

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

Yet, the reality of western democracies often looks different, and the faults and even crimes against international law, violations of human and civic rights reach from symbolic exclusion over imperial war to the declared or non-declared state of siege. The story of impressive normative learning processes is not the whole story. If we tell the whole story then we have to accept that in many cases (and in some way in all cases) the expansion of social inclusion was with the price of new exclusion, or new forms of first latent, later manifest oppression. The history of western civilization and western democracy is not only a success story of expansion through the inclusion of the other. It is at the same time a story of expansion through imperialism. Since the first European division of the world in the Treaty of Tordesillas 1494 between Spain and Portugal imperialism vanished and reappeared with ever new means, and under ever new covers and labels, even anti-imperialist labels.² It is true that the many faces of imperialism are always followed by ever new pushes of social inclusion. But the story is also true the other way round. From the Christian robbers, missionaries, inquisitors and humanists since the 16th century every expansion of inclusion, every new emancipation, every expansion of democracy and human rights was at the same time a reinvention of exclusion and oppression. This includes even critics of imperial law like Vitoria as well as the Eurocentric ideology of civilizing the heart of darkness that emerged since the 18th century, including both the perspectives of Kurtz and of Marlow.³ The same ambivalence darkens the humanist project of the gentle civilizers of nations (the then new international lawyers) since the 19th century⁴ as well as the whole process of decolonization, developmental politics and nation-building since the 1960s or the politics of humanitarian intervention and the war on terrorism, and the new exclusion of rough states or listed terrorists in our present days. Even the present state of inclusion of the other in the new cosmopolitan civil society sometimes appears to be nothing else than the expression of the highly exclusive "class consciousness of frequent travelers."⁵

But all this does not change the fact that all modern democratic constitutions are relying on the one universal legal principle of the *exclusion of inequalities*.⁶ The legal normativity of of the exclusion of

¹ John Rawls, *Political Liberalism*, (New York: Columbia 1993), XXIX.

² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Harvard Univ. Press 2004).

³ Josef Conrad, *Heart of Darkness*, Norton-edition.

⁴ Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870 bis 1960*, (Cambridge: Harvard Univ. Press) 2001.

⁵ Craig Calhoun, "The Class Consciousness of Frequent Travelers: Toward a Critique of Actually existing Cosmopolitanism," *The South Atlantic Quarterly* 1001, 4/ 2002, 869-897; see also: Calhoun, "'Belonging' in the cosmopolitan imaginary," *Ethnicities* 3 (4), 531-553.

⁶ Thomas H. Marshall, *Bürgerrechte und soziale Klassen*, (Frankfurt: Campus 1992), 33ff; Rudolf. Stichweh, *Die Weltgesellschaft*, (Frankfurt: Suhrkamp 2000), 52.

inequalities becomes manifest when communicative power appears as the “power of revenge,” as “rächende Gewalt” (Habermas). People, who are listed as terrorists by the Security Council on a more than doubtful legal basis, are deprived of nearly all their rights and legal remedies, but after some years later some of them try successfully to apply before the European Court, and things begin to change, and even the SC now seems to come under legal pressure. Legal text books, and in particular constitutional text books are not only talk, they are “objective spirit” (Hegel). Legal text books can be taken seriously by people, by officials or judges, and then can be enforced even against those who have invented them in their own particular interest, simply because they had the power to do that. That makes legal texts more objective or real than mere moral or ethical deliberations. Their “objectivity” is that they are or can be combined with compulsive power. Legal text books can be misused, they can be implemented by and in the only interest of a small ruling class, but they also “can strike back” if we the people “act in concert” (Arendt) to remind the ruling classes that they once have implemented valid norms that bind *all of us*, including the hegemonic powers.⁷

Yet, the *objectivity* of the constitutional *spirit* of the revolutions of the 18th century is the modern nation state. This state always had many faces, and they include the Arendtian face of violence, the Habermasian face of administrative power, the Foucauldian face of surveillance and punishment, the faces of imperialism, colonialism, war on terror and so on. But the nation state, once it became democratic, had not only the *administrative power of oppression and control* but at the same time the *administrative power to exclude inequalities* with respect to *individual rights, political participation* and *equal access to social welfare and opportunities*. Only the modern nation state had not only the *idea* but also the *power* to do that. Up to now all advances in the reluctant *inclusion of the other* are advances of the modern nation state. National constitutional regimes have solved the *three basic conflicts* of the modern capitalist and functionally differentiated society. They have solved the crises of the

