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Constitutionalism and Democracy in the World Society

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I. CONSTITUTIONAL REVOLUTION

The democratic revolutions of the eighteenth century demonstrate an impressive process of social and institutional learning, which has regularly led to the inclusion of formerly excluded persons, groups, classes, sexes, races, countries, and regions. In the words of 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.'[1] The experience of a successful learning process of social inclusion can be, and has been, extended to incorporate formerly silenced voices of Western societies as well as the oppressed voices of non-Western cultures. But normative learning does not tell the whole story. In many cases (and, in some perspectives, in all cases) the expansion of social inclusion was acquired at the price of new exclusion, or of new forms of latent or manifest oppression. The history of Western civilisation 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'.[2] Since the first European division of the world in the Treaty of Tordesillas of 1494 between Spain and Portugal, imperialism vanished and reappeared in constantly changing fashion, and with constantly changing labels—some of which in fact were even anti-imperialist.[3] Even the present state of inclusion of the other within an emerging cosmopolitan civil society sometimes appears to be nothing more than the expression of a highly exclusive 'class consciousness of frequent travellers'.[4]

[1] J. Rawls, *Political Liberalism* (New York: Columbia, 1993), xxix.

[2] Joseph Conrad, *Heart of Darkness* (New York: Norton, 2005).

[3] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Mass.: Harvard University Press, 2004).

[4] C. Calhoun, 'The Class Consciousness of Frequent Travelers' (2002) *South Atlantic Quarterly* 869–97.

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But the reproduction of social structures of class rule and relations of domination, exclusion, and silencing does not change the normative facticity that resides in the fact that all modern democratic constitutions since the eighteenth century rely on the universal legal principles of the inclusion of all human beings and the exclusion of inequality.[5] The normative meaning of these two principles becomes manifest when communicative power appears as the (albeit deeply ambivalent) 'power of revenge', which was awakened in Seattle and in Genoa with the cry: 'You are G8, we are 6,000,000,000.'[6] Constitutional law textbooks are not only talk: they are what Hegel called 'objective spirit', and they 'can strike back'.[7]

If there is anything specifically characteristic of what Berman calls the 'Western legal tradition', it is the dialectical dual structure of law. It is, on the one hand, the immunity system of society, a medium of repression and a means to stabilise expectations. But, on the other hand, law is able to change the world and seek to establish the *civitas Dei* on earth. Expressed in more secular terms, law is a medium of emancipation, which is why Kant and Hegel even identified law with egalitarian freedom and defined law as the 'existence of freedom' (*Dasein der Freiheit*).[8] The Declaration of Independence is a medium of emancipation which declares that 'all men are created equal' and claims, against the King of Great Britain, open access for all emigrants. But the Declaration is also a document of bloody oppression that legalises the genocide of the aboriginal population of America—not only the king, but also his supposed allies, 'the merciless Indian Savages', were declared to be public enemies of 'civilized nations'.

Specifically characteristic of Western constitutional law is its ability to reconcile these deep tensions between the two faces of repression and emancipation by legal institutions which coordinate conflicting powers and enable the always risky and fragile 'productivity of the antinomy'.[9] Harold Berman terms this a 'dialectical reconciliation of opposites',[10] but we could also add that it is a dialectical (and procedural) reconciliation of lasting opposites, of lasting conflicts, differences,

[5] T. H. Marshall, *Citizenship and Social Class* (London: Pluto Press, 1992); R. Stichweh, *Die Weltgesellschaft* (Frankfurt am Main: Suhrkamp, 2000), at 52.

[6] M. Byers, 'Woken up in Seattle', *London Review of Books*, 6 January 2000, 16–17.

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

[8] Immanuel Kant, *Metaphysik der Sitten, Rechtslehre, Werke VII* (Frankfurt am Main: Suhrkamp, 1974), at 345, 434, 464; Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts § 4, Werke 7* (Frankfurt am Main: Suhrkamp, 1970), at 46; id, *Philosophie des Rechts Vorlesung* 1819/20 (Frankfurt am Main: Suhrkamp, 1983), at 52; Karl Marx, 'Verhandlungen des 6. Rheinischen Landtags: Debatten über das Holzdiebstahlsgesetz (Oktober 1842)' in *Marx-Engels Werke 1* (Berlin: Dietz, 1972), 109–47, at 58.

[9] T. Kesselring, *Die Produktivität der Antinomie* (Frankfurt am Main: Suhrkamp, 1984).

[10] H. J. Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 2006), 5–6.

and contradictions.[11] The point is that the Western legal tradition emerged from the terror and fanaticism of a series of great and successful legal revolutions since the papal revolution of the eleventh and twelfth centuries.[12] But the constitutional regimes which were the final outcome of all great and successful European Revolutions established legal conditions for a much less violent struggle *for* equal rights *within* the claim of right.

The constitutional spirit of the revolutions of the eighteenth century became objective for the first time within the borders of the modern nation state. This state always had many faces: the Arendtian face of *violence*, the Habermasian face of *administrative power*, the Foucaultian face of *surveillance and punishment*, the faces of imperialism, colonialism, war-on-terror, and so on.[13] However, the nation state, once it became democratised, possessed not only the *administrative power of oppression and control*, but at the same time the *administrative power to exclude inequality* with respect to individual rights, political participation, and equal access to social welfare and opportunities.[14] Only the modern nation state has not only the normative *idea*, but also the administrative *power* to achieve that. From the very beginning this formed the core of the Enlightenment ideal. Up to the present all advances in the reluctant *inclusion of the other*, and so also all advances of cosmopolitanism, are to a greater or lesser degree advances that have been accomplished by the modern nation state. National constitutional regimes have solved the three basic conflicts of the modern capitalist and functionally differentiated society. Stated in general historical terms, which leave a number of empirical questions open, we can say that the formation and democratic development of the nation state has provided a series of solutions that are constitutive of modern societies.

[11] *Law of collision* or '*Kollisionsrecht*' is deeply rooted in Western constitutional law: see A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1045. Chantal Mouffe refers to this as a transformation from *antagonism to agonism*, but ignores the constitutive role of constitutional law in this process (C. Mouffe, *On the Political* (London: Routledge, 2005)).

[12] Berman, above n 11.

[13] This is a complex argument and needs some explanation. So, Arendt opposes power and violence (in German: *Gewalt*) and argues that law is concerned with power not violence or force. But this makes no sense because there is no power which is not backed by force as its 'symbiotic mechanism'. Therefore Habermas, who has taken up Arendt's concept of power, likened it not to force or violence but to *administrative power*, now calling Arendt's concept of power *communicative power*. Communicative power in particular is backed by revolutionary violence which Habermas calls the power (violence) of revenge (in German: *rächende Gewalt*). Arendt seeks explicitly to separate power from force and violence but implicitly refers to a power which is backed by revolutionary violence simply because her paradigm case of *power* is revolution, and she never argues for something like resistance without violence. See H. Arendt, *On Revolution* (Harmondsworth: Penguin, 1973); J. Habermas, *The Theory of Communicative Action*, i. (London: Heinemann, 1984).

