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# "GLOOMY PROSPECTS – THE FUTURE OF DEMOCRACY WITHIN A WORLD SOCIETY SEVEN THEORIES"

**by**
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Of my seven theories the first hesitantly sings the praises of the now elderly figure of the nation-state, the second views the modern law of the "Western legal tradition" as simultaneously repressive and liberating, the third considers the nation-state as overshadowed by its imperialism, the fourth asserts the ground-breaking standard-setting advances of the 20th century, the fifth sees the (purely liberal) constitutionalisation of a world society not as a solution, but as part of the problem of undemocratic world governance, the sixth paints a gloomy picture of globalisation of the market, power and religion, and the seventh also holds out no promises of a happy ending, merely a feeble hope in democratic legal formalism, which is, at least, more often than not a satisfaction for jurists.

1. The subjective spirit of the great constitutional revolutions of the 18th century first took objective form in the modern nation-state. To date this has remained a paradigm of the democratic rule of law. This state, whether or not democratic, was from the outset an administrative monster, a bureaucratic, supervisory, controlling state, a state founded on unbridled executive power.[1] However, in the course of its democratisation, ultimately wrested from it and its then ruling classes through constant social struggle, revolutions and wars, this state did not merely bring under control the unchecked chain reactions which were triggered by the fission of the major forces shaping modern life, whereby desocialised religion (Weber) split away from the clerical universal state, free labour, money and property markets (Polanyi) from the social stratification system, and political executive power (Marx) from the rule of force.[2] The nation-state - so my first theory goes - not only developed the administrative authority to control the unleashed productive force of communication, but also successfully used this authority so as to - at least within its borders - bar inequality, translate into public policy the guarantee of the same individual rights for all, make possible participation on an equal footing and guarantee equal access to economic and educational opportunities and to minimum standards of welfare and care.[3] In the course of the, not solely totalitarian, 20th century the democratised, juridified nation-state finally succeeded

    (1) in establishing freedom *of* religion, as unleashed by the Protestant crises of motivation and revolutions of the 16th and 17th centuries, together with freedom *from* religion in the sphere of political participatory rights,[4] and hence also was able to develop both education *and* religion as sources of national solidarity;
    (2) in reconciling freedom of public life with growth of public authority, and therefore free participation in politics with political freedom, through a democratic right of state organisation, which, even more than human rights, was the real innovation of the 18th century's crises of legitimacy and constitutional revolutions; and lastly
    (3) in achieving and guaranteeing, during the second half of the 20th century, freedom *of* markets and freedom *from* their negative externalities, through social revolutions and reforms, political planning and regulated capitalism - all consequences of and reactions to the economic and social crises engendered by unbridled capitalism.

[1] Wolfgang Reinhard, "Geschichte der Staatsgewalt" (Munich: Beck, 1999).

[2] On the metaphor of nuclear fission, see Peter Brown, “Society and the Supernatural: A Medieval Change”, in: Daedalus, spring 1975, 133-151.

[3] Thomas H. Marshall and Thomas B. Bottomore, "Citizenship and social class", Pluto, 1992, 33ff; Rudolf Stichweh, "Die Weltgesellschaft", Frankfurt am Main: Suhrkamp, 2000, 52.

[4] On the political nature of these rights in the American and French revolutionary constitutional tradition (and the difference from the German church-focused and state-centred special approach to religious freedom), see also Lepsius.

This made it possible for not only the technical-instrumental potential for rationality, which had triggered the emergence of modern society in the form of very fast-growing productive forces (Marx), but also the rationality of strategic-communicative action (Hobbes) - hugely enhanced and perfected through political accumulation of power - and, above all, the, since the Protestant revolution, liberated communicative-co-operative potential for rationality of the world religions (Weber) to be combined and updated in the institutional context of the democratic law-based state, in this sense becoming a form of "reason in history" (Hegel), a now dated concept.[5]

All the objectively perceptible progress to date is owed to "inclusion of the other" (Habermas), not least all the advances of international law and the constitutionalisation it has brought about of the - just as huge as they are menacing - powers of the modern nation-state, which through juridification and the separation of powers have not become less threatening but have first and foremost grown exponentially.[6] The - in the end perhaps too high - cost of this simultaneously functional and standard-setting progress within the nation-state nonetheless lies not only in the scarcely annullable ambivalence of reflexive power, but also in the far-reaching, but in practice reversible, sacrifice of the originally universalist, cosmopolitan demands of the great constitutional revolutions, which gave birth to this state and set it into motion.