- (1) *Religious civil wars* (or Protestant revolutions) from the 16th and 17th century in a way that *reconciled lasting conflicts, differences and contradictions by law*. The effect was a constitutional transformation of the uncontrolled atomic explosion of religious freedom into a controlled chain reaction that kept the productive forces of religious fundamentalism alive and its destructive forces (more or less) under control. The emerging nation state also has transformed the
- (2) *Antagonistic constitutional fights over public autonomy* (public autonomy vs. administrative power) from the 18th and 19th century (Constitutional Revolutions) into *agonistic political fights between political parties, unions and entrepreneurs, civic associations etc.* within a democratic constitutional regime.⁸ By means of this second transformation the destructive and oppressive powers of functionally differentiated politics could be (more or less) controlled whereas the productive forces of all the communicative powers of an “untamable public”⁹ grew tremendously. At least even the
- (3) *Social class conflicts* from the 19th und 20th century could be solved through the emergence of a regulatory social welfare state which transformed the elitist bourgeois parliamentarism of the 19th Century into mass-democracy. The violent social became a more or less peaceful, legally organized “educational revolution”.¹⁰ It was the great advance of social democracy to keep most of the productive, and get (more or less) rid of the destructive forces of the exploding free

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

⁸ Mouffe, Laclau.

⁹ Habermas, F&G

¹⁰ Parsons/ Platt.

markets of money, real estate and labour by overcoming the fundamentalist bourgeois dualism of private and public law.¹¹

In the end it was the advance of egalitarian mass democracy that transformed the bloody revolutionary fights over public autonomy into a *permanent and legal revolution*.¹² And it was the legally limited yet still untamed utopianism of democratic constitutional regimes that tamed the social class fights of modern capitalism by implementing the freedom *of* markets *together* with the freedom *from* the negative external effects of markets, and it was the communicative power of the same legal utopianism – the idea of a “law of (...) unabridged freedom” (Kant) or law as “Dasein der Freiheit” (Hegel)¹³ – that implemented the equal freedom *of* together with the equal freedom *from* religious and other belief systems.

In all these cases of revolutionary conflicts (which lead to series of great revolutions from the 16th and 17th Protestant over the 18th constitutional towards the 20th socialist revolutions), the modern democratic nation state could disclose two sources of solidarity and fuel social change and radical reformism from the still existing *religious sources* as well as from the new and independent *profane sources* of solidarity, which were the original invention of 18th century enlightenment.

II

The modern nation state until 1945 was the state of the regional societies of Europe, America and Japan, and the rest of the world was either under their imperial control or kept outside. The *exclusion of inequality* until the mid of the 20th century did mean internal equity for the citizens of the state, and external inequality for those who did not belong to the regional system of states. There was even no serious or legal claim for a *global* exclusion of inequalities.

Yet, during the time from 1945 to the present day, classical imperialism (not hegemony) vanished, euro-centrism was completely decentred, state sovereignty was legally equalized, the state went global, and together with the globalization of the modern constitutional nation state all functional subsystems which—from the 16th century until 1945—were bound to state power and to the international order of the regional societies of Europe, America and Japan, became global systems. Even the rational and secular, *regional culture* of Europe and North America has become a rational and secular *culture of the world*, and it constitutes the basic orientations of all main actors of the global society—of states, organizations and human individuals.¹⁴ Now Western rationalism, functional differentiation, legal formalism and moral universalism no longer are something specific western, and Eurocentrism has been completely decentred.

At the end of the 20th century human rights violations, social exclusion of global and local regions and tremendous inequalities (that still divide the North-West from the rest of the world) did not disappear. But now (and this is the difference between the beginning of the 20th and the beginning of the 21st century) they are perceived as *our own* problems, and not only because we need each other to solve our specific problems but because we now *have* serious and legally binding claims for a *global exclusion of inequalities*. International law has deeply changed since the founding of the United Nations, the European Union, the Human Rights Treaties from the 1960s, the Vienna convention on the law of the Treaties, the emergence of international *ius cogens* etc. The old rule of

¹¹ Kelsen.

¹² Justus Fröbel, quoted from: Habermas, “Ist der Herzschlag der Revolution zum Stillstand gekommen?“, in: *Die Ideen von 1789*, Frankfurt 1989.

¹³ Kant, Hegel.

¹⁴ On global culture: John W. Meyer, “World Society and the Nation-State,” *American Journal of Sociology* Vol. 103, 1/ 1997, 144-181; Meyer, *Weltkultur*, (Frankfurt: Suhrkamp 2005).

equal sovereignty of states became the “sovereign equality” *under* international law (Art. 2 par. 1 UN), individual human beings became subject to International Law, democracy became a legal principle that is valid also against sovereign states, and the right to have rights which Arendt missed in the 1940s is now a legal norm that binds the international community. All these legal rules are broken again and again, but what is new is that they exist as legal norms, and hence, can be taken seriously etc.

The dependency of the life of *all* human individuals on access to the educational and the economic system, which is just a brute fact, together with the shaping power of the existing world culture, makes individualism and rational life plans unavoidable for everybody without a single exception. This global society is a *completely secularized society*, with rational power politics, positive law, experimental sciences, academic professions, autonomous art, instrumental economy and technique, a *secularized* global human rights culture, global mass culture and a global semantics of political and economic progress, and last but not least an *autonomous sphere of religious values*—which stands not *vis à vis* but is located *within* the modern, functional specialized, hence secular society.

Yet, there is on the one hand the *legal principle of the global exclusion of inequalities*, but on the other hand global functional systems, a global public and global spheres of value emerged which *did tear themselves off from the constitutional bonds of the nation state*. This double edged process has caused a *new dialectic of enlightenment*. The most dramatic effect of this process of the formation of the global society is the decay of the ability of the nation state to exclude inequalities—even within the highly privileged OECD-world. This becomes very significant first with the *economic system*. Here we can observe the complete transformation of the

- (1) *State-embedded markets of regional late capitalism* into the *market-embedded states of global Turbo-capitalism*.¹⁵ Yet, surprisingly enough, when it comes to the religious sphere of values, we can make a similar observation. Religion went global, was decontextualized, individualized, universalized, deterritorialized, detraditionalized, in particular by the strong impact of fundamentalist movements on all modern religions.¹⁶ Hence, the global society makes the same proposition that is true for the capitalist economy, true for the autonomous development of the religious sphere of values. We now are confronted with the transformation of
- (2) *State-embedded religions of the western regional society* into the *religion embedded states of the global society*. Until the 1960s religion everywhere in the world was embedded in the respective nation-states, be it via institutionalized and legally-regulated religious freedom (as in the US), be it via more or less brutal repression (as in Iran or Egypt). Since the 1970s, everywhere religious communities crossed borders and were escaping from state control – be it the Evangelists in America, be it the Islamic fundamentalists in Asia or the South East. Neither the US as a nation-state can control the now global networks of decentralized religions any longer, nor can the Egyptian State or Saudi-Arabia.

During the last three decades the freedom *of and from* markets and the freedom *of and from* religion to a certain degree have been (not de-regulated but) *deconstitutionalized*. The first striking effect of this deconstitutionalization is that the freedom (and heavy, sometimes war-like competition) *of* markets explodes globally, and the freedom *from* their negative externalities decays rapidly. And the

¹⁵ W. Streek, “Sectoral Specialization: Politics and the Nation State in a Global Economy”, paper presented on the 37th *World Congress of the International Institute of Sociology*, Stockholm 2005. As we now can see, the talk about *late* capitalism was not wrong but has to be restricted to state-embedded capitalism, and state embedded capitalism indeed is over. But what then came was not socialism but global disembedded capitalism which seems to be as far from state embedded capitalism of the old days as from socialism.

¹⁶ Olivier Roy; Berger, Desecularization; Vasques and Friedmann Marquardt, Globalizing the Sacred.

second striking effect is that the freedom of religions explodes, even sometimes so much that it leads to religious war, but at the same time the freedom from religion comes under pressure from public and administrative power.

The rapidly emerging *global public* and the *executive powers of the public* also has emancipated itself from the bonds of the nation state, and therefore also has been *deconstitutionalized*. What becomes obvious now, after the experience that the feather of a cartoonist of a Danish provincial newspaper can cause a global hurricane, is that the global public not only enables the first flourishing of a cosmopolitan civil society, but at the same time lacks all the constitutional regulations and the dense legal networks that only can guarantee the *equal* freedom of speech, and that existed up to now only within the democratic nation state.¹⁷ Hence, also for the global public, in regard to the great hope of a globalization of deliberative democracy, it seems that again the same proposition that is true for capitalism and religion becomes true for the global public. With the turn from

(3) *State embedded public to public embedded states* we have to experience the return of the old European problem of heavy fights over public autonomy. The public sphere went global together with a dense network of “free associations” (Tocqueville), NGO’s of all kind – reaching from *Amnesty International* over the *International Chamber of Commerce* up or down to *Al Qaida*. The problem is that we already have something like a global *res publica* (global common matters, which are debated all over the world, e. g. the Iraq war and the session of the SC before it, the Danish cartoons or Princess Diana’s death etc.), but no global state. The problem is that we have all these Tocquevillian associations, but instead of legislation and jurisdiction to concretize the international human right of free speech we have something like Western-liberty and “Western-law” (Liberty Valence to the Eastern lawyer performed by Jimmy Stuart in John Fords “The Man who shot Liberty Valence”). But this only looks like anarchy but is nothing else than a *legal order of undemocratic global statehood*.¹⁸