[14] Marshall, above n 5; Stichweh, above n 5.

First, the nation state has solved the motivational *crisis of religious civil war* sparked by the Protestant Revolutions of the sixteenth and seventeenth centuries; this has been achieved through the constitutional reconciliation of lasting conflicts between religious, agnostic, and anti-religious belief systems.[15] This was the result of a two-step development, accomplished in a manner that was both functionally and normatively universal. On the one hand, the functional effect of the formation of a territorial system of states transformed the uncontrolled explosion of religious freedom into a controlled chain reaction that kept the productive forces of religious fundamentalism alive and its destructive forces (to some degree) under control.[16] This was initially the repressive effect of the confessionalisation of the territorial state.[17] On the other hand, the long and reluctant process of democratisation of the nation state replaced repressive confessionalisation by emancipatory legislation which ultimately led to the implementation of the equal freedom *of* religion and the equal freedom *from* religious and other belief systems.[18]

Second, the emerging nation state also solved the legitimacy and constitutional crisis of the public sphere, of public law, and public power, which marked the old European *Ancien Regime* and culminated in the constitutional revolutions of the eighteenth and nineteenth centuries. Constitutions have transformed antagonistic class struggles into agonistic political struggles between political parties, unions, and entrepreneurs, civic associations, etc.[19] In the more successful processes of Western history, bloody constitutional revolutions turned into permanent and legal revolutions.[20] Once again, the effect was twofold. It led, on the one hand, to a functional transformation of the destructive and oppressive potential of a highly specialised politics of power accumulation for its own sake into a more or less controlled explosion

[15] On the distinction of different types of crises (motivational, legitimisation, etc), see J. Habermas, *Legitimation Crisis* (Boston, Mass.: Beacon Press, 1975).

[16] Max Weber, *Die protestantische Ethik und der Geist des Kapitalismus* [1905], in his *Gesammelte Aufsätze zur Religionssoziologie*, i. (Tübingen: Mohr, 1920), 1–206.

[17] W. Reinhard, *Geschichte der Staatsgewalt* (Munich: Beck, 1999); H. Schilling, *Die neue Zeit* (Berlin: Siedler, 1999); H. Dreier, 'Kanonistik und Konfessionalisierung: Marksteine auf dem Weg zum Staat', in G. Siebeck (ed), *Artibus ingenius: Beiträge zu Theologie, Philosophie, Jurisprudenz und Ökonomik* (Tübingen: Mohr Siebeck, 2001), 133–69; M. Stolleis, ' "Konfessionalisierung" oder "Säkularisierung" bei der Entstehung des frühmodernen Staates' (1993) 20 *Ius Commune XX* 1–23, at 7; W. Reinhard and H. Schilling (eds), *Die katholische Konfessionalisierung: Wissenschaftliches Symposion der Gesellschaft zur Herausgabe des Corpus Catholicorum und des Vereins für Reformationsgeschichte* (Münster: Aschendorff, 1995); H. Schilling, *Die Neue Zeit: Vom Christenheitseuropa zum Europa der Staaten. 1250 bis 1750* (Berlin: Siedler, 1999).

[18] T. Parsons, *The System of Modern Societies* (Englewood Cliffs, NJ: Prentice Hall, 1972).

[19] For the distinction between *antagonism* and *agonism,* see Mouffe, above n 11.

[20] See J. Habermas, 'Ist der Herzschlag der Revolution zum Stillstand gekommen? Volkssouveränität als Verfahren; ein normativer Begriff der Öffentlichkeit?' in his *Die Ideen von 1789 in der deutschen Rezeption* (Frankfurt am Main: Suhrkamp, 1989), 7–36.

of all the productive forces of administrative power.[21] This, in turn, was accompanied by democratic emancipatory legislation, which finally brought about the implementation of the freedom *of* public power together with the freedom *from* public power.

Third, the nation state also solved the social class conflicts in the social revolutions of the nineteenth and twentieth centuries. It accomplished this through the emergence of a regulatory social welfare state, which transformed the elitist bourgeois parliamentarianism of the nineteenth century into egalitarian mass democracy. The social class struggle was institutionalised,[22] and the violent social revolution became a legally organised 'educational revolution'.[23] In this respect, it was the great functional advance of social democracy to keep most of the productive forces and to get rid to some degree of the destructive forces of the exploding free markets of money, real estate, and labour.[24] It achieved this by overcoming the fundamentalist bourgeois dualism of private and public law.[25] In the first decades of social welfare regimes, this was more or less the merit of administrative law and bureaucratic rule in a regime of low-intensity democracy.[26] The ongoing democratic rights revolution which was directed against low-intensity democracy finally led to the implementation of the freedom *of* markets together with the freedom *from* markets. This transformed the system of individual rights based on the freedom of property into a comprehensive system of welfare and anti-discrimination norms.[27]

Despite this, however, the impressive normative and functional advances of the Western democratic nation state were obtained at the price of the cosmopolitan claims of the French Revolution. These claims were integral to the Enlightenment, the intellectual basis and the source of the directing ideas of the law of the constitutional revolutions in the late eighteenth and early nineteenth centuries. For a long time, they were at best soft law but expressed in important legal documents (even if without legal force) like the American Declaration of Independence and the French Declaration

[21] In this respect three very different approaches (one historical, one power-theoretical, and the third from system theory) are in agreement. See A. Lüdtke, 'Genesis und Durchsetzung des modernen Staates' (1980) 20 *Archiv für Sozialgeschichte* 470–91; M. Foucault, *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, 1979); N. Luhmann, 'Verfassung als evolutionäre Errungenschaft' (1990) 9 *Rechtshistorisches Journal* 176–220.

[22] D. Hoss, *Der institutionalisierte Klassenkampf* (Frankfurt: EVA, 1972).

[23] Parsons, above n 18.

[24] K. Polanyi, *The Great Transformation: Politische und ökonomische Ursprünge von Gesellschaften und Wirtschaftssystemen* (Frankfurt: Suhrkamp, 1997).

[25] H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* [1920] (Aalen: Scientia, 1981); id, *Reine Rechtslehre* [1934] (Vienna: Verlag Österreich, 1967); id, *Demokratie und Sozialismus: Ausgewählte Aufsätze* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1967).

[26] S. Marks, *The Riddle of all Constitutions* (Oxford: Oxford University Press, 2000).

