

# Democracy under pressure

The return of the Dialectic of Enlightenment in the world society

## *Democracia sob pressão*

*Retorno à Dialética do esclarecimento na sociedade mundial*

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**Abstract:** The modern nation state has more or less successfully solved the religious, political and socio-economic crises that emerged in modern Europe since the 16<sup>th</sup> Century together with the modern society. Yet, its greatest advance, the exclusion of inequalities presupposed the exclusion of the internal other of blacks, workers, women etc, and the other that stemmed from the non-European world that furthermore was under European colonial rule or other forms of European, Northamerican, or Japanese imperial control. Yet, the wars and revolutions of the 20<sup>th</sup> Century led to a complete reconstruction, new foundation and globalization of all national and international law. The evolutionary advance of the 20<sup>th</sup> Century was the emergence of world law, and this enabled the construction of international and national welfarism. The global exclusion of inequalities now has become something like a leading legal principle of world law. Nevertheless the dialectic of enlightenment resurged and led to new forms of postnational domination, hegemony, oppression and exclusion, and the emergence of a new formation of transnational class rule.

**Keywords:** Crisis; Exclusion of inequalities; World society; World law; Global legal revolution

**Resumo:** O estado-nação moderno resolveu de modo mais ou menos bem-sucedido as crises religiosas, políticas e sócio-econômicas que surgiram na Europa moderna desde o século 16, juntamente com a sociedade moderna. No entanto, seu maior avanço, a exclusão das desigualdades, pressupunha a exclusão do outro interno – os negros, trabalhadores, mulheres etc. –, e dos outros descendentes do mundo não-europeu que, além disso, estava sob domínio colonial europeu ou de outras formas de controle

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imperial europeu, norte-americano ou japonês. No entanto, as guerras e revoluções do século 20 levaram a uma completa reconstrução, a uma nova fundação e globalização de todas as leis nacionais e internacionais. O avanço evolutivo do século 20 foi o surgimento do direito mundial, e isso possibilitou a construção do bem-estar (*welfarism*) nacional e internacional. A exclusão global das desigualdades agora tornou-se algo como um princípio orientador jurídico do direito mundial. No entanto, a Dialética do Esclarecimento voltou novamente e levou a novas formas de dominação pós-nacional, a hegemonia, opressão e exclusão, e à emergência de uma nova formação da dominação de classe transnacional.

**Palavras-chave:** Crise; Exclusão de desigualdades; Sociedade mundial; Direito mundial; Revolução legal global

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After a brief recollection of the advances of the modern nation state (1) I will turn to the dark side of the history of that state (2). Whereas the greatest advance of the (Western) democratic nation state was the *exclusion of national inequalities* but at the price of the construction of an international law of formal inequality between (civilized) and (non-civilized) nations, it was precisely this distinction that vanished during the massive transformations of national and international law after 1945, and the emergence of a world society (3). The deep change of 1945 that divides the whole Century could be called revolutionary without exaggeration, and it was a legal revolution (4). Yet, in the last chapter we have to face the return of the dialectic of enlightenment in the juridified and even partly constitutionalized but not democratized world society (5).

## 1

The *subjective spirit* of the revolutions of the eighteenth century became *objective spirit* 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 (Arendt, 1973; Habermas, 1984).<sup>1</sup> However, the nation state,

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<sup>1</sup> 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, confronted it not to force or violence but to *administrative power*, calling Arendt's concept of power now *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 argued for something like resistance without violence. See: Arendt (1973); Habermas (1984).

once it became democratized, 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 (Marshall, 1992, p. 52; Stichweh, 2000). Only the modern nation state had (and still has) not only the normative *idea*, but also the administrative *power* to achieve that. 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 and crises of the modern capitalist and functionally differentiated society.

