Cosmopolitanism and Democratic Freedom

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Abstract

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

Keywords

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

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

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

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


⁴ This is criticism originally goes back to John Dewey and Max Horkheimer, see Hauke Brunkhorst, ‘Rorty, Putnam and the Frankfurt School’, *Philosophy & Social Criticism* 5, 1996, 1-
The universal idea of a political and rational man functioned as an ideology for the self-justification of class-rule, which was reinforced and stabilized by the societal structure of stratified societies. Even if we counterfactually suppose that the ruling classes originally came to power by virtue and perfection, reality is that once they were in power they tried — and had to try if they did not want to lose their power — to preserve it for themselves and their families and children by any means that worked for self-preservation of the power of the new ruling class, be it by virtuous means or not. On penalty of decline they were bound to the logic of the symbolically differentiated medium of power that does not care for perfection and virtue. Consequently, virtue became an ideology, and the intellectuals of the ruling classes experimented with the teleology of happiness, which in its most sophisticated version became a philosophy of eudaemonia and the good life.

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

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


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

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

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


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

\(^{13}\) For a different perspective on Ulpian natural right of freedom in the more narrowed context of *lex mercatoria*, see Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, München: Beck, 1999, 236.
enslavement. 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 Empire’s positive law, set off an extraordinarily progressive ‘effective history’ [Wirkungsgeschichte]. Its symbolic meaning in the course of a long history of legal and political revolutions and radical reinterpretations was transformed into normative constitutional meaning in particular during the Enlightenment and the Constitutional Revolutions of the 18th and 19th centuries.

II

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

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

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

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

III

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

22 Craig Calhoun, ‘The Class Consciousness of Frequent Travelers’, The South Atlantic Quarterly 4, 2002, 869-897; Craig Calhoun, ‘“Belonging” in the Cosmopolitan Imaginary’, Ethnicities 3(4), 531-553; Craig Calhoun, ‘Cosmopolitanism and Belonging’, presentation at the 37th World Congress of the International Institute of Sociology, Stockholm, 2005. Yet as true as it is, in many other cases one must be very careful with criticism of cosmopolitanism. Hegel once wrote that the ‘hatred of law is the shibboleth whereby fanaticism, imbecility and hypocritical good intentions manifestly reveals themselves.’ (Georg Wilhelm Friedrich Hegel, Philosophy of Right, Cambridge, MA: Cambridge University Press, 1991, § 258, fn) This is even more true of the hatred of the idea of cosmopolitan law (from which Hegel himself was not completely free). In the 20th century this hatred was closely related to the disastrous ideologies of fascism and other totalitarian (e.g. Stalinist) movements. It was the ‘rootless cosmopolitan Jew’ who heated the killing fantasies of all right-wing nationalists. Anti-semitic criticism of cosmopolitanism, at least until the end of the Second World War, had a strong backing in nearly all kinds of conservative and neoconservative thinking (Fine, Cosmopolitanism, 21).
legal principle of the inclusion of all human beings and the exclusion of inequality. The normative meaning of these two principles becomes manifest when communicative power appears as the (deeply ambi valent) ‘power of revenge’, as rächende Gewalt (Habermas). To take only relatively harmless examples: Woken up in Seattle. Yet, also with less noise: People, who are listed as terrorists by the United Nations Security Council (SC) on a more than doubtful legal basis, are deprived of nearly all their rights and legal remedies, but some years later some of them try successfully to apply to a regional court in Luxemburg, and things begin to change. Even the SC seems to come under legal pressure now. Legal text books, in particular constitutional text books, are not only talk, they are ‘objective spirit’ (Hegel), hence ‘can strike back’.

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

29 Berman, Law and Revolution II, 5f.
30 Law of collision or ‘Kollisionsrecht’ (Joerges, Teubner, Fischer-Lescano) has deep roots in Western constitutional law. One can, using Chantal Mouffe, discribe this also as transformation from antagonism to agonism – if one keeps in mind (against Mouffe) the constitutive role of constitutional law in this transformational process.
The constitutional spirit of the revolutions of the 18th century became objective for the first time within the borders of the modern nation state. This state always had many faces, including the Arendtian face of violence, the Habermasian face of administrative power, the Foucauldian face of surveillance and punishment, the faces of imperialism, colonialism, war on terror, and so on. But the nation state, once it became democratic, had not only the administrative power of oppression and control but also the administrative power to exclude inequality with respect to individual rights, political participation and equal access to social welfare and opportunities. Only the modern nation state did not only have the normative idea but also the administrative power to do that. From the very beginning, this was the hard core of the Enlightenment’s utopia. Up to now, all advances in the reluctant inclusion of the other, and hence all advances of cosmopolitanism, are more or less advances of the modern nation state. National constitutional regimes have solved the three basic conflicts of the modern capitalist and functionally differentiated society. Putting it in a historically very rough way that leaves a lot of empirical questions open, we can say that the formation and the democratic development of the nation state has solved:

1. The (motivational) crises of religious civil war (protestant revolutions) of the 16th and 17th centuries by the constitutional reconciliation of lasting conflicts between religious, agnostic and anti-religious belief systems. This was — very schematically — the result of a two-step-development, in a way that was (a) functionally and (b) normatively universal.

   a. The functional effect of the formation of a territorial system of states consisted of the transformation of the uncontrolled atomic explosion of religious freedom into a controlled chain reaction that kept the productive forces of religious fundamentalism alive and its destructive forces (more or less) under control. In the beginning this was the repressive effect of the confessionalization of the territorial state.

   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

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31 Marshall, Bürgerrechte und soziale Klassen, 33ff.

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

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

equal freedom of, together with the equal freedom from, religion and other belief systems.\textsuperscript{35}

The emerging nation state has also solved:

2. The (legitimisation and) constitutional crisis of the public sphere, of public law and public power of the old European Ancient Regime (constitutional revolutions) of the 18\textsuperscript{th} and 19\textsuperscript{th} centuries. Constitutions have transformed antagonistic class fights into agonistic political fights between political parties, unions and entrepreneurs, civic associations, etc. Bloody constitutional revolutions became in the (better) course(s) of (Western) history permanent and legal revolutions.\textsuperscript{36} Again the effect was twofold:

a. A functional transformation of the destructive and oppressive potential of a highly specialized politics of accumulation of power for powers sake into a (more or less) controlled explosion of all the productive forces of public and administrative power\textsuperscript{37} was accompanied by;

b. democratic emancipatory legislation, which finally led to the implementation of the freedom of public power together with the freedom from public power.

At least even the:

3. Social class conflicts (social revolutions\textsuperscript{38}) of the 19\textsuperscript{th} und 20\textsuperscript{th} centuries could be solved through the emergence of a regulatory social welfare state, which transformed the elitist bourgeois parliamentarism of the 19\textsuperscript{th} century into egalitarian mass-democracy. The social class fight was institutionalized\textsuperscript{39}, and the violent social revolution became a legally organized ‘educational revolution’.\textsuperscript{40}

a. It was the great functional advance of social democracy to keep most of the productive, and get (more or less) rid of the destructive forces of the exploding free markets of money, real estate and labour\textsuperscript{41} by overcoming the fundamentalist bourgeois dualism of private and


\textsuperscript{37} In this respect three very different approaches, the one historical, the other power-theoretical the third from systems theory comply: Alf Lüdtke, ‘Genesis und Durchsetzung des modernen Staates’, in : \textit{Archiv für Sozialgeschichte}, 20, 1980, 470-491; Foucault, \textit{Überwachen und Strafen}; Luhmann, \textit{Verfassung als evolutionäre Errungenschaft}.

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

\textsuperscript{39} Dietrich Hoss, \textit{Der institutionalisierte Klassenkampf}, Frankfurt am Main: EVA, 1972.

\textsuperscript{40} Parsons, \textit{System of Modern Societies}.

\textsuperscript{41} Karl Polanyi, \textit{The Great Transformation}, Frankfurt am Main: Suhrkamp, 1997.
public law. In the first decades of social welfare regimes, this was more or less an achievement of administrative law and bureaucratic rule in a regime of low-intense democracy.

b. The ongoing democratic rights revolution 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.

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

IV

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

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

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

46 Kant, Toward Perpetual Peace.

47 Whereas the Globe for Kant was not much more than a logical or transcendental category that limited in particular our practical reason (Reinhard Brandt, ‘Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre’, in R. Brandt (ed.), Rechtspolitik 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, 53ff.).
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.\textsuperscript{48} He further explicitly limits
human rights to national civic law (of the \textit{bürgerliche Gesellschaft} and its \textit{lex mercatoria})
that looses its validity when it comes to the essential concerns of the executive
administration of the state (\textit{der Staat}) and its particular relations of power (\textit{besondere
Gewaltverhältnisse}, \textit{justizfreie Hoheitsakte}). Therefore Hegel condemns any
‘cosmopolitanism’ that opposes the concrete \textit{Sittlichkeit} of the state.\textsuperscript{49} Some decades
later, when one of the ‘gentle civilizers of nations’ (Koskenniemi) – Johann Caspar
Bluntschli – declared the implementation of a ‘humane world order’ (\textit{menschliche
Weltordnung}) to be the main end of international law\textsuperscript{50}, he never saw any
contradiction between this noble aim and his (and his colleagues’) identification of the
modern state with a male dominated civilization: ‘\textit{Der Staat ist der Mann}’\textsuperscript{51}. He also
saw no contradiction to his latently racist thesis that all law is Aryan.\textsuperscript{52} The liberal
cosmopolitanism of the ‘men of 1873’, who founded the \textit{Institut de droit international} in
the same year and invented a cosmopolitan international law, was completely
Eurocentric, relying on the basic distinction between (Christian) \textit{civilized nations} and
barbarian people and the rough states of the 19\textsuperscript{th} and early 20\textsuperscript{th} centuries.\textsuperscript{53} The generous
tolerance of the men of 1873 was from the very beginning paternalistic and
repressive.\textsuperscript{54} Hence, it is no surprise that the liberal cosmopolitan humanists, who
wanted to found a humane world order, became, in no time, apologists for
Imperialism,\textsuperscript{55} who defended King Leopold’s private-measure state in the heart of
darkness by drawing a strict legal distinction between \textit{club-members} on the one side,
and \textit{outlaws} (Bluntschli) on the other.\textsuperscript{56} Following this line of argumentation, article 35
of the Berlin Conference on the future of Africas (1884-85) offers ‘jurisdiction’ for \textit{us}
civilized nations of Europa, ‘authority’ for \textit{them} in the heart of darkness.\textsuperscript{57}
Guantánamo has a long Western pre-history.

\textsuperscript{48} Hegel, \textit{Philosophy of Right}, § 209.
\textsuperscript{49} Hegel, § 209. For a more differentiated reading in particular of Hegel: R. Fine, ‘Kant’s theory
\textsuperscript{50} Johann Caspar Buntschli, \textit{Das moderne Völkerrecht} 1878, 59. Compare: Andreas Fischer-
\textsuperscript{51} Johan Caspar Bluntschli, ‘\textit{Der Staat ist der Mann}’, in: \textit{Gesammelte kleine Schriften} 1, 284,
\textsuperscript{52} Koskenniemi, \textit{Gentle Civilizer}, 77ff.
\textsuperscript{53} Nathaniel Bermann, ‘Bosnien, Spanien und das Völkerrecht – Zwischen ‘Allianz’ und
\textsuperscript{54} Koskenniemi, \textit{Gentle Civilizer of Nations}, 69; on repressive tolerance see Herbert Marcuse,
\textsuperscript{55} Koskenniemi, \textit{Gentle Civilizer of Nations}, 168f.
\textsuperscript{56} Koskenniemi, \textit{Gentle Civilizer of Nations}, 83.
\textsuperscript{57} Koskenniemi, \textit{Gentle Civilizer of Nations}, 126.
Yet, during the time from 1945 to the present day, classical imperialism (not a more and more deterritorialized and flexible kind of hegemony\textsuperscript{58}) vanished, euro-centrism was completely decentred, state sovereignty was legally equalized, the state went global, and, together with the globalization of the modern constitutional nation state, all functional subsystems, which — from the 16\textsuperscript{th} 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\textsuperscript{59}), and even the moon became an object of international treaties between states.\textsuperscript{60} The rational and secular \textit{regional culture}, which originally was the specific \textit{occidental rationality} (Weber) of Europe and North America, has become a rational and secular \textit{culture of the world}; it constitutes the basic orientations of all main actors of the global society — of states, organizations and human individuals.\textsuperscript{61} The not yet sufficiently understood consequence is that now Western rationalism, functional differentiation, legal formalism and moral universalism are no longer something specifically western, and Eurocentrism has been completely decentred.\textsuperscript{62}

At the end of the 20\textsuperscript{th} 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 20\textsuperscript{th} and the beginning of the 21\textsuperscript{st} centuries) they are perceived as \textit{our own} problems; they are perceived not only politically and economically, but also from the point of view of \textit{universal equal rights} as a problem that concerns every citizen of the world. These rights never existed before the mid-20\textsuperscript{th} century as a \textit{global system of positive legal norms}. We now have serious and legally binding claims for a \textit{global exclusion of inequality}.

Maybe one should describe this development, and at the same time re-describe the history of the 20\textsuperscript{th} century — the time of extremes (Hobsbawn) — as the result of a great and successful \textit{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.\textsuperscript{63} President Wilson forced the 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 or — in a less Western perspective — with the decolonization of the 1950s and the 1960s. It resulted in the constitution of the United Nations in San Francisco, a new system of system of basic human rights norms, declared in 1948 and implemented in the Treaties of 1966, together with a completely new system of inter-, trans- and supranational institutions and —organisations, which were created during the short period from 1941 to 1951 — including international welfarism which was invented before the great triumph of national welfare states in the period between 1945 and 1967.64

The development of international law has deeply changed since the founding of the United Nations: The turn from a law of coordination to a law of cooperation65, the European Union, the Human Rights Treaties of the 1960s, the Vienna Convention on the law of the Treaties, the emergence of international ius cogens, etc. The old rule of equal sovereignty of states became the ‘sovereign equality’ under international law (Art. 2 par. 1 UN), individual human beings became subject to international law, democracy became an emerging right or a legal principle that is valid also against sovereign states, and the right to have rights, which Arendt missed in the 1940s, is now a legal norm that binds the international community.66

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

V

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

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66 For a more comprehensive overview, see Brunhorst, ‘Die Globale Rechtsrevolution: Von der Evolution der verfassungsrevolution zur Revolution der Verfassungsevolution?’.
global functional systems, a global public and global spheres of value, which tear themselves off from the constitutional bonds of the nation state, emerging expeditiously. This is a double-edged process that has caused a new dialectic of enlightenment. The most dramatic effect of this process of the formation of the world society is the decay of the ability of the nation state to exclude inequalities effectively — even within the highly privileged OECD-world. This becomes very significant first in the economic system. Here we can observe the complete transformation of the:

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

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

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

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

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


decoupled from national control and judicial review, the more they coordinate and associate themselves on regional and global levels where they constitute a couple of loosely connected transnational executive bodies. Postnational (‘good’ or ‘bad’) governance without (democratic) government is performed through partly formal and egalitarian rule of law, elitist rule through law, and informal bypassing of (constitutional) law and democratic public by a new regime of soft law legislation, which although it normatively has no binding force yet, empirically has a strong binding effect, a bit like the old Roman senatus consultum which had no legally binding force but every official was well advised to follow it. 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. The effect is an accelerating process of a global original accumulation of power beyond national and representative government. Some examples: the Basel Bank Committee, the so called Bologna process of the European reform of the university system, 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.

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-


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


75 Wolf, Neue Staatsräson.

76 Möllers, Transnationale Behördenkooperation.


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

making now are working the other way round, closing the doors for public opinion. White-Paper-Democracy. The new transnational ruling class hardly relies on egalitarian will-formation anymore. This class is (not so different from the national bourgeoisie of the 19th century) highly heterogeneous and characterized by multiple conflicts of interest. It does, however, have a certain amount of common class interests, such as to increase its room for maneuver by withdrawing from democratic control, and, as a comfortable side effect, to preserve and increase the enormously expanded individual and collective opportunities for private profit-generation. This is the new cosmopolitanism 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.

The deep divide of the contemporary world — segregating people into two classes: people with good passports and people with bad passports — is mirrored by the constitutional structure of the world society. Today, there already exists a certain kind of global constitutionalism: one constituted by the lasting results of the revolutionary changes from the first half of the 20th century. But the existing global constitutional order is far away from being democratic. 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. Hence, the legal revolution of the 20th century was successful, but remains unfinished. The one or many global constitutions are in bad shape, based on a constitutional compromise (Franz Neumann) that mirrors the hegemonic power structure and the new relations of domination in the world society, as Inger Johanne Sand recently has described it:

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

81 Anghie, Imperialism, Sovereignty and the Making of International Law.
83 For the original version of this thesis, see Brunkhorst, Globalising Democracy Without a State; Brunkhorst, Demokratie in der globalen Rechtsgenossenschaft.
dealing with one set of problems or purposes — without the abilities of seeing the different types of problems in relation to each other. The organizations are not democratic in relation to citizens. They are generally based on states as members and many of them are dominated by internal secretariats and experts. They are set up as top-down tools for dealing with separate issues and areas of problems. They are dominated by different elites.84

Scientific and technical expertise have again become an ideology85, which obscures the social fact that ‘most regulatory decisions involve normative assumptions and trigger redistributive outcomes that can not be reduced to seemingly objective scientific inquiries; each time someone wins and someone loosens’.86 Hence, what seems to be necessary and out of reach in the present situation of, pessimistically speaking post-, optimistically speaking, pre-democratic global constitutionalism is a Kantian Reform nach Prinzipien87 or ‘radical reformism’ (Habermas) as well as a new ‘democratic experimentalism’ (Dewey) that operates on the same level as the power of the emerging transnational ruling class: Beyond representative government and national government.88

VI

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

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

86 Bernstorff, Procedures of Decision-Making and the Role of Law in International Organizations, 8.
88 Marks, Riddle of all Constitutions, 2f.
Staatenbund and Bundesstaat, international and national law, constitution and treaty, public law and private contract, state and society, politics (or ‘the political’) and law, law-making and -application, sovereign and subject, people and representatives, (action-free) legislative will formation and (weak-willed) executive action, legitimacy and legality, heterogenous population and (relatively) homogenous people, pouvoir constituant and pouvoir constitué, etc. All these dualisms already conceptually hinder us from constructing European and global democracy adequately and finally, from joining the civitas maxima.

Yet, what Dewey and the pragmatists did with classical idealistic and metaphysical dualisms in philosophy, Kelsen and his students did with the dualisms in political, legal and constitutional theory. They have replaced each of them by a continuum. Kelsen’s and Merkle’s paradigm case was the legal hierarchy of steps (Stufenbau des Rechts). 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. 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) 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. Only then could democracy replace the last (highly transcendentalized and formalized) remains of the old European leges-hierarchy and natural law that are higher than democratic legitimation, and that means to get rid of the last inherited burden of dualism, which ‘weights heavily like a nightmare on our brains’ (Marx). Moreover, we should read Kelsen’s theory no longer primarily as a scientific theory of pure legal doctrine, but as a practical oriented theory (and anticipation) of the global legal revolution of the 20th century, and as a hopeful message, as an attempt to change our worldview and our vocabulary in a way that fits to a praxis that emancipates us from ideological blindness, and helps us to get rid of the old international law of ‘sorry comforters’ (Kant).

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93 This comes close to Habermas’ normatively strong or Luhmann’s normatively neutralized idea of circles of communication without a subject (subjektlose Kommunikationskreisläufe).

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

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

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

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

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

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97 Kelsen, *Vom Wesen und Wert der Demokratie.*
institutions and economic enterprises (hence, the whole Parsonian AGIL-schema is open for democratization\(^98\) as far as it does not destroy either private or public autonomy\(^99\)).

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

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

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


105 Democratic legitimization is inclusive because it governed by the one and only constitutional principle of democracy, and that is the principle of self-legislation or autonomy. This principle is socially inclusive because it presupposes that a procedure of legitimation that is democratic has to include everybody who is concerned by legislation and jurisdiction, therefore all exceptions (e. g. babies) have to be justified publicly and need compensation.
4. Democracy is not, as the young Marx once wrote, the ‘solved riddle of all constitutions’ but, as Susan Marks has objected, democracy is the ‘unsolved riddle of all constitutions’\textsuperscript{106}, hence a constitution that is democratic has to keep the riddle open. It belongs to the \textit{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’\textsuperscript{107}. Without the ‘normative surplus’\textsuperscript{108} of \textit{democratic meaning} or the meaning of democracy which always already transcends any set of \textit{legal procedures of democratic legitimization},\textsuperscript{109} the people, the ‘subject’ of democracy no longer would be a self-determined group of citizens, or a self-determined group of all men\textsuperscript{110} who are affected by a given set of binding decisions. If they are not able to exhaust the meaning of democracy, and to experiment within an unlimited meaning-variance of key-words like equality, equity, freedom, constitution, rights or rule of law, if we the people are not able to determine, discover, construct or disclose new meanings of democracy (input-legitimization), then there is no democracy at all but only a heteronomous people of — maybe happy — slaves (output-legitimization).

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\textsuperscript{106} Marks, \textit{Riddle of all Constitutions}.

\textsuperscript{107} Marks, \textit{Riddle of all Constitutions}, 103, 149f.


\textsuperscript{109} ÜR 188 etc.

\textsuperscript{110} ‘All men’ can mean a lot of things, e. g. all men in a bus, all men on German territory, all men with US passports (that is far less than all US citizens), all men on the globe, all men in the universe, all men who are French citizens, all men who are addressed by a certain legal norm. Democracy and democratic legitimization is only concerned with the last two meanings (and the possible tension between them).
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RECON is an Integrated Project financed by the European Commission’s Sixth Framework Programme for Research, Priority 7 – Citizens and Governance in a Knowledge-based Society. Project No.: CIT4-CT-2006-028698.
Coordinator: ARENA – Centre for European Studies, University of Oslo.
Project website: www.reconproject.eu

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