[27] Cf Berman, above n 10, 16 et seq; id, *Justice in the USSR* (Cambridge, Mass.: Harvard University Press, 1963); Alexander Somek, *Das europäische Sozialmodell: Die Kompatibilitätsthese* (Berlin: e-man, 2008).

of Rights. Once it came to concretise them in ordinary legislation, the universality inherent in the spirit of the equal rights of citizens vanished and was combined with an unequal status of the others—women, workers, non-Europeans. Yet this did not mean that they were forgotten; on the contrary, as Kant had rightly observed, they stayed alive and their communicative power grew in the course of history until they were implemented by binding decisions at least partially, but step by step.

II. THE EMERGENCE OF WORLD SOCIETY

Until 1945, the modern nation state was the state of the regional societies of Europe, America, and Japan. The rest of the world was either under the imperial control of these states or kept outside the system of nation states. Until the mid-twentieth century, the 'exclusion of inequality' meant equality for the citizens of the state and inequality for those who did not belong to the regional system of states. There was not even any serious demand for a global exclusion of inequality.

When Kant proposed the 'cosmopolitan condition' of linking nations together on the grounds that in modern times 'a violation of rights in one part of the world is felt everywhere',[28] his notion of *world* (concerning the political world in contrast to the *globe*, which for Kant was only a transcendental scheme) was more or less reduced to Europe and the European system of states. Also Hegel's claim 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.'[29] is relativised by his reductionist understanding of the legal meaning of human rights as applicable to male citizens, biblical religions, and European nations only. He also explicitly limits human rights to national civil law (of the *bürgerliche Gesellschaft* and its *lex mercatoria*), and this law loses its validity when confronted with the essential concerns of the executive administration of the state and its particular relations of power (*besondere Gewaltverhältnisse*, *justizfreie Hoheitsakte*). Hegel therefore condemns any 'cosmopolitanism' that is opposed to the concrete ethical practices (*Sittlichkeit*) of the state.

Some decades later, when Johann Caspar Bluntschli declared the implementation of a 'humane world order' (*menschliche Weltordnung*) to be the main end of international law, he neither saw any contradiction between this noble aim and his (and his colleagues') identification of the modern state with a male dominated civilisation[30] nor with his at least latently racist thesis that all law is Aryan.[31] The liberal cosmopolitanism of the 'men of 1873' who founded the Institut de Droit International and invented

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

[29] Georg Wilhelm Friedrich Hegel, *Grundlinien*, above n 8.

[30] Johann Caspar Bluntschli: '*Der Staat ist der Mann*': cited in M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of Internataionl Law 1870–1960* (Cambridge: Cambridge University Press, 2001), at 80.

[31] Ibid 77.

a cosmopolitan international law was completely Eurocentric, relying on the basic distinction between (Christian) *civilised nations* and *barbarian people*.[32] The generous tolerance of the men of 1873 was paternalistic and repressive from its very beginning. Hence, it is no surprise that the liberal cosmopolitan humanists who wanted to found a humane world order soon became apologists of imperialism, defending King Leopold's private-measures state (*Maßnahmestaat*) in the 'heart of darkness' by drawing a distinction between *club members* on the one side and *outlaws* on the other.[33] Following this line of argument, Article 35 of the Berlin Conference on the future of Africa (1884–5) offers 'jurisdiction' for the civilised nations of Europe and 'authority' for those in the heart of darkness.[34] The global world order during the nineteenth and early twentieth centuries was a universal *Doppelstaat* (dual state).[35] Guantanamo has a long history.

Since 1945, however, colonialism and classical imperialism have vanished,[36] and Euro-centrism has become decentred.[37] Western rationalism, functional differentiation, legal formalism, and moral universalism are no longer specifically Western phenomena. The deep structural and conceptual change that this decentring of Euro-centrism has brought about is not yet sufficiently understood. For good or ill, everybody today must conduct his or her life under the more or less brutal conditions of the selective and disciplinary machinery of markets, schools, kindergartens, universities, lifelong learning, traffic rules, and 'total institutions' such as jails, hospitals, or military barracks.

At the same time, state sovereignty was equalised as the state went global. The last square metre of the globe became state territory (at least legally[38]), and even the moon became an object of international treaties between states.[39] Together with

[32] N. Bermann, 'Bosnien, Spanien und das Völkerrecht: Zwischen "Allianz" und "Lokalisierung"' in H. Brunkhorst (ed), *Einmischung erwünscht? Menschenrechte und bewaffnete Intervention* (Frankfurt: Fischer, 1998), 117–40; Anghie, above n 3.

[33] Koskenniemi, above n 30, at 80, 168–9.

[34] Ibid 126.

[35] E. Fraenkel, *Der Doppelstaat* [1941], in his *Gesammelte Schriften,* ii. ed A. von Brünneck (Baden-Baden: Nomos, 1999).

[36] M. Hardt and A. Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2001); A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen* (Frankfurt: Suhrkamp, 2005); S. Buckel, *Subjektivierung und Kohäsion: Zur Rekonstruktion einer materialistischen Theorie des Rechts* (Weilerswist: Velbrück Wissenschaft, 2007); B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law*, 1–37.

[37] H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, Mass.: MIT Press, 2005).

[38] S. Oeter, 'Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung' in R. Kreide and A. Niederberger (eds), *Verrechtlichung transnationaler Politik: Nationale Demokratien im Kontext globaler Politik* (Frankfurt am Main: Campus, 2008), 90–114.

[39] P. Dobner, *Konstitutionalismus als Politikform: Zu den Effekten Staatlicher Transformation auf die Verfassung als Institution* (Baden-Baden: Nomos, 2002).

the globalisation of the modern constitutional nation state, therefore, all functional subsystems, which from the sixteenth 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.

Sociologists rightly and successfully have criticised the 'methodological nationalism' of their own discipline,[40] and have started to replace the pluralism of national societies by the singular concept of a 'global social system' or a 'world society' which includes all communications,[41] which is normatively integrated,[42] and which has transformed all political, legal, economic, cultural, functional, and geopolitical differences into internal differences of the one and only world society. These differences now depend entirely on the fundamental societal structure of the world society and its cultural constituents.[43]

Whereas the function of the basic structure primarily is selective and constraining, the function of the superstructure of the global secular culture (or the background of global knowledge, the global *Lebenswelt*) is shaping and constituting for the behaviour and the subjectivity of everybody everywhere on the globe. Everybody, whether they want it or not, is shaped by the individualism and rationality of a single global culture which includes human rights culture as well as the culture of individualised suicide bombing.[44] All cultural differences are now of the same society and of individualised persons who have to organise and reorganise, construct and reconstruct their ego and their personal and collective identity lifelong, and in order to do that they rely only on the (weak or strong) means of their own autonomy. Sartre was right: everybody now is *condemned to be free*. Yet as 'free men' we are not looking with Sartre into the abyss of nothingness, but are acting against a dense and common background of relatively abstract, highly general and formal, thoroughly secular, nevertheless substantial global knowledge that is implicit in the global social life-world. This is so simply because traditional identity formations no longer and nowhere are available without a permanently growing and changing variety of

[40] U. Beck, *Macht und Gegenmacht im globalen Zeitalter* (Frankfurt am Main: Suhrkamp, 2002).