Initially, on the great day when they were declared in August 1789, the rights of man and the citizen indeed had no kind of legal binding force, but were so stringently universal that the distinction clearly drawn in the text between man and citizen and between human and civil rights came down to the fact that "man" referred to a population in the natural state and "citizen" to the same population in a state of society, in which natural rights merely became positive rights and their number increased since it was now a matter of their autonomous organisation within a political association. The wording excluded no one from any fundamental right, even if the additional, superfluous sanctification of property in the last article was already a bad sign.[7] However, over the 19th and 20th centuries the programmatic binding force of the subjective rights grew and they even in the end became legally enforceable basic rights. As the legislative, executive and judicial branches gave them positive, tangible form, soft law was transformed into hard law, but their universal nature remained of the status of soft law, and the tangible emergence of rights for some made clear the lack of rights of others, of strangers and foreigners, women and children, black and coloured people, prisoners and exiles; subsequently, this outcome was, to begin with, so stable that it was scarcely possible to change it without vast reforms, huge social struggles or even revolutions. The more the nation state succeeded in fulfilling its standard-setting promise and in barring inequality, the clearer became the lack of rights inherent in a "bourgeois" law-based state, not only in its increasingly far-flung colonies, but also in the home "civilisation".

2. The success of the nation-state can be explained by the functional efficiency and the standard-setting force of democratic constitutions, a revolutionary idea which, at the outset, was not yet attributed to this powerful state. The French declaration makes no mention of the "state", preferring the terms "political association", "civil society" or "nation"". Even in the writings of Kant the "state" is mostly synonymous with a machine and with absolutism, while the republic is still, or yet again and pre-Hegel, a "bourgeois society". In America there were not only democratic state constitutions but also a democratic constitution of the union. A democratic constitution, as even the most recent German authors of constitutional theory (Möllers) teach us, does not presuppose any tangible state. (To this extent the duality of state and society was not only the most momentous, but also the most fateful innovation of Hegelian legal philosophy.)

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[5] On the typology of rationality reference can naturally be made not to Hegel but to Habermas's "Theory of Communicative Action" vol. 2, 1981.

[6] "Absolute power is weak" (Luhmann, "Trust and power").

[7] See Hasso Hofmann, „Zur Herkunft der Menschenrechtserklärungen“, in: JuS 11 / 1988.

My second theory is that a crucial feature of modern, in particular democratically enacted, law is that it is not simply an aid, like old Roman law, to co-ordinating ruling interests and repressing the ruled. Nor does it amount to nothing more than a stabilisation of expectations; it is not just, to cite Luhmann, society's immune system, but is also simultaneously a means of actually changing the world. It is aimed not only at repression but also (as Kant and Hegel pointed out) at emancipation (the existence of freedom). This is why Habermas (in the idealist tradition) talks about the simultaneous facticity and validity inherent in positive law. The classic concept of the "pouvoir constituant" (constitution-making authority) is already imbued with a dynamic of barrier-breaking self-transcendence, which led John Dewey to coin such terms as "democratic experimentalism" and "democratic expansionism".[8] As was the case with the well-known Monroe doctrine, gestures of imperialist subjugation (US hegemony over both the Americas) are also here mixed with anti-imperialist emancipation (from all the claims to power of European monarchs).