- First, the nation state has solved the *motivational crisis* that caused a long period of *religious civil wars* nearly all over Europe, and was sparked by the Protestant Revolutions of the sixteenth and seventeenth centuries; this has been achieved through the *constitutional institutionalization* of the conflicts between different religious, agnostic, and anti-religious world views (Habermas, 1975).<sup>2</sup> 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 (Weber, 1920). This was initially the *repressive effect* of the confessionalization of the territorial state which for a long time wrongly was called ‘secularization’ (Reinhard, 1999; Schilling, 1999; Dreier, 2001, p. 133-169; Stolleis, 1993). On the other hand, the long and reluctant *process of democratization* of the nation state replaced repressive confessionalization by emancipatory legislation which ultimately led to the implementation of the equal freedom *of* religion together with the equal freedom *from* religious and other belief systems (Parsons, 1972).
- Second, the emerging nation state also solved the *legitimacy 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. (Mouffe, 2000).<sup>3</sup> In the more successful processes of Western history, bloody constitutional revolutions turned into permanent and legal revolutions (Habermas, 1989, p. 7-36). Once again, the effect was twofold, accompanied on all its steps by the shadow of the dialectic of enlightenment. It led, on the one hand, to a functional transformation of the destructive and oppressive potential of a highly

<sup>2</sup> On the distinction of different types of crises (motivational, legitimization, etc.) see: Habermas (1975).

<sup>3</sup> For the distinction between *antagonism* and *agonism* see: Mouffe (2000).

specialized politics of power accumulation for its own sake into a more or less controlled *explosion of all the productive forces of administrative, discursive and disciplinary state-power* (Lüdtke, 1980, p. 470-491; Foucault, 1979; Luhmann, 1990, 176-220).<sup>4</sup> 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.

- Thirdly, 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 did not vanish but was institutionalized (Hoss, 1972), and the violent social revolution became at its core a legally organized ‘educational revolution’ (Parsons; Platt, 1990). 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 (Polanyi, 1997). It achieved this by overcoming the fundamentalist bourgeois dualism of private and public law (Kelsen, 1967a, 1967b). 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-intense democracy (Marks, 2000). The dialectic of enlightenment here led to Adornos “administrated world” (*verwaltete Welt*) of lucky slaves. Yet, it was not a slave-holders society, but based on democratic institutions and rule of law. Therefore, and only therefore an ongoing democratic rights revolution was feasible, which was performed by social movements, and directed *against* low-intense democracy. It 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 (Berman, 1963; Somek, 2008).

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 internal 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 of Rights. Once it came to concretize 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,

<sup>4</sup> In this respect three very different approaches (one historical, one power-theoretical, and the third from system theory) are in agreement. See: Lüdtke(1980, p. 470-491); Foucault (1979); Luhmann (1990, p. 176-220).

their claims for equal treatment 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.

## 2

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’ (Kant, 1996), 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.’ (Hegel, 1991, § 209) 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 ‘human 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 civilization (Bluntschli *apud* Koskeniemi, 2001, p. 80) nor with his at least latently racist thesis that all law is Aryan (*arisch*) (*ibid.*, p. 77). The liberal cosmopolitanism of the ‘men of 1873’ (who founded the *Institut de Droit International* and invented a cosmopolitan international law as a new legal discipline) was completely Eurocentric, relying on the basic distinction between (Christian) *civilized nations* and *barbarian*

*people* (Bermann, 1998, p. 117-140; Anghie, 2004). 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 human world order soon became apologists of imperialism, defending King Leopold's private-prerogative state (Ernst Fraenkel's *Maßnahmestaat*) in the 'heart of darkness' by drawing a distinction between *club members* on the one side and *outlaws* on the other (Koskenniemi, 2001, p. 168-169). Following this line of argument, Article 35 of the Berlin Conference on the future of Africa (1884-5) offers 'jurisdiction' for the civilized nations of Europe and 'authority' for those in the heart of darkness (*ibid.*, p. 126). The global world order during the nineteenth and early twentieth centuries was a universal *Doppelstaat* (dual state) (Fraenkel, 1999). Guantanamo has a long history.