[41] N. Luhmann, 'Die Weltgesellschaft' (1971) 57 *Archiv für Rechts- und Sozialphilosophie* 1–34; id, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1997), at 145 et seq.

[42] T. Parsons, 'Order and Community in the International Social System', in J. N. Rosenau (ed), *International Politics and Foreign Policy* (Glencoe, Ill.: The Free Press, 1961), 120–9; R. Stichweh, 'Der Zusammenhalt der Weltgesellschaft: Nicht-normative Integrationstheorien in der Soziologie', in J. Becker et al (eds), *Transnationale Solidarität: Chancen und Grenzen* (Frankfurt am Main: Campus, 2004), 236–45.

[43] J. W. Meyer, 'World Society and the Nation-State' (1997) 103 *American Journal of Sociology* 144–81; id, *Weltkultur: Wie die Westlichen Prinzipien die Welt Durchdringen* (Frankfurt: Suhrkamp, 2005).

[44] R. Rorty, 'Human Rights, Rationality, and Sentimentality' in S. Shute and S. L. Hurley (eds), *On Human Rights, Oxford Amnesty Lectures* (New York: Basic Books, 1993), 111–20; O. Roy, *Der islamistische Weg nach Westen: Globalisierung, Entwurzelung und Radikalisierung* (Munich: Pantheon, 2006).

alternative offers, in Teheran as well as in New York, in the Alps of Switzerland as well as in the mountain regions of Afghanistan, Pakistan, or Tibet.[45]

These developments are now reflected more and more by the scientific superstructure, not only in social sciences but also in history and philosophy. For over twenty years we have been observing a strong turn in history from national to European and world history; in philosophy Kant's essay on perpetual peace is suddenly no longer a marginal subject. Even jurists have now started to develop Hans Kelsen's insight from the 1920s that there is no dualist gap between national and international law, but only a continuum.[46] In the last decade, there has been a mushrooming of national–international hybrids and new branches of legal disciplines such as transnational administrative law.

III. THE AGE OF EXTREMES?

The twentieth century strikingly has been called an 'age of extremes',[47] and every attempt to bridge the abyss that separates these extremes would be an 'extorted reconciliation'.[48] This century was the catastrophe that has incurably 'damaged life'.[49] But it was also the century of a great legal revolution which transformed not only law but society as a whole: a revolution that triggered experimental-communicative productivity in new social and cultural practices, political and legal institutions, and scientific and philosophical discourse.

If we call the twentieth century the totalitarian century, then this is at the same time right *and* wrong. After disastrous revolutionary and counterrevolutionary worldwide wars, after battles for material and battles of attrition, bombing wars and civil wars, pogroms, genocides, concentration and death camps, national uprisings, racist excesses, terrorism and counter-terrorism, the destruction and founding of states and fascist, socialist and—not to forget—democratic grand experiments—totalitarianism was not the winner, but the loser. In particular, the World Wars were fought by their winners not only for national interest alone, but also for democracy, global peace, and human rights.

[45] Parsons, above n 18; Parsons and G. M. Platt, *Die amerikanische Universität* (Frankfurt am Main: Suhrkamp, 1990); R. Döbert, J. Habermas, and G. Nunner-Winkler (eds), *Entwicklung des Ichs* (Königstein: Anton Hain, 1980).

[46] H. Brunkhorst, 'Kritik am Dualismus des internationalen Recht—Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts' in Kreide and Niederberger (eds), above n 38, 30–63.

[47] E. Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914–1991* (London: Michael Joseph, 1994).

[48] T. W. Adorno, 'Erpreßte Versöhnung', in his *Noten zur Literatur* (Frankfurt am Main: Suhrkamp, 1974), 251–80.

[49] T. W. Adorno, *Minima Moralia: Reflexionen aus dem beschädigten Leben* (Frankfurt am Main: Suhrkamp, 1951).

The twentieth century was not only the century of state-organised mass terror (which could not, on this scale, have been organised any other way than by state).[50] It was also the century of ground-shaking normative progress, through which democracy was universalised and constitutional law transformed into global constitutionalism, national human rights into global civil rights, constitutional state sovereignty into democratic sovereignty, and the bourgeois state into a social welfare state. Between Europeans and non-Europeans there has existed for hundreds of years the formal and legal unequal distribution of rights: jurisdiction for us, authority for the others.[51] Now, for the first time in history, rights are formally equal. Admittedly, the massive human-rights violations, social exclusion and outrageous, unequal treatment of entire world regions have not disappeared. But human-rights violations, lawlessness, and political and social disparity are now for the first time considered to be our common problem—a problem that concerns every single actor in this global society. Only now are there serious and legally binding claims to the global (and not any longer just national) exclusion of inequality.

The global law and the human rights culture of the late twentieth century was not only the result of the negative insight from 1945 that Auschwitz and war should never again happen. It was also the positive result of a great and successful legal revolution, which began at the end of the First World War with the American intervention in the war in 1917, and was fought for progressive, new, and supposedly more inclusive rights, and more and expanded individual and political freedom.[52] In 1917 President Wilson forced the reluctant Western allies to claim revolutionary war objectives, and from this moment the war (and later the Second World War, again as a result of American intervention) was fought, not only for self-preservation and national interest, but also for global democracy and peace: 'To make the world safe for democracy.' The leader of the Russian Revolution and the religious Marxist (Lenin) and the Calvinist–Kantian American President who believed in the social gospel and God's personal mandate (Wilson), both recognised the First World War—from very different perspectives—as the beginning of a global revolution and as a revolutionary war against war.

Lenin and Wilson were both fierce opponents of the then still powerful monarchies and the existing pluralism of monarchist and democratic, imperialistic, federate, and nationalistic constitutional regimes. This negative objective was achieved first: constitutional monarchy—reinvented in every new, great revolution since the pontifical revolution of the twelfth century—was so thoroughly abolished that hardly anyone remembers it today.[53]

[50] Reinhard, above n 17.

[51] Concluding protocol of the Berlin Conference on West Africa in 1884–5, Art 35.

[52] H. Brunkhorst, 'Die Globale Rechtsrevolution: Von der Evolution der Verfassungsrevolution zur Revolution der Verfassungsevolution?', in R. Christensen and B. Pieroth (eds), *Rechtstheorie in rechtspraktischer Absicht: Freundesgabe zum 70. Geburtstag von Friedrich Müller* (Berlin: Dunker & Humblot, 2008), 9–34.