Not only (like in a second Weberian transformation) religion and capitalism went global, but together with the public sphere also the executive bodies, governments and state-administrations went global, and they have become more and more transnational.¹⁹ The executive bodies of the state decouple themselves from the state based separation, coordination and unification of powers under the democratic rule of law and went global. The more they are decoupled from national control and review, the more they become coordinated with other regional or global executive bodies of states who now act loosely united as something like a transnational or a couple of transnational executive bodies under the rule of international law *as well as* under the rule of their own self-interest to preserve and accumulate their power beyond the law of their national constitutions.²⁰ Postnational government or governance without government is at once (formal) *rule of law* and (informal) *rule through law*. The general trend again goes from

¹⁷ Cass R. Sunstein, *Democracy and the Problem of Free Speech*, (New York 1993).

¹⁸ Chimny, Albert/ Stichweh.

¹⁹ On transnational administrative during the last few years a whole industry of research emerged, see only: Christian Tietje, Die Staatsrechtslehre und die Veränderung ihres Gegenstandes, in: Deutsches Verwaltungsblatt 17/ 2003, 1081-1164; Möllers, Transnationale Behördenkooperation, ZaöRV 65/ 2005, 351-389; Nico Krisch/ Benedict Kingsbury, Symposium: Global Governance, EJIL 1/ 2006; Kingsbury/ Krisch/ Richard B. Steward, The Emergence of Global Administrative Law, <http://law.duke.edu/journals/lcp>. Christoph Möllers/Andreas Voßkuhle/Christian Walter (Hrsg.), Internationalisierung des Verwaltungsrecht 2007.

²⁰ Claus Offe, Berufsbildungsreform; Klaus Dieter Wolf, Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft, Baden-Baden: Nomos 2000.

- (4) *State embedded power to power-embedded states.* In association with newly emerging transnational class domination, state power also breaks away from democracy and law. It begins to emerge a *privileging of the globally more flexible second branch of power vis-à-vis the first and third one*, which jeopardizes the achievements of the modern constitutional state.²¹ Good examples are the Basel-Bank-Committee that makes most of global and European financial law, but persists in nearly completely informal meetings in a private bank in Basel. It is largely unreachable for formal legislation or judicial review, hence *bypasses* national and international law and all instruments of democratic control.²² Another example is the European Council. The members of the largely informal Council are the EU-prime- and foreign-ministers together with the Commissions president. The prime- and foreign-ministers have a clear democratic mandate only for national foreign policies but what they do is mostly European domestic politics.²³

These are the main reasons why in world society, the *national exclusion of inequality* no longer is successful. The old imperial mechanism of externalization of poverty regions has failed, as has the internalization of functional systems, value-spheres and publics into the state boundaries. Yet, this has turned the democratically chosen and legally organized political power within the nation state into the power of a *transnational politico-economic-professional ruling class*, which hardly relies on egalitarian will-formation anymore. This class is (not so much different from the national bourgeoisie of the 19th Century) highly heterogeneous and characterized by multiple conflicts of interest, but it has *common class interests, such as* to increase its room for maneuver by withdrawing from democratic control, and as a comfortable side-effect to preserve and increase the enormously grown, individual and collective opportunities for private profit generation.²⁴

A *new class rule of the "cosmopolitanism of the few"* (Calhoun) emerges, where at the same time national solidarity between Northern and Southern Italy, between Catalonia and Andalusia, between Western and Eastern Germany is breaking up. The heterogeneous risk community of the democratic state disintegrates "in favor of smaller and more specialized risk communities"²⁵ that, on their part, develop similar to immigrant subcultures, which form no closed national Diaspora any more, but link up transnationally and develop transnational identities like the immigrants at the bottom of society.²⁶ Those at the powerful and well-off top of the position pyramid fall out of the, once state organized, functional systems, as do the 'miserables' in the favelas at the bottom of the pyramid; they fall out of the rule of law, the state financial system, the public system of education, constitutionalized power, public transport, etc. and render state mechanisms for legal, political and social inclusion ineffective.²⁷ Even the ideological inclusion by nationalism fails, regressing either into aggressive regionalism, or place- and homelessly developing its deadly xenophobia in new and flexible transnational identities, networks, organizational forms of neo-Nazism and racism of every hue.²⁸

21 Wolf, Neue Staatsräson; see also: Dobner, Konstitutionalismus.

22 Möllers, Transnationale Behördenkooperation.

23 Brunkhorst, „Unbezähmbare Öffentlichkeit. Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung“, forthcoming in: Leviathan 1/ 2007..

24 Klaus Dieter Wolf, Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft, Baden-Baden: Nomos 2000.

25 Wolfgang Streek, 'Internationale Wirtschaft, nationale Demokratie', in Wolfgang Streek (ed.), Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie (Frankfurt: Campus 1998), 11-58, 30-31 (own transl.).

26 For the newly emerging identity of immigrants, see Mathias Albert, Zur Politik der Weltgesellschaft (Weilerswist: Velbrück Wissenschaft 2002), 145 et seq.

27 Marcelo Neves, Verfassung und positives Recht in der peripheren Moderne (Berlin: Duncker und Humblot 1992).

28 Zur globalen Transformation des Faschismus bzw. seiner Nachfolgebewegungen: Bauernkämper.

To the extent to which the state can no longer fulfill its constitutive function of inclusion, societally it is rendered dysfunctional and comes into the whirl of the *structural legitimation crisis*, which, as we will see, has all organizations of world society in its grip. Together with closed, home market oriented national economies, the possibility of social democratic (Keynesian) policies of steering and redistribution vanishes, and even the best guarded border in the world cannot reduce the influx of immigrants from poor neighboring regions.²⁹ The failure of the national exclusion of inequality leads to a blurring of the borderline between money, power and law, once clearly defined within the constitutional state, and this in the end leads to the collapse of functional differentiation.³⁰ The legitimation crisis of the rationalized life world becomes a *crisis of the system* of functional systems, and this crisis engenders a growing need for substitutes of the state on global levels.

29 Albert, *Zur Politik der Weltgesellschaft*, 178 et seq. The structural failure of Keynesianism explains the success of renewed left-wing populism (Lafontaine), the break down of national solidarity the success of right-wing populism (Le Pen, Lega Nord). Within the (still) working normative constitutional regimes of the well-off segments of world society, both cannot hope for a majority, yet their popularity remains stabile as they react to a structural problem not soluble by the nation state.

30 Neves, *Verfassung und positives Recht in der peripheren Moderne*; Brunkhorst, *Solidarität*, 111 et seq., 153 et seq.; similar, the argument about colonialism in Habermas, *TkH 2*.

III

If the national constitutional state alone is unable to balance functional imperatives and solidarity, then one has to ask whether the replacement of state functions by regional and global constitutional regimes and, hence, whether *the evolution of new forms and elements of inclusive global statehood* can provide such a balance. There is hardly evidence for such a case. Although, global constitutionalism and the dynamic legalization of all international relations has given a new push to the Kantian project of republican-democratic global citizenship, it has produced a global civil society and has, for the first time, rendered individuals subjects in international law, yet not only law and democracy have transcended national borders and undermined its desire for imperial domination.

Instead of *global democratic government* we now are approaching some kind of directorial *global bonapartist governance* – soft bonapartist governance for *us*, hard bonapartist governance for *them*, the outlaw states and outlaw-regions of the globe.³¹ The problems of global statehood today are closely related to the constitutional structure of the world society. Today there exists already a certain kind of global constitutionalism, and that is far away from being democratic.

More than 50 years after the foundation of the United Nations we can observe a twofold evolution of constitutional regimes on the global level. *First* the evolution of the modern *nation state* since the late 1950s has led to a tremendous expansion of the institutional setting and the constitutional claims of the *democratic and republican* nation state all over the world. Nearly all *constitutions of nation states* are now democratic constitutions which nominal guarantee all basic human and civic rights, even if only some constitutions are “normative”, in the way Carl Loewenstein has defined this term, whereas others are only “nominal” or mere “symbolic” constitutions without any democratic meaning for the people. Legally state constitutions today are constitutions of *open states* (Rainer Wahl) that are an *internal* part of the global political and legal system, not only *constituting* (Triepel) but in a circular process also *constituted* by international law (Kelsen).³² What we can observe on the level of the global system of nation-states is a *de-differentiation* of constitutional regimes in favour of democracy. Marks

Not so, and this is the *second* observation, on the *regional and global level* of legal and political regimes. There we have the opposite evolutionary development of a *growing differentiation and variety* of constitutional or quasi-constitutional regimes. The “constitution” of the European Union is very different from the “constitution” of the United Nations global security system or the “constitution” of the global economic system, and even the use of the term *constitution* on these levels of regime formation is highly questionable. What seems more consent is the statement of (a) a *highly accelerated evolution of new legal regimes* for legislative and judicial purposes, and (b) a *strong shift of political power to global and regional levels* (European Council, G8 and so on).

All *post-national constitutional regimes* are declaring again and again the universal constitutional validity of democratic basic principles, rule of law, human and civic rights, and during the last decades the legalization and implementation of rights on national, regional and global levels has made progress which 50 years ago appeared to be completely utopian. It now no longer seems to be an overestimation to speak of a (still ongoing) *international rights revolution* – a revolution with ambivalent outcomes.

In particular when it comes to democracy the progress looks much smaller, and even might turn into some regression. Constitutionalization and deconstitutionalization go hand in hand. The evolution of post-national political and legal regimes has led to new forms and experiments of structural coupling between law and politics, but mere functional constitution and evolutionary

31 Anghie, Imperialism, Sovereignty and the Making of International Law.

32 Müller/ Christensen, Europarecht.

constitutionalism have the objective societal function to stabilize already persistent hegemony and domination. The growing dependency of national regimes from global and regional agencies, international law, and inter-, trans- and supra-national institutions, enables not only new and stronger human rights regimes but at the same time the emergence of new global (and regional) hegemonic power structures which sometimes are already addressed as an “imperial global state in the making” (B.S. Chimni). These power structures are much more *informal* than within the nation states. This makes them so attractive for new and highly consensual forms of government.

All post-national constitutional regimes are characterized by the *disproportion between legal declarations of egalitarian rights and democracy and its legal implementation by the international constitutional law of check and balances (Staatsorganisationsrecht)*. Despite of their variety, most of the inter-, trans- and supranational organizations and institutions (including the EU) are not very democratic in their legislation, administration and jurisdiction. Whereas egalitarian rights are the same everywhere and, if necessary, are protected by humanitarian intervention, organizational law guaranteeing their implementation and concretization stabilizes hegemonic power at the same time. This coexistence of abstract rights to access and concrete excluding norms, constitutes the (latent) *legitimation crisis of world society*.

The simultaneity of hegemonic organizational power and democratic communicative power is mirrored in *all*, global and regional constitutional regimes. They all are characterized by the fundamental opposition between *egalitarian norms* and democratic declarations on the one side, and *hegemonic organizational law* (or: constitutional law of check and balances) on the other.³³ In the contradictory shape of constitutional life, the legitimation problem of *late capitalism as still bound to the nation state*³⁴ has resurfaced in the ‘post-national constellation’ (J. Habermas) of the globally *debordered turbo-capitalism*. The latent legitimation problem increases to a full-blown *crisis to the extent to which the executive power of post-national regimes and their organized state executives grow larger and are at the same time publicly visible and subject of debate*, like recently during the referenda in France and the Netherlands in May 2005.³⁵ Similar to the global public conflicts that accompanied almost every WTO, G-8 or European summit, the structural contradiction between egalitarian law and undemocratic organizational norms becomes obvious and worth discussing; showing, at its core, not only the hardly controllable complexity of *global organizational problems*, which we have to endure, but also the overwhelming power of *relations of domination*, which can be changed.

Global Constitutionalism still is far away from a revolutionary foundation of the global citizenship, Kants *Weltbürgerschaft*. Revolutionary means to transform the persistent hegemonial power-limiting, *rule-of-law-constitutionalism* into a power-founding, *egalitarian-democratic constitutionalism* are – after the bad experiences of the 20s century with bloody revolutions – out of question. But that does not mean that we have to drop the idea of a revolutionary constitution of the global legal community. A Kantian *Reform nach Prinzipien*, or what Habermas once has called *radical reformism*, is not out of reach.

A *Reform nach Prinzipien* could start with the fundamental legal principle of international law which today is the *sovereign equality of states*. This principle is the basic principle of a global power-limiting constitutionalism which today runs risk to stabilize the formal and informal power of the emerging

33 Detailed: Brunkhorst, Demokratie in der globalen Rechtsgenossenschaft.

34 For this, see Jürgen Habermas, Legitimationsprobleme im Spätkapitalismus, Frankfurt/M.: Suhrkamp 1973.

35 For the function of visibility in the media in world society, see Armin Nassehi, ‘Politik des Staats oder Politik der Gesellschaft? Kollektivität als Problemformel des Politischen’, in Kai-Uwe Hellmann and Rainer Schmalz-Bruhns (eds.), Theorie der Politik: Niklas Luhmanns politische Soziologie (Frankfurt/M.: Suhrkamp 2002).

transnational ruling class and to deepen the domination of one part of the global population over the other. But the growing discussion over an *emerging right to democratic governance* (Thomas Franck),³⁶ and the lip service international legal text books pay to *democracy and egalitarian rights*, allows us to envision an *alternative* to a constitutional principle of international law that is more and more in service of executive bonapartism and the social and cultural hegemony of the cosmopolitanism of the few. The alternative constitutional and legal principle of a revolutionary global constitution is the *international legal principle of democratic inclusion* (Susan Marks).³⁷

The principle of democratic inclusion in one of the most important constitutional documents of international law, in the UN-Charter is pushed away into the “We the peoples...” of the *Preamble* which clearly claims for a *second civic track of legitimization* “by” and “through” the peoples. In the text of the Preamble the “Governments”, and their “representatives, assembled in the city of San Francisco “are only supposed to express the will and “resolutions” of the “peoples”. If the Preamble is more than the Preamble of a mere “symbolic”, or “instrumental” constitution, then the civic track of legitimization should supplement the first *track of intergovernmental legitimization* of international law.

Yet, as a legal *Principle* the claim for democracy does not reappear in Chapter I Article 2 of the Charter where it belongs. There is at best a placeholders for democratic inclusion in Chapter I: the state-centered and anti-colonial/ anti-imperial right to *collective self-determination* (Art. 1 par. 2 UN); and the trans- and supranational *human rights-regimes* are further placeholders: individual *human dignity* (invented by the *General Declaration* of 1948 into international law), the principle of *civil inviolability*, and in general: the *global common interest* and *rule of law*.³⁸ Yet, a *Reform nach Prinzipien* should strive to locate the idea and emerging right to democratic inclusion on the same legal level of international law as the principle of sovereign equality. Democratic inclusion today is already a legal principle and even a right in the making.³⁹ The global legal order is already shifting from state centrism to a hybrid and dualistic order, based no longer on “(modified) state sovereignty” as the “exclusive source of legitimacy of international norms”.⁴⁰ If democratic inclusion once would become one of the then *two fundamental legal principles* of international law, then *hegemonial global constitutionalism* would begin to change into a *global revolutionary constitution*, and Chap. I, Art. 2 par. 1 UN-Charter which reads today: *The Organization is based on the principle of the sovereign equality of all its Members*, in future should read as follows: *The Organization is based on the democratic inclusion of all world-citizens, and the sovereign equality of all its Member-States*.

V

A *Reform nach Prinzipien* of the global constitutional order or disorder has some theoretical and even philosophical presuppositions. There are not only brute material facts of class-interest and informal domination that blockade a democratic development of the world society, but there are also mental, ideological and especially conceptual blockades of the disclosure of new meanings of democracy which are not “exhausted” by, and go beyond the traditional meaning of democracy as “representative government” and “national government”.⁴¹ There are a lot of hegemonial/

36 Thomas Franck, *The Emerging Right to Democratic Governance*, in: *American Journal of International Law* 86/1992: 46.91.; C. Cerna, *Universal Democracy*, in: *New York University Journal of International Law and Politics*, 86/ 1995, 289ff; Marks, *Riddle of all Constitutions*.

37 Susan Marks, *The Riddle of all Constitutions*, Oxford: Oxford Univ. Press 2000, 103, 109ff.

38 Peters, *Compensatory Constitutionalism*, 586.

39 Müller, *Demokratie zwischen Staatsrecht und Weltrecht*, Berlin 2003, 52

40 Peters, *Compensatory Constitutionalism*, 587.

41 Marks, *Riddle of all Constitutions*, 2f.

ideological doctrines in political and legal theory, in constitutional law and in particular German *Staatsrecht* which already conceptually exclude democracy beyond national borders and representative government. These doctrines are all latently relying on a dualistic construction of law which is state-centered. One of the doctrines is that there exists a fundamental difference between a *Staatenbund* and a *Bundesstaat*, between international and national law, between constitution and treaty, between public law and private contract, between society and state, between law (as object of the state) and the state (as subject of the law), between a heterogenous population under legal norms and a real people (whatever that is), between the people and their representatives, and last but not least between legitimacy and legality. All these dualisms hinder us already conceptually to join the *civitas maxima*. They were criticized by Hans Kelsen and his disciples already since the end of the First World War in a pathbreaking, a way that broke the path towards a new paradigm of international law which more or less approximately was established only after World War II in the new system of an emerging world law.

A constitution that is democratic needs none of these dualisms. Their only function is to restrict our understanding of democracy to representative government (or the priority of representative government) and to national government alone. Both restrictions are deeply undemocratic. This is so because it belongs to the *necessary meaning of democracy that is modern* that the “meaning” of “democratic self-rule and equity” never can be “reduced to any particular set of institutions and practices”.⁴² Without the “normative surplus”⁴³ of *democratic meaning* or the *meaning of democracy* which always already transcends any set of *legal procedures of democratic legitimization*⁴⁴ the people, the “subject” of democracy no longer could be a self-determined group of citizens or better: a self-determined group of all men who are affected by a given set of binding decisions. If they are not able to exhaust the meaning of democracy, and to experiment within the unlimited meaning-variance of key-words like equality, equity, freedom, constitution, rights or rule of law, if we the people are not able to determine, discover, construct or disclose new meanings of democracy, then there is no democracy at all but only a heteronomous people of – may be happy – slaves.

Democracy therefore is not, as the young Marx once wrote, the “solved riddle of all constitutions”⁴⁵, but *much more radical*: the “unsolved riddle of all constitutions”⁴⁶. Revolutionary constitutions that are democratic have to keep the riddle open, simply because it is up to the individual and collective *self-determination* of the people to determine, interpret and re-interpret the altering *meanings* of democratic self-determination, self-rule and equity, again and again in ever new terms of institutional design, be it representative or not, be it national, sub-national, trans- or supranational. To such an understanding of democratic meaning only a concept of democratic legality and legitimacy, national and international law, people and ‘representatives’ does fit that is not dualistic and representational.

Whereas the concept of the (higher) *legitimacy* of a ruling substantial subject (the king or the state as “*Staatswillenssubjekt*”⁴⁷) is as fundamental for power limiting constitutionalism as it was for medieval Christian, Papist or later absolutist regimes with its “two bodies of the king”⁴⁸ – democratic and power founding constitutionalism replaces *legitimacy* completely by a legally organized

42 Marks, Riddle of all Constitutions, 103, 149f.

43 Tom McCarthy, Philosophy and Critical Theory, 21.

44 ÜR 188 etc.

45 Marx, 1.Brumaire des Louis Bonaparte; on Marx thory of constitution: Brunkhorst 2007.

46 Marks, Riddle of all Constitutions.

47 Brunkhorst, Schatten des Staatswillenpositivismus.

48 Ernst H. Kantorowicz, The King’s Two Bodies, Princeton: Univ. Press 1957.

procedure of egalitarian and inclusive *legitimization*.⁴⁹ The procedures of legitimization have no higher legitimacy. They are themselves nothing else than products of democratic legislation, hence legitimization is circular, but not in the sense of a closed and *vitiosus* circle but in the sense of an open, socially inclusive hermeneutic circle or loop of *legitimization without legitimacy*.⁵⁰

The classical *representational* idea of the two bodies of the king, the people and their representative government is replaced by the idea of one body of people who *build* and *express* their political will in different organs (like parliaments, courts, governments, administrations, federal regimes, inter-, trans- and supranational regimes), forms and procedures (like 'participatory', 'deliberative' 'representational' or 'direct' procedures of will formation). These different organs, forms and procedures are *all in equal distance to the people*, and no organ is left to represent the people as a whole. State organs that perform power under a full-fledged democratic constitution are simply different means or methods of forming and coordinating the expressions of the will of the people.⁵¹

Therefore one should finally follow the *anti-representational* 20th century track of linguistic pragmatism, ban the notion of "representation" from political and legal theory of power-founding constitution, and replace the representational model by an expressive model of democracy.⁵² Hence, following the basic track of 20th Century theoretical philosophy we also should drop in political and legal theory the metaphysical ideas of *substantial (state-)sovereignty, a substantial people, legitimacy* and *representation of the true nature of the people in the mirror of the parliament*.⁵³ Instead of that dualistic and metaphysical (and latently authoritarian) vocabulary we should use concepts like *legal community, formal citizenship, public deliberation, democratic experimentalism, legitimization, methods of will formation* and so on.

49 Habermas, Faktizität und Geltung; Möllers, Gewaltengliederung, Tübingen 2005.

50 Democratic legitimization is inclusive because it governed by the one and only constitutional principle of democracy, and that is the principle of self-legislation or autonomy. This principle is socially inclusive because it presupposes that a procedure of legitimization that is democratic has to include everybody who is concerned by legislation and jurisdiction, therefore all exceptions (e. g. babies) have to be justified publicly and need compensation through human rights. Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie*, Berlin 1997; Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community*, Cambridge: MIT-Press 2005, Chap. 3; Susan Marks, *The Riddle of all Constitutions*, Oxford: Oxford Univ. Press 2000.

⁵¹ Kelsen, but also: Heller (in this respect following Kelsen).

⁵² Möllers, Expressive versus repräsentative Demokratie, in: Regina Kreide/Andreas Niederberger, Hg., *Verrechtlichung internationaler Politik. Ende oder Neubeginn der Demokratie?* Frankfurt: Campus (forthcoming)..

⁵³ Rorty, *Mirror of Nature*; Brandom, *Making it Explicit*; Habermas, *Wahrheit und Rechtfertigung*.