The US Declaration of Independence itself offers a very telling example of modern law's dynamic duality - repression and emancipation, both imperialist and democratic expansionism. As a vehicle for emancipation it proclaimed "all men are created equal" and, against the will of the King of England, underlined that all would-be immigrants to America were welcome there. Rawls quite rightly points out that the 18th century revolutions initiated a process of learning to include formerly excluded voices, classes, races, sexes, countries, regions and so on: "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."[9] Nonetheless, although it contains the beautiful phrase on equality, the Declaration is at the same time a document of brutal subjugation, legitimising the war of extermination of the native Americans by accusing the British Crown of being a secret ally of those enemies of all "civilized nations": the "merciless Indian savages".

However, even the rightly much-derided concept of the civilised nation remains ambiguous when human rights defenders before the US Supreme Court even now refer to the "standards of civlized nations" of the Declaration of Independence in order to denounce the tortures perpetrated in Guantanamo and other US prison camps and to bring international law within the compass of the US constitution, while at the same time fundamentalist nationalists such as Scalia emphasise the dualism of national and international law (as did the German Federal Constitutional Court in the Treaty of Lisbon case) so as to justify huge departures from those standards (for the time being unlike the Federal Constitutional Court).[10]

Only by paradoxically combining repressive stabilisation efforts with emancipatory forces was the democratic constitution able to "institutionalise" the antagonistic interests and class conflicts, the colliding beliefs and social value systems that clashed irreconcilably during the bloody revolutions, in such a way that, once the revolutions were over, they remained in opposition so that the communicative productivity of their antagonism was preserved and the fight about rights could henceforth be continued as a fight for rights, including those of slaves, women or "merciless Indian savages". Like Chantal Mouffe we might describe the transition from lawless revolution to the condition of "permanent legal revolution" (Fröbel) as one from antagonism to agonism,[11] if - unlike Mouffe - we bear in mind that this transformation of deadly

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[8] Brunkhorst, ed.., "Demokratischer Experimentalismus"; see also Möllers, 'Expressive vs. repräsentative Demokratie' in R Kreide and Niederberger, A (eds), Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik, Frankfurt am Main, Campus-Verlag, 2008.

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

[10] Rainer Nickel, "Transnational Borrowing Among Judges: Towards a Common Core of European and Global Constitutional Law?", in: Nickel, ed., Conflicts of Law and Laws of Conflict in Europe and Beyond, Oslo: Arena 2009, 281-306.

[11] *Chantal Mouffe*, On the Political, London: Routledge, 2005, 20: "We could say that the task of democracy is to

conflicts of values and interests was solely due to the juridification of politics (so hated by both leftwing and rightwing Schmittians).[12] Only when institutions are so paralysed that policy is eclipsed by law or, conversely, only when the law has become so flexible, in the best class interests of the elite (or the key-players as they are called today), that it is scarcely distinguishable from the execution of policy decisions, does the fight for law within law become hopeless, making insurrection and civil war inevitable, where permitted by the balance of powers or dictated by despair. Communicative power is then forced to fall back on its physical reserve, the "symbiotic mechanism" (Luhmann) of " vengeful violence" (Hegel), which, like all forms of direct force (including legal ones), explodes the limits of democratic legitimacy.[13]