[53] 'Der alte Offizier konnte es bis zum letzten Augenblick … nicht für möglich halten, dass ein vielhundertjähriges Reich einfach vom Schauplatz der Geschichte verschwinden könne'

While Wilson wanted to transform international law according to Kant's plan and unite the nations in a great federation of democratic nations,[54] Lenin was trying to revolutionise social conditions and build up a socialist and Soviet world empire. According to Kelsen, the Treaty of Versailles and the concomitant founding of the League of Nations were events as revolutionary as the Russian Revolution.[55] While the success of the October Revolution made the drastic reform of property law in an entire world region possible and subsumed the legal system under socio-political and socio-pedagogical goals, the Treaty of Versailles and the 'Covenant of the League of Nations [supplanted] the *ius publicum europaeum*'.[56]

Russia and America—the two sides of this revolutionary pincer movement that laid siege to Europe and put pressure on its centre—were brothers hostile to each other from the beginning, but who had to respond to each other in a mutually beneficial manner. The West felt compelled to turn the attack on property law and the powerful, global, and social-revolutionary impulse of the Russian Revolution into a 'peaceful revolution', and thus opened a way towards socialism that conformed to constitutionality.

At the end of the Second World War, the Soviet Union had to get on board with international politics, found the United Nations *together* with the United States, their European allies and some representatives of the then emerging later so-called Third World. From this time on, the Soviet Union was in the web of international law and human rights. Up until the Conference on Security and Cooperation (CSCE) they had to sign human rights declarations that helped to make it implode in the end.[57] The radical changes in the twentieth century led to variants of the same legal reforms—pre-constitutional and pseudo-democratic in the East, democratic–constitutional in the West.[58] These radical changes repealed the bourgeois centring of equality rights around property and turned these rights into a comprehensive system of anti-discrimination norms.[59] Franklin D. Roosevelt's famous 'Second Bill of Rights' from January 1944 was

(H. Kelsen, *Veröffentlichte Schriften 1905-1910 und Selbstzeugnisse*, ed M. Jestaedt (Tübingen: Mohr Siebeck, 2006), at 51).

[54] G. Beestermöller, *Die Völkerbundidee: Leistungsfähigkeit und Grenzen der Kriegsächtung durch Staatensolidarität* (Stuttgart: Kohlhammer, 1995); O. Eberl, *Demokratie und Frieden: Kants Friedensschrift in den Kontroversen über die Gestaltung globaler Ordnung* (Baden-Baden: Nomos, 2008).

[55] H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* [1920] (Aalen: Scientia, 1981); A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: Springer, 1926).

[56] O. Eberl, *Demokratie und Frieden: Kants Friedensschrift in den Kontroversen der Gegenwart* (Baden-Baden: Nomos 2008).

[57] This, of course, was accompanied by other developments, in particular the much better working functional differentiation in Western democracies and their higher reflexive capacity to observe themselves together with the particular blindness of the socialist countries to produce adequate knowledge of their own society.

[58] Cf Berman, above n 10, 16–17.

[59] C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1993).

the beginning of a 'rights revolution' whose waves of anti-discrimination legislation continued into the 1970s and 1980s, extending rights of equality to other spheres. In his address to Congress, Roosevelt declared the existing 'inalienable political rights' of the constitution to be valid but insufficient for dealing with a complex society. Rather, he stated, we need to ensure 'equality in the pursuit of happiness' within this society through social rights. Although mentioning 'free speech', 'free press', 'free worship', 'trial by jury', and 'freedom from unreasonable searches and seizure', he did not refer at all to property rights, an absence that is the most significant aspect of the text.

The revolutionary reforms further changed the legislation from conditional to final programming,[60] developed a comprehensive administrative planning law (tried and tested in the World Wars),[61] and introduced a new system of regulative family, socialisation, and conduct law. To adopt Luhmann's phrase, one could call it 'alteration of persons' law' (*Personenänderungsrecht*); Berman, by contrast, speaks of 'parental law' and of a 'nurturing' or 'educational role of law'; and with Foucault one could speak of the law of discourse police and bio-power.[62]

The legal revolution ended in 1945 with the constitution of the United Nations in San Francisco. A new system of basic human rights norms, coupled with a completely new system of inter, trans, and supranational institutions was created during the short period from 1941 to 1951. This system in fact included international welfarism, which was invented before the great triumph of national welfare states.[63]

International law has changed deeply since the revolutionary founding of the United Nations. It has witnessed a turn from a law of coexisting states to a law of cooperation,[64] the founding of the European Union, the Human Rights Treaties from the 1960s, the Vienna Convention on the Law of the Treaties, and the emergence of international *ius cogens*, etc. The old rule of equal sovereignty of states became 'sovereign equality' *under* international law (Article 2, para 1 UN Charter);

[60] D. Grimm (ed), *Wachsende Staatsaufgaben: Sinkende Steuerungsfähigkeit des Rechts* (Baden-Baden: Nomos, 1990); D. Grimm, 'Der Wandel der Staatsaufgaben und die Krise des Rechtsstaats', in his *Die Zukunft der Verfassung* (Frankfurt am Main: Suhrkamp, 1991), 159–75; N. Luhmann, *Politische Theorie im Wohlfahrtsstaat* (Munich: Olzog, 1981); F. Neumann, 'Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft' (1937) 6 *Zeitschrift für Sozialforschung* 542–96.

[61] W. Seagle, *Weltgeschichte des Rechts: Eine Einführung in die Probleme und Erscheinungsformen des Rechts* (Munich: Beck, 1951); H. Maurer, *Allgemeines Verwaltungsrecht* (Munich: Beck, 17th edn, 2009).

[62] Luhmann, above n 60; Berman, *Justice in the U.S.S.R.*, above n 27, especially 277–8. Concerning the beginning in the 1930s see C. Joerges and N. Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford: Hart, 2003).

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

[64] J. Bast, 'Das Demokratiedefizit fragmentierter Internationalisierung', in H. Brunkhorst (ed), *Demokratie in der Weltgesellschaft, Soziale Welt Sonderband 18* (Baden-Baden: Nomos 2009), 185–93.

individual human beings (in the good and in the bad) became subject to International Law; democracy became an emerging right or a legal principle that can also be enforced against sovereign states; and the right to have rights, whose absence Arendt lamented in the 1940s, is now a legal norm that binds the international community.[65] All these legal rules are regularly broken. However, this is not a specific feature of international law; and it happens with national law as well, which to a considerable degree is also soft, symbolic, or dead law. What is new today is that international and cosmopolitan equal rights have become binding legal norms, and as such they have to be taken seriously. There is no longer any space for any action outside the law or outside the legal system.[66] Every single action of every kind of actor, individuals, states, and organisations is either legal or illegal—*tertium non datur*. In consequence, the difference in principle between national and international law has vanished, a point that Hans Kelsen, Alfred Verdross, Georges Scelle, and other cosmopolitan international lawyers were already claiming during the First World War.