Let me add a brief remark on the ambivalent use of notions as "civilization" or "civilized nations". Critical Legal as well as Post-Colonial Studies rightly criticized the Western-centric and imperial use of the notion of "civilization" (Bermann, 1998, p. 117-140).<sup>5</sup> This is most obvious in the *Declaration of Independence* where the "civilized nations" already bridge the gap between the individual natural law, or human right that "all men are created equal", and the collective exception of the "merciless Indian Savages" who are prepared for extermination by introducing them as international public enemies who are beyond all "standards of civilized nations", hence *excluded* from human rights protection and humanity as such. Deconstructionists, Post-Colonialists and others rightly have drawn a dark and bloody track that reaches from the original Spanish and Portuguese treatment of the Indians end of the 15<sup>th</sup> Century to the rough states and listed terror suspects of our days (Anghie, 2004). But even "standards of civilized nations" *as legal standards* have a *Janus-face* (Habermas). Now, the US-Supreme Court Justice Breyer (and the majority of the Court) uses just that phrase from the *Declaration of Independence* to open the US-constitutional law for the internalization of international law, *inter alia* with the aim to *include* terror suspects and others as subjects of human rights application, and against the parochial and far right interpretation of the Constitution by Scalia (Nickel, 2009, p. 281-306).

### 3

Since 1945, however, colonialism and classical imperialism have vanished (Hardt; Negri, 2001; Fischer-Lescano; Teubner, 2005; Buckel, 2007;

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<sup>5</sup> Instead of all others: Bermann (1998, p. 117-140).

Chimni, 2004, p. 1-37), and Eurocentrism has become decentred (Brunkhorst, 2005). 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 Eurocentrism 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’ (Goffman) 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) (Oeter, 2008, p. 90-114), and even the moon became an object of international treaties between states (Dobner, 2002). Together with 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 criticized the ‘methodological nationalism’ of their own discipline (Beck, 2002), 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 (Luhmann, 1971, p. 1-34; 1997, p. 145-146), which is normatively integrated (Parsons, 1961, p. 120-129; Stichweh, 2004, p. 236-245), 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 (Meyer, 1997, p. 144-181; 2005).

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 individualized suicide bombing (Rorty, 1993, p. 111-120; Roy, 2006). *All cultural differences are now of the same society*, and of individualized persons who have to organize and reorganize, construct and reconstruct their ego and their personal and collective identity lifelong, and in order to do that they *must* rely on the (weak or strong) means of their own autonomy only. 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 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 (Parsons; Platt, 1990; Döbert; Habermas; Nunner-Winkler, 1980).

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 (Brunkhorst, 2008, p. 30-63). In the last decade, there has been a mushrooming of national-international hybrids and new branches of legal disciplines such as transnational administrative law.

#### 4

The twentieth century strikingly has been called an ‘age of extremes’ (Hobsbawm, 1994), and every attempt to bridge the abyss that separates these extremes would be an ‘extorted reconciliation’ (Adorno, 1974, p. 251-280). This century was the catastrophe that has incurably ‘damaged life’ (Adorno, 1951). But it was also the century of a great legal revolution which transformed not only law but society as a whole; a revolution that had its deep roots in the workers movement of the 19<sup>th</sup> and 20<sup>th</sup> Centuries; 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.

The twentieth century was not only the century of state-organized mass terror (which could not, on this scale, have been organized any other way than by state) (Reinhard, 1999). It was also the century of ground-shaking normative progress, through which *democracy was universalized* 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.<sup>6</sup> 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 *world 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 (which both deeply hanged together) should happen never again. 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 tragic Russian Revolution and 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 (Brunkhorst, 2008, p. 9-34). 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’ (Wilson). The leader of the Russian Revolution, Lenin who was a quasi-religious, Marxist and Atheist *believer* and the Calvinist-Kantian American President Wilson who believed in the social gospel and God’s personal mandate, both recognized the First World War – from very different perspectives – as the beginning of a global revolution and as a revolutionary war against war.

<sup>6</sup> Concluding protocol of the Berlin Conference on West Africa in 1884-85, Art 35.

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 (Kelsen, 2006, p. 51).<sup>7</sup>

While Wilson wanted to transform international law according to Kant's plan and unite the nations in a great federation of democratic nations (Beestermöller, 1995; Eberl, 2008), Lenin was trying to revolutionize social conditions and build up a socialist and Soviet world empire. The Treaty of Versailles and the concomitant founding of the League of Nations were events as revolutionary as the Russian Revolution (Kelsen, 1981; Verdross, 1926). 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*' (Eberl, 2008).