3. From the early 19th century to the last quarter of the 20th century the modern state was confined to the regional societies of Europe, America and Japan, which themselves transformed huge swathes of the rest of the world into their own vast imperial domains, initially from a territorial standpoint and subsequently (since the English revolution, whose Calvinist leaders devised the modern nation and modern nationalism)[14] as dominions of the nation-state. This was initially European, and subsequently north-Western, world governance, but not yet any normatively integrated world society. Imperialism was in no way foreign to the sovereign European state, but rather part of its inner self. The long history of the imperial state - henceforth aiming to rule the world - and of its international law stretched from 7 June 1494, when the newly discovered lands were divided between Spain and Portugal in Tordesillas, to the unconditional capitulation of the German Reich on 2 May 1945. The Treaty of Tordesillas already split the world in two. On one side, or at least in the centre and in the brilliant vanguard, the "civilised" Christian royal houses of Europe, which would later give rise to the system of European nation-states and in which the Jus Publicum Europaeum, European public law, prevailed. On the other side of the world "disaster triumphant" (Horkheimer/ Adorno). The vast "uncivilised", pagan regions external to Europe lay in the "heart of darkness" (Josef Conrad). The Congo was where Europe's public affairs ended and the gloomy realm of its private obsessions began. Even the genocide perpetrated by Belgium in the late 19th century was justified by certain humanist European jurists, gathered together in 1873 in the name of freedom, equality, humanity, world peace, parliamentarianism and progress at the Geneva "Institute of international law", by the argument that only the European acts of King Leopold of Belgium fell within the scope of European public international law, whereas his acts in the Congo came under the private law of property, whereby Leopold as owner was free to do as he wished. The bitter consolation is that a global atrocity such as the genocide of Black Africans was not yet at the time a danger for world peace. According to my third theory, the fundamental distinction drawn by European public law was between equal rights for European states and unequal rights for "the other heading" (Derrida). The Berlin Conference on the future of Africa of 1884/85 offered the colonised and freely colonisable peoples authoritarian rule instead of a legal system (Article 35 of the final General Act), special measures instead of statute law, the

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transform antagonism into agonism." One source of this thinking is Nicolò Machiavelli's *Discourses* (Book I, 4): "all legislation and measures favourable to liberty are brought about by discord". See also *Bankowski*, Revolutions in Law and Legal Thought, 29f.

[12] Johannes Fried, Die Entstehung des Juristenstandes, 1970.

[13] The term communicative power coined by Habermas goes back to Arendt. However, Arendt wrongly contrasts it with force, since power is only ever power if, in the event of doubt, it can fall back on force, "the movement of bodies" (Luhmann). From this standpoint there is no difference between communicative and bureaucratic or administrative power. The relationship between power and force delineates the boundary of democratic legitimability. Only norms and all the stages whereby they come into existence are capable of democratic legitimation and require such legitimation in a democratic law-based state. Use of physical force is, however, in principle (without Hegel-like additional metaphysical assumptions) not synonymous with the achievement of self-determination or self-legislation. Even a law threatening imposition of the death penalty can be democratically legitimable (albeit at the same time being borderline), but its legal enforcement is not. The same applies to prison sentences and to deployment of the police.

[14] Berman, Law and Revolution II.

first global Dual State, or to cite the closing words of Conrad's famous novella "The horror, the horror!"

4. The horror remained, but the law at least was to undergo radical changes in the second half of the 20th century. The 20th century has been described as the "age of extremes" (Hobsbawm), and every attempt to erase the chasm between the extremes was "reconciliation under duress" (Adorno). This most recent of centuries was a catastrophic one that did incurable "damage" to life (Adorno). However, according to my fourth theory, it was also a century in which law underwent a major revolution and groundbreaking standard-setting advances were made, whereby:

- democracy became universalised,
- national law was transformed into global law,
- national human rights were transformed into global citizens' rights, and
- the constitutional rule of law was transformed into the democratic, social rule of law.

Until the mid-20th century the dark reverse side of the exclusion of inequality by nation-states, which was regionally limited and confined to their own citizens' equality by law, consisted in inequality, also enshrined in law, for those individuals, organisations and political regimes that did not belong to the north-west focused world of states; until the mid-20th century there was no legally binding entitlement to the global exclusion of inequalities. This situation changed dramatically at least after the Second World War, which was fought not just against Hitler and not only in the interests of national self-preservation, but also for democracy and human rights and for a new world, socialism on one hand and, on the other, Roosevelt's "one world" in which "equality in the pursuit of happiness" was secured not solely for his own nation (Roosevelt's Second Bill of Rights 1944), but also for all nations (already with the Atlantic Charter of 1941). Huge violations of human rights, the social exclusion of whole regions of the world and outrageous forms of discrimination of course did not disappear. But now breaches of human rights, lawlessness and political and social inequalities are perceived as our own problem, a problem concerning all stakeholders in the world society, and now there are serious, legally binding entitlements (*ius cogens*) to the global exclusion of inequality. For this and similar reasons Talcott Parsons, who was certainly no enthusiastic Utopian nor an orthodox German jurist, referred, as early as 1961, to the emerging constitutionalisation of the global system.[15]