IV. GLOBAL LAW?

As with other things in a highly accelerated and complex modern society,[67] this international (and national) legal and revolutionary progress is deeply ambivalent and fragile. The basic legal principles of the global inclusion of the other and the exclusion of inequality coexists with global functional systems, global actors, and global values which are emerging with great rapidity, and which tear themselves 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 formation of the global society is the decline of the nation state's ability effectively to abolish inequalities, even within the highly privileged world of the Organisation for Economic Co-operation and Development. This has three significant consequences.

First, we can observe in the economic system the complete transformation of the 'state-embedded markets of regional late capitalism' into the 'market-embedded states of global turbo-capitalism'.[68] The negative effect of economic globalisation on rights is that the freedom *of* markets explodes globally, and again at the cost of the freedom *from* the negative externalities of disembedded markets, and it is combined with heavy,

[65] For a more comprehensive overview see Brunkhorst, above n 52.

[66] M. Byers, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 2 *The Journal of Political Philosophy* 171–90, at 189.

[67] Hartmut Rosa, 'The Universal Underneath the Multiple: Social Acceleration as the Key to Understanding Modernity', in S. Costa et al (eds), *The Plurality of Modernity: Decentering Sociology* (Munich: Hampp, 2006), 22–42.

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

sometimes warlike competition, in particular about the oil and energy resources of the earth, and now even combined with a global economic crisis: *there will be blood*.[69]

Surprisingly, in questions regarding the *religious sphere of values* we can make a similar observation and identify similar consequences. Global society makes the proposition that what is true for the capitalist economy is equally true for the autonomous development of the religious sphere of values. In consequence, we are now confronted with the transformation of the state embedded religions of Western regional society into the religion embedded states of the global society.[70] Since the 1970s, religious communities have crossed borders and have been able to escape from state control. Again, the negative effect of this on our rights is that the freedom *of* religions explodes whereas the freedom *from* religion comes under pressure. At the same time the fragmented legal and administrational means of states, inter, trans, and supranational organisations seems not to be sufficient to get the unleashed destructive potential of religious fundamentalism under control: *there will be blood*.

Last but not least, the internally fragmented executive branches of the state have decoupled themselves from the state-based separation, coordination, and unification of powers under the democratic rule of law, and they too have gone global.[71] The more they are decoupled from national control and judicial review, the more they are coordinated and associated on regional and global levels, where they constitute a group of loosely connected transnational executive bodies. Postnational governance without (democratic) government is performed at one and the same time through a partly formal and egalitarian rule of law, through an elitist *rule through law*, and through an informal bypassing of (constitutional) law and the demos by means of a

[69] One-sided but in this point striking is the neo-Pashukanian analysis of international law by C. Mieville, *Between Equal Rights: A Marxist Theory of International Law* (London: Haymarket, 2005).

[70] H. Brunkhorst, 'Democratic Solidarity under Pressure of Global Forces: Religion, Capitalism and Public Power' (2008) 17 *distinktion: Scandinavian Journal of Social Theory* 167–88.

[71] On transnational administrative law, during the last few years a whole industry of research emerged: see C. Tietje, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes' (2003) 17 *Deutsches Verwaltungsblatt* 1081–164; C. Möllers, 'Transnationale Behördenkooperation' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*) 351–89; Krisch and Somek in this volume; C. Möllers, A. Voßkuhle, and C. Walter (eds), *Internationalisierung des Verwaltungsrecht: Eine Analyse anhand von Referenzgebieten* (Tübingen: Mohr Siebeck, 2007); A. Fischer-Lescano, 'Transnationales Verwaltungsecht' (2008) 8 *Juristen-Zeitung* 373–83. On the globalisation of executive power: K.-D. Wolf, *Die neue Staatsräson: Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft* (Baden-Baden: Nomos, 2000); P. Dobner, 'Did the State Fail? Zur Transnationalisierung und Privatisierung der öffentlichen Daseinsvorsorge: Die Reform der globalen Trinkwasserpolitik', in K.-D. Wolf (ed), *Staat und Gesellschaft: Fähig zur Reform? Der 23. wissenschaftliche Kongress der Deutschen Vereinigung für Politikwissenschaft* (Baden-Baden: Nomos, 2007), 247–61; G. Lübbe-Wolf, 'Die Internationalisierung der Politik und der Machtverlust der Parlamente', in H. Brunkhorst (ed), *Demokratie in der Weltgesellschaft*, above n 64, 127–42.

new regime of soft law. This law has so far no normatively binding force. Empirically, however, it has a strong compulsory effect.[72] It therefore resembles the old Roman *senatus consultum*, which had no legally binding force, but which every official was well advised to follow.[73] As a result, the new globalised executive power seems to be undergoing the same transformation as markets and religious belief systems, and it is thus transformed 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 jeopardises the achievements of the modern constitutional state.[74] The effect of this is an accelerating process of an original accumulation of global power beyond national and representative government.

The three great transformations of the world society have turned the democratically elected and legally organised political power within the nation state into the power of a transnational politico-economic–professional ruling class—including high ranked journalists and media stars who function as a bypass system, which are implemented to remove the core of political decision making from any spontaneous formation of communicative power through an untamed and anarchic public sphere. It seems now as if, in a new transformation of the public sphere, the Habermasian and Petersian filters, supposed to transform public opinion into political decision making,[75] are working the other way round, and are closing the doors on public opinion. White-Paper-Democracy is the outcome.[76] The new transnational ruling class hardly relies any longer on egalitarian will formation. This class is (like the *national* bourgeoisie of the nineteenth century) highly heterogeneous and characterised by multiple conflicts of interest. Yet it has a certain number of common class interests: for instance, it seeks to increase its room for manoeuvre by withdrawing itself from democratic control and, as a comfortable side-effect of this, it aims to preserve and increase its enormously enlarged, individual, and collective opportunities for private profit generation.[77] This is the new cosmopolitism of the few.[78] Instead of global democratic government we are now approaching some kind of directorial global Bonapartist governance: that is, soft Bonapartist governance for *us* of the North-West, and hard Bonapartist governance for *them* of the South-East, the failed and outlaw states and regions of the globe:[79] *there will be blood*.

[72] J. von Bernstorf, 'Procedures of Decision-Making and the Role of Law in International Organizations' (draft paper MPI, Heidelberg, 2008), 22; Möllers, 'Transnationale Behördenkooperation', above n 71.

[73] U. Wesel, *Geschichte des Rechts* (Munich: Beck, 1997), 163.

[74] Wolf, *Die neue Staatsräson*, above n 71.

[75] B. Peters, *Öffentlichkeit* (Frankurt: Suhrkamp, 2008).

[76] European Commission, 'European Governance: A White Paper', COM(2001) 428 final of 25 July 2001, OJ C287/2001, <http://ec.europa.eu/governance/white_paper/index_en.htm>.

[77] Wolf, *Die neue Staatsräson*, above n 71.