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, reinforced strongly by their respective domestic workers movements, 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.<sup>8</sup> The radical changes in the twentieth

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<sup>7</sup> 'Der alte Offizier konnte es bis zum letzten Augenblick (...) nicht für möglich halten, dass ein vielhundertjähriges Reich einfach vom Schauplatz der Geschichte verschwinden könne' (Kelsen, 2006, p. 51).

<sup>8</sup> 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 the own society.

century led to variants of the same legal reforms – pre-constitutional and pseudo-democratic in the East, democratic-constitutional in the West (Berman, 2006, p. 16-17).

- These radical changes *repealed the bourgeois centering of equality rights around property and turned these rights into a comprehensive system of anti-discrimination norms* (Sunstein, 1993). Franklin D. Roosevelt's famous 'Second Bill of Rights' from January 1944 was 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 that were from the very beginning global, further changed the legislation *from conditional to final programming* (Grimm, 1990, 1991, p. 159-175; Luhmann, 1981; Neumann, 1937, p. 542-596), developed a comprehensive *administrative planning law* (tried and tested in the World Wars) (Seagle, 1951; Maurer, 2009), 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 (in the language of Soviet law) 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 (Luhmann, 1981; Berman, 1963; Joerges; Ghaleigh, 2003).
- 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 (Leisering, 2007, p. 185-205).

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* (Bast, 2009, p. 185-193), 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 (Art. 2 prop. 1 UN Charter); 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; the right to have rights, whose absence Arendt lamented

in the 1940s, is now a legal norm that binds the international community (Brunkhorst, 2005).<sup>9</sup> All these legal rules are regularly broken. However, this is not a specific feature of international law; 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 (Byers, 2003, p. 171-190). 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 and other cosmopolitan international lawyers were already claiming during the First World War.

## 5

The legal, political and economic world order today is a *juridified* or *constitutionalized* order. But the global constitutional system is in bad shape. There exist now, on the one hand, the basic legal principles of the *global inclusion of the other* and the *global exclusion of inequality*. Yet on the other hand there exist global functional systems, global actors and global spheres of value, which emerge with great rapidity, and which *tear themselves off from the constitutional bonds of the nation state*. This is a double-edged process that has caused a *new dialectic of Enlightenment*. The most dramatic effect of this process of the formation of the global society is the decline of the ability of the nation state to exclude inequalities effectively – even within the highly privileged OECD-world. This has three very significant consequences.

These consequences are observable,

- first of all, in the *economic system*. In this respect, we can observe the complete transformation of the *state-embedded markets of regional late capitalism* into the *market-embedded states of global Turbo-capitalism* (Streek, 2005).<sup>10</sup> The negative effect of economic globalization on our rights is that the freedom of markets explodes globally, and again at the cost of the freedom from the negative externalities of disembedded markets, and it is combined with

<sup>9</sup> For a more comprehensive overview cf Brunkhorst (2008, p. 9-34).

<sup>10</sup> Wolfgang Streek, “Sectoral specialization: politics and the nation state in a global economy”, paper presented on the 37th World Congress of the International Institute of Sociology, Stockholm 2005. As we now can see, the talk about late capitalism was not wrong but should be restricted to state-embedded capitalism, and state embedded capitalism indeed is over. But what then came was not socialism but global disembedded capitalism which seems to be as far from state embedded capitalism of the old days as from socialism.

heavy, sometimes war-like competition, and to be sure, this will be reinforced strongly by the present economic crisis: *There will be blood.*<sup>11</sup>