5. Although the 1920s proponents of the concept of *civitas maxima*, of the League of Nations, global law and democracy, such as Hans Kelsen or Georges Scelle, in the end prevailed over Carl Schmitt and Hans Morgenthau, the *civitas maxima* in and with which we have to live today is still far from being in good shape. Juridification, constitutionalisation and the rule of law do not in themselves lead to democracy, but always strengthen the existing dominant power. The device and the name of the, globally active (as a kind of international *pouvoir constituant)*[16] and on the very issue of eastward expansion highly influential, Venice Commission of the Council of Europe - "Democracy through law" - is at best an empty euphemism, or at worst the ideology of the most recent hegemonic power.[17] The converse - Law through democracy - would be better. There is no stable, functioning dictatorship without rule *through* law (and therefore at least a minimum of rule *of* law). It is above all through law that the power of both democratic and undemocratic rulers becomes stable, effective and, first and foremost, enhanceable, as the senators and emperors of ancient Rome already knew only too well.[18] The constitutionalisation of global law, global politics and the global economy is hence - so my fifth theory goes - not a

[15] Parsons, Order and Community 1926.

[16] Philip Dann.

[17] Nickel, Transnational Borrowing

[18] According to Wesel (1997:156) "Roman law was the law of the elite. Classic indeed means 'model', and this was the name given to Roman law from the end of the 18th century. But classic law was also the law of a class, the law governing relations between members of the propertied class, and accordingly civil law. Other people were dealt with summarily, outside the law."

solution to the problem of eradicating undemocratic governance (in, between and over states) but is itself part of the problem.

The current constitution of the world society is a network of rights and organisational norms that reproduces the contradiction between democratic solidarity and hegemonic world governance which pervades this society. This contradiction shapes not only international and European law, but also increasingly national legal orders. The contradiction between egalitarian legal entitlements and the inegalitarian standards governing their implementation is not the contradiction between an empty normative ideal and a harsh legal reality, but is part and parcel of the harsh reality itself. It can therefore also be used as a political lever by both sides, by those who govern and those who are governed, by those who are part of the glittering inner circle and the excluded relegated to the wretched outer fringes. No matter how hard it may be for the latter to activate this lever, and no matter how far they are still prevented from doing so, they can utilise the lever of the law (and thereby possibly launch a democratisation process) at least for as long as the applicable law still has some remaining standard-setting force. The latest example could be observed in Teheran, where, at least until recently, there was still a constitutional theocracy (quite similar to the 19th century constitutional monarchy that has to date been idolised[19] by German constitutional law) with, admittedly restricted but nonetheless genuine, presidential and parliamentary elections. It is true that in Iran the first attempt to mobilise the communicative power of the streets, following a huge electoral fraud, failed, but in suppressing the revolt the regime seems to have exhausted its last sources of legitimacy. Even a minimum of juridification and constitutionalisation (as exists even in the post-national world society) achieves this for democracy and in its interests: If genuinely free elections take place, the ruling classes cannot tamper with them on a huge scale and reverse the presumed results without having to accept correspondingly huge losses of legitimacy.

Undemocratic constitutionalism nonetheless has its own drawback in that the hegemonic power which it tames via the constitution can be stabilised and enhanced through juridification and that it makes possible the development of new forms of governance involving a democratic deficit or even lacking any kind of legitimacy. New systems of governance, as are to be observed today in the world society,[20] are developing above all in response to the fact that global law is simultaneously undergoing a juridification and a deformalisation, a standardisation and a fragmentation. This results in a flexible and elastic (one of Carl Schmitts' favourite terms in the 1930s) but deterritorialised (a concept not employed by Schmitt) legal order, which is perfectly suited to the hegemonic outlook of the day.[21] In future the, with constitutionalisation, growing capability of the multicultural, highly individualised and ever-more specialised society to maintain its cohesion in the face of increasing diversity[22] will go hand in hand with increasingly unbearable differences between capital and labour, the included and the excluded, the powerful and the powerless, the believers and the unbelievers, the knowledgeable and the unknowledgeable, those with and those without rights.[23] The world's division into people with good and people with bad passports is mirrored in the constitutional structure of the world society, which regularly lets egalitarian *ius cogens* rights and democratic lip-service shatter and become silent in the face of the hard law of undemocratic organisational norms.[24]