[78] Calhoun, above n 4.

[79] Anghie, above n 3.

The deep division of the contemporary world into two classes of people—those with good passports and those with bad ones[80]—is mirrored by the constitutional structure of the world society. Today, there already exists a certain kind of global constitutionalism, which is one of the lasting results of the revolutionary change that began in the 1940s, and observed already by Talcott Parsons in 1960, a sociologist who was never under suspicion of being an idealist.[81] However, existing global constitutions are far from being democratic.[82] All postnational constitutional regimes are characterised by a disproportion between legal declarations of egalitarian rights and democracy and its legal implementation by the international constitutional law of checks and balances.[83] Hence, the legal revolution of the twentieth century was successful, but it was unfinished. The one or many global constitutions are in bad shape, based on a constitutional compromise that mirrors the hegemonic power structure and the new relations of domination in the world society.[84]

Scientific and technical expertise has again become an ideology[85] which obscures the social fact that 'most regulatory decisions involve normative assumptions and

[80] Calhoun, above n 4.

[81] Parsons, above n 42, at 126.

[82] For the thesis that the UN Charter is the one and only constitution of the global legal and political order, see B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) *Columbia Journal of Transnational Law* 529–619; A. von Bogdandy, *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (Berlin: Springer, 2003); id, 'Constitutionalism in International Law' (2006) 47 *Harvard International Law Journal* 223–42; M. Albert and R. Stichweh, *Weltstaat und Weltstaatlichkeit* (Wiesbaden: VS, 2007); H. Brunkhorst, 'Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism' (2002) 31 *Millennium: Journal of International Studies* 675–90; id, 'Demokratie in der globalen Rechtsgenossenschaft' (2005) *Zeitschrift für Soziologie: Sonderheft Weltgesellschaft*, 330–48. For the thesis of constitutional pluralism, see G. Teubner, 'Globale Zivilverfassungen' (2003) 63 *ZaöRV* 1–28.

[83] For the original version of this thesis see Brunkhorst, above n 82.

[84] 'The treaties and the law-making are increasingly comprehensive, and the courts and dispute-settlement bodies are increasingly judicially organized and operatively effective. They are however still different than the similar forms of nation-state organized institutions in a number of ways. The treaties and the law-making are comprehensive, but fragmented and asymmetrical. Each treaty dealing with one set of problems or purposes—without the abilities of seeing the different types of problems in relation to each other. The organizations are not democratic in relation to citizens. They are generally based on states as members and many of them are dominated by internal secretariats and experts. They are set up as top-down tools for dealing with separate issues and areas of problems. They are dominated by different elites' (I. J. Sand, 'A Sociological Critique of the Possibilities of Applying Legitimacy in Global and International Law', paper presented at Onati School for Sociology of Law, Onati, Spain, 2008).

[85] H. Marcuse, 'On Science and Phenomenology', in *Boston Studies in Philosophy of Science*, ii. (New York: Proceedings of the Boston Colloquium for the Philosophy of Science, 1965), 279–91; J. Habermas, *Technik und Wissenschaft als 'Ideologie'* (Frankfurt am Main: Suhrkamp, 1968).

trigger redistributive outcomes that cannot be reduced to seemingly objective scientific inquiries; each time someone wins and someone loses'.[86] Hence, what seems to be necessary and out of reach in the present situation of pre-democratic global constitutionalism is a Kantian *Reform nach Prinzipien* (Kant),[87] or 'radical reformism' (Habermas), or a new 'democratic experimentalism' (Dewey) that operates on the same level as the power of the emerging transnational ruling class: that is, beyond representative government and national government.[88]

V. REFORM NACH PRINZIPIEN

What could radical reformism or *Reform nach Prinzipien* mean today? I don't know. But before posing the hard questions of constitutional change and institutional design which often fail because conceptually they fail to recognise 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 twentieth century, in particular by philosophers like John Dewey, Ernst Cassirer (after his symbolic turn), early Heidegger, late Wittgenstein, or W. V. O. Quine.[89] Yet, representational thinking that is deeply based on dualism still prevails in political and legal theory. In particular, in international law and international relations dualism covers a broad mainstream of opposing paradigms. From international relations realism to critical legal studies, from German *Staatsrecht* to critical theory, from liberalism to neo-conservatism, the state-centred dualism is tacitly accepted—that is, the dualism between *Staatenbund* and *Bundesstaat*, international law and national law, constitution and treaty, public law and private contract, state and society, politics (or '*the* political') and law, law-making and law-application, sovereign and subject, people and representatives, (action-free) legislative will formation and (weak-willed) executive action, legitimacy and legality, heterogeneous population and (relatively) homogeneous people, *pouvoir constituant* and *pouvoir constitué,* etc. All these dualisms prevent us from constructing European and global democracy adequately and, finally, to join the *civitas maxima*.

Yet, what Dewey and the pragmatists did with classical idealistic and metaphysical dualisms in philosophy, Kelsen and his students did with the dualisms in political, legal, and constitutional theory. They have replaced each of them by a *continuum*.

[86] Bernstorf, above n 72, at 8.

[87] C. Langer, *Reform nach Prinzipien: Untersuchung zur politischen Theorie Immanuel Kants* (Stuttgart: Klett-Cotta, 1986).

[88] Marks, above n 26, at 2–3.

[89] A paradigmatic account is: R. Rorty, *Philosophy and the Mirror of Nature* (Princeton, NJ: Princeton University Press, 1980). For recent developments see R. Brandom, *Making It Explicit: Reasoning, Representing & Discursive Commitment* (Cambridge, Mass.: Harvard University Press, 1994); J. Habermas, *Wahrheit und Rechtfertigung* (Frankfurt am Main: Suhrkamp, 1997).

Kelsen's and Merkl's paradigm case was the legal hierarchy of steps (*Stufenbau des Rechts*).[90] The doctrine of *Stufenbau* transforms the dualisms of legislative will and executive performance, of political generation and professional application of legal norms, of general law and specific judgment, and last but not least of international and national law into a *continuum of concretisation*.[91] Hence, if all levels on the continuum of legal norm concretisation are politically created, then the principle of democracy is fulfilled only if those who are affected by these norms are included fairly and equally on all levels of their creation.

Moreover, if we follow Jochen von Bernstorff one step further than Kelsen and drop the transcendental foundation of a legal hierarchy and the *Grundnorm*,[92] then we are left with an enlarging or contracting circle of legal and political communication which has no beginning and no end *outside* positive law *and* democratic will formation.[93] Only then could democracy replace the last (highly transcendentalised and formalised) remains of the old-European *legal hierarchy* and *natural law* that is higher than democratic legitimisation, and that means getting rid of the last inherited burden of dualism which 'weighs heavily like a nightmare on our brains' (Marx). We should no longer read Kelsen's theory primarily as a scientific theory of pure legal doctrine, but as a practically orientated theory which anticipates the global legal revolution of the twentieth century. It should also be read as a hopeful message—an attempt to change our worldview and vocabulary to fits a praxis that emancipates us from ideological blindness and helps us to get rid of the old international law of 'sorry comforters' (Kant).

Post-representation, democratic institutions should be designed to enable the expression of political and individual self-determination in a great variety of different governmental bodies at all levels, and through a variety of procedures of egalitarian will formation: participatory, deliberative, representative, or direct. Although Kelsen is sometimes read as a strong defender of representational democracy and parliamentary supremacy, this reading is wrong because Kelsen, like Dewey, made a powerful criticism of representation and replaced it with the idea of a continuum of different practical methods to express political opinions and make egalitarian

[90] A. Merkl, *Allgemeines Verwaltungsrecht* (Vienna: Springer, 1927), 160, 169; id, 'Prolegomena zu einer Theorie des rechtlichen Stufenbaus', in H. Klecatsky, R. Marcic, and H. Schambeck (eds), *Adolf Merkl und die Wiener rechtstheoretische Schule* (Vienna: Europa Verlag, 1968), 252–94.

[91] J. von Bernstorff, 'Kelsen und das Völkerrecht', in H. Brunkhorst and R. Voigt (eds), *Rechts-Staat: Staat, internationale Gemeinschaft und Völkerrecht bei Hans Kelsen* (Baden-Baden: Nomos, 2008), 167–90, at 181.

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

[93] This comes close to Habermas's normatively strong or Luhmann's normatively neutralised idea of circulations of communication without a subject (*subjektlose Kommunikationskreiläufe*). J. Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992); N. Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main: Suhrkamp, 1983); in conjunction with M. Neves, *Zwischen Themis und Leviathan* (Baden-Baden: Nomos, 2000).

decisions.[94] Radical criticism of representational democracy is not directed at parliamentary democracy. It leads, first, to a reinterpretation of parliamentary democracy as one (possible[95]) part of a comprehensive procedural method of egalitarian will formation, deliberation, and decision making,[96] and, second, to a relativisation of parliamentary legislation. Parliaments can no longer be interpreted as the highest organs of the state, or as the one and only true representative of the general will of the people, or as the expression of the essential, higher, or refined will of the better self of the people (the one that fits better to the ideas of intellectuals), or as the representation of the *Gemeinwohl* or commonwealth (whatever that is). Although parliaments may be the best method of achieving democratic will formation in a given historical situation, this is contingent.

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

1. If all levels of the continuum of legal norm concretisation are politically created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fairly and equally on all levels of their creation (local, national, regional, and global) and in all institutions (political, economic, social, and cultural levels; hence, the whole Parsonian AGIL-schema is open for democratisation[97] as far as it does not destroy either private or public autonomy[98]).
2. The different institutions (public and private) and procedures of legislation, administration, and jurisdiction are all in equal distance to the people, and no institution or procedure is taken to represent the people as a whole: 'No branch of power is closer to the people than the other. All are in equal distance. It is meaningless to take one organ of democratic order and confront it as the *representative* organ to all others. There exists no democratic priority (or supremacy) of the legislative branch.'[99] Instead of one substantial sovereign democracy, the regime must express itself in '*subjektlosen Kommunikationskreisläufen*' (circulations of communication without a subject).[100]

[94] H. Kelsen, *Vom Wert der Demokratie* [1920] (Aalen: Scientia, 1981); id, *Allgemeine Staatslehre* [1925] (Vienna: Österreichische Staatsdruckerei, 1993); id, *Reine Rechtslehre* [1934] (Vienna: Österreichische Staatsdruckerei, 1967).

[95] Nothing is necessary in a democratic legal regime except the normative idea of equal freedom: Kant, above n 8, 345; I. Maus, *Zur Aufklärung der Demokratietheorie* (Frankfurt am Main: Suhrkamp, 1992); Brunkhorst, *Solidarity*, above n 37, 67–77; C. Möllers, *Demokratie: Zumutungen und Versprechen* (Berlin: Wagenbach, 2008), 13–14, 16.

[96] Kelsen, *Demokratie*, above n 94.

[97] C. Möllers, *Staat als Argument* (Munich: Beck, 2001), 423.

[98] Maus, above n. 95; Habermas, *Faktizität und Geltung*, above n 93.

[99] C. Möllers, 'Expressive vs. repräsentative Demokratie', in R. Kreide and A. Niederberger (eds), above n 38, 160–82.

[100] Habermas, *Faktizität und Geltung*, above n 93, at 170, 492–3.

3. Whereas the concept of the higher legitimacy of a ruling subject (the king, or the state as *Staatswillenssubjekt*) is as fundamental for power limiting constitutionalism as it was for medieval regimes of 'the king's two bodies',[101] democratic and power founding constitutionalism replaces legitimacy completely by a legally organised procedure of egalitarian and inclusive legitimisation.[102] The procedures of legitimisation become nothing other than the products of democratic legislation; legitimisation is therefore circular in the sense of an open, socially inclusive hermeneutic circle or loop of *legitimisation without legitimacy*.[103]
4. Democracy is not, as the young Marx once wrote, the 'solved riddle of all constitutions' but, as Susan Marks has objected, the 'unsolved riddle of all constitutions'.[104] Hence, a constitution that is democratic has to keep the riddle open. It belongs to the necessary modern meaning of democracy that the 'meaning' of 'democratic self-rule and equity' never can be 'reduced to any particular set of institutions and practices'.[105] Without the normative surplus of democratic meaning which always already transcends any set of legal procedures of democratic legitimisation, the people as the 'subject' of democracy would no longer be a self-determined group of citizens, or a self-determined group of 'all men'[106] who are affected by a given set of binding decisions.

[101] E. H. Kantorowicz, *The King's Two Bodies* (Princeton, NJ: Princeton University Press, 1957).

[102] Habermas, *Faktizität und Geltung*, above n 93; C. Möllers, *Gewaltengliederung: Legitimation und Dogmatik im internationalen Rechtsvergleich* (Tübingen: Mohr, 2005).

[103] Democratic legitimisation is inclusive because it is 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 legitimisation that is democratic has to include everybody who is concerned by legislation and jurisdiction. Consequently, all exceptions (eg babies) have to be justified publicly and need compensation through human rights: cf Müller, above n 7; Brunkhorst, *Solidarity*, above n 37, ch 3; Marks, above n 26.

[104] Marks, above n 26.

[105] Ibid 103, 149.

[106] 'All men' can mean many different things, eg all men in a bus, all men on German territory, all men with US passports (which is far less than all US citizens), all men on the globe, all men in the universe, all men who are French citizens, all men who are addressed by a certain legal norm. Democracy and democratic legitimisation is only concerned with the last two meanings, and the possible tension between them.