- Surprisingly enough, in questions regarding the *religious sphere of values* we can make a similar observation and identify similar consequences. Global society makes the proposition that is true for the capitalist economy equally true for the autonomous development of the religious sphere of values. In consequence, second, we are now confronted with the transformation of the *state-embedded religions of Western regional society* into the *religion-embedded states of the global society*. Since the 1970s, religious communities have crossed borders and have been able to escape from state control. Again the negative effect of this on our rights is that the freedom of religions explodes whereas the freedom from religion comes under pressure. At the same time the fragmented legal and administrative means of states, inter-, trans- and supranational organizations 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 state-power* 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 (Tietje, 2003, p. 1081-1164; Möllers, 2005, p. 351-389; Krisch; Kingsbury, 2006; Möllers; Voßkuhle; Walter, 2007; Fischer-Lescano, 2008, p. 373-383; Wolf, 2000; Lübke-Wolf, 2009; Dobner, 2006).<sup>12</sup> As a result of this, the new globalized executive power seems to be undergoing the same transformation as markets and religious belief systems, and it is thus transformed, third, from *state-embedded power to power-embedded states*. This leads to a new and now global privileging of the always more flexible second branch of power vis-à-vis the first and third one, which jeopardizes the achievements of the modern constitutional state (Wolf, 2000). The effect of this is an accelerating process of a global *original accumulation of power beyond national and representative government*. Instead of global *democratic government* we now are approaching some kind of directorial global *bonapartist governance*: that is, soft bonapartist governance for us of the North West, and hard bonapartist governance for them of the South East, the failed and outlaw states and regions of the globe (Anghie, 2004): *There will be blood.*

The deep division of the contemporary world into two classes of people – that is, into people with good passports and people with bad passports (Calhoun, 2002, p. 869-897; 2003, p. 531-553; 2005) – is mirrored by the constitutional

<sup>11</sup> There will be blood, USA 2007, Director: Paul Thomas Anderson. One-sided but in this point striking the neo-Pashukanian analysis of international law by China Mieville (2005).

<sup>12</sup> On transnational administrative during the last few years a whole industry of research emerged, see only: Tietje (2003, p. 1081-1164); Möllers (2005, p. 351-389); Krisch and Kingsbury (2006); Kingsbury; Krisch; Steward (2005). Möllers; Voßkuhle; Walter (orgs.) (2007); Fischer-Lescano (2008, p. 373-383). On the globalization of executive power: Wolf (2000); Dobner (2006); Lübke-Wolf (2009).

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 *as* ‘constitutionalism’ already by Talcott Parsons in 1960, a sociologist who never was under suspicion to be an idealist (Parsons, 1961). However, the existing global constitutional regime is far removed from being democratic (Fassbender, 1998, p. 529-619; Bogdandy, 2003; Albert; Stichweh, 2007; Bogdandy, 2006, p. 223-242; Brunkhorst, 2002, p. 675-690; Brunkhorst, 2005, p. 330-348; Teubner, 2003, p. 1-28).<sup>13</sup> All post-national constitutional regimes are characterized by a *disproportion between legal declarations of egalitarian rights and democracy and its legal implementation by the international constitutional law of check and balances* (Brunkhorst, 2002, 2005).<sup>14</sup> Hence, the legal revolution of the 20<sup>th</sup> Century was successful, but it was unfinished. This is so because the one or many global constitutions are based on a constitutional compromise (Franz Neumann) that mirrors the hegemonic power structure and the new relations of domination in the world society; and it is far from sure, that global constitutionalism is already in a shape to enable the legal fight *for* law *within* the law. But this is the only hope left in a time of global crisis and *no* social movement that can take the chance of crisis, and change the world in a way as the last great social movement of world history could do and did, the workers movement which withered away at the threshold of the 21s Century and was replaced by a *Multitude* which has no longer any meaning for the reproduction of modern global capitalism. But, may be, the deep structural transformations of the world society which we witness in the 21s Century will give birth to a new and powerful social movement of emancipation. Yet, this is completely unpredictable and beyond social science.

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<sup>13</sup> For the thesis that the UN-Charter is the one and only constitution of the global legal and political order, see: Fassbender (1998, p. 529-619). Different approaches in: Bogdandy (2003); Albert; Stichweh (2007); Bogdandy (2006, p. 223-242); Brunkhorst (2002, p. 675-690); Brunkhorst (2005, p. 330-348); For the thesis of constitutional pluralism see: Teubner (2003, p. 1-28).

<sup>14</sup> For the original version of this thesis: Brunkhorst (2002, p. 675-690).

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