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[19] In the light of the German Constitutional Court's decision in the Treaty of Lisbon case, Stefan Oeter aptly talks of a return of the 19th century "undead"; see also Armin von Bogdandy "Prinzipien der Rechtsfortbildung im Europäischen Rechtsraum. Überlegungen zum Lissabon-Urteil des Bundesverfassungsgerichts und gegen den methodischen Nationalismus", conference paper, 2009

[20] A. Glaeser,…

[21] The sole interesting observation made by Hardt and Negri in "Empire"

[22] Luhmann 1992, 25.

[23] See also Cristina Lafont and Regina Kreide.

[24] Brunkhorst 2002; Brunkhorst 2005. See also Craig Calhoun.

The basic contradiction between democratic rights and undemocratic organisational norms, which is a core feature of all constitutionalist regimes, makes possible the development of new forms of class rule. One means of dominance is gubernative human rights policies (Klaus Günther). No matter how right their implementation in a given case may be, human rights then degenerate into empowering norms (Maus) of hegemonic policy. With the establishment of "global state" and "global law" structures the capability of the nation-state effectively to exclude inequality is waning, without any form of post-national counterbalance being foreseeable or a retreat into the nation-state (recently vested with political symbolism by the Federal Constitutional Court) remaining possible. Anyone who seriously takes the latter step routinely ends up not with democracy but with fascism. On pronouncing its decision in the Lisbon Treaty case the Federal Constitutional Court must in fact have been aware of this when it presumed to dismiss ("hinwegzujudizieren" as Möllers puts it) the European Parliament in a legal act and thereby to weaken European democracy to the benefit of the prevailing constitutionalism (at least symbolically).

One comment on the judgment: The judgment's weakness from the standpoint of democratic theory is clear from the entirely baseless denial of the cosmopolitan implications already inherent in democratic state constitutions. All democratic constitutions indeed combine universal norms of exclusion of unequal freedom, which range well beyond all existing frontiers (not just the state's), with a procedural right of self-organisation (or right to legislate), which in Germany is characteristically termed a "right of state-organisation". This implies that the democratic self-determination of the people, the population or the nation with regard to democracy cannot be linked to a specific historical form of government or form of law (not to the territorial nation-state nor to the generality of law). The categorial confusion of the "nation", as a self-determined subject of legitimation, with the "state" merely repeats the old errors of the 19th century concept of the positivism of state will. The "revolutionary tradition reduced to state form" of democratic constitutions reveals - as Möllers pointed out years before the judgment - a profound misunderstanding of the "radical democratic substance of the tenet of the 'pouvoir constituant'."[25] The latter must in point of fact be understood not as a substantive concept, as Schmitt believed, but as a normative and procedural concept in the revolutionary tradition and in line with the thinking of Kelsen, Maus or Habermas (for Kelsen one involving a production method), a concept which, beyond its prevailing form, points to a democratic cosmopolitanism that, in no way by chance (see theories 1 and 2 above), was given its strongest impetus so far (Pauline Kleingeld) by the great constitutional revolutions of the 18th century.

[25] Maus, Enlightenment of democratic theory; Christoph Möllers, Pouvoir Constituant.

6. What is particularly striking is the dwindling capability of the nation-state effectively to exclude inequality, confronting it with three major structural problems, which modern society already had to combat when it was still confined to Europe alone: the - according to my sixth theory - environmentally blind autonomisation of markets is leading to economic and social systemic problems and crises, the environmentally blind autonomisation of executive power to problems and crises of legitimation and the no longer environmentally blind autonomisation of religious spheres of value to problems and crises of motivation.[26] The globalisation of the autonomised markets, powers and belief systems has the following implications:

(1) The state-embedded markets of national late capitalism are transformed into the market-embedded states of global turbo-capitalism.[27] The new capitalism, which has emerged very fast since the 1970s and 1980s, has traded the narrow, rigid framework of democratic constitutional law for the light garb of a flexible, elastic global law and is plunging the half democratic, half bureaucratic Western welfare state into a deep-seated crisis at a time when it is still gleefully triumphing over the dictatorial Eastern social state. Freedom of the markets has been unleashed again at the cost of freedom from their negative externalities, the bubble is bursting and the competitive rivalry for markets and fossil energy sources is causing ever-greater damage: *There Will be Blood*.[28]

(2) What's sauce for capitalism is sauce for religion. The fundamentalist sect- and network-religions and the Catholic Church, which for almost a thousand years has been experimenting with organisational forms reminiscent of the global state, are the major winners of globalisation, and the Protestant state churches the losers.[29] The second great transformation has made state-embedded religions into religion-embedded states.[30] The thereby newly won anarchistic freedom of religion is already ominously spreading at the cost of freedom from religion and is making ubiquitous the crises of motivation and of identity which in the 1960s could still be counterbalanced with educational reforms and (under authoritarian regimes) could be restricted at a national level through police-state measures. Endlessly prolonged youth and the life-long persistence of crises of learning, meaning, adolescence and conversion can no longer be contained through national programmes, with the result that religious fundamentalism can erupt at any time anywhere and in any given social group or stratum and religion can repeatedly come up with something new. In any case the instruments at the disposal of state and supranational organs seem no longer sufficient, even when combined, to recivilise the unleashed destructive potential of the world religions: *There Will be Blood*.

(3) However, it is not just capitalism and religion but also public executive powers that have become inter-, cross- and supranationally linked and broken away from their state-organising law anchorage.[31] The third major transformation is that of state-

[26] For a typology of crises see Habermas, Legitimation Crisis

[27] Wolfgang Streek, "Sectoral Specialization: Politics and the Nation State in a Global Economy", paper presented at the 37th *World Congress of the International Institute of Sociology*, Stockholm 2005; Fritz Scharpf, …in: Offe.

[28] There Will Be Blood, USA 2007, directed by Paul Thomas Anderson.

[29] Brunkhorst 2005.

[30] *Brunkhorst*, Democratic Solidarity under Pressure of Global Forces: Religion, Capitalism and Public Power, in: Distinktion. Scandinavian Journal of Social Theory issue No. 17/ 2008, 167-188.

[31] Reference need simply be made to the unobtrusive but significant boom of the entirely new sub-discipline of trans-national administrative law, which is followed neither by trans-national governments nor by trans-national parliaments (but by the inter-, trans- and supranational courts, if it is followed by anyone): 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

embedded public powers into power-embedded states. The globalisation movement's winners everywhere are the fast and free-moving executive powers, which through novel private-public partnerships are expanding world-wide to become a transnational ruling class. They have established loosely coupled soft-law regimes operating at the regional and global levels, which have de facto binding effect and thereby free themselves from oversight by democratic parliaments and laws. In future here too freedom of public authority should grow at the cost of freedom from public authority. New global legitimation problems are being added to the old, nationally-embedded ones and could plunge the fragile multi-level system of global governance without (democratic) government, hailed by many political scientists as the solution to all global conundrums, into a grave crisis, which should be every bit as terrifying as that of global financial capitalism. This then means, more than ever: soft Bonapartist governance for us in the North-West of the globe, at least those who do not sink into the ever-broader outer fringe of the excluded, and the full rigour of the "Massnahmestaat" (a state under a system of rule in which normal legal procedures are replaced by special measures) for the others in the South-East, those with the wrong passports: *There Will be Blood*.

7. The 20th century revolution of law was successful but remains incomplete. Constitutionalