of the (higher) *legitimacy* of a ruling substantial subject (the king or the state as "*Staatswillenssubjekt*"[104]) 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"[105] – *democratic and power founding constitutionalism* replaces *legitimacy* completely by a legally organized procedure of egalitarian and inclusive *legitimization*.[106] 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

[100] 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").
[101] Maus, Aufklärung der Demokratietheorie; Habermas, Faktizität und Geltung.
[102] Möllers, „Expressive vs. repräsentative Demokratie", in: R. Kreide u. A. Niederberger (Hg.) Internationale Verrechtlichung.
[103] Habermas, Faktizität und Geltung, 170, 492f.
[104] Brunkhorst, Schatten des Staatswillenpositivismus.
[105] Ernst H. Kantorowicz, The King's Two Bodies, Princeton: Univ. Press 1957.
[106] Habermas, Faktizität und Geltung; Möllers, Gewaltengliederung, Tübingen: Mohr 2005.

and *vitiosus* circle but in the sense of an open, socially inclusive hermeneutic circle or loop of *legitimization without legitimacy*.[107]

(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"[108], 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".[109] Without the "normative surplus"[110] of *democratic meaning* or the *meaning of democracy* which always already transcends any set of *legal procedures of democratic legitimization*,[111] the people, the "subject" of democracy no longer would be a self-determined group of citizens, or a self-determined group of all men[112] 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 – may be happy – slaves (output-legitimization).

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

[108] Marks, Riddle of all Constitutions.

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

[110] Tom McCarthy, Philosophy and Critical Theory, 21.

[111] ÜR 188 etc.

[112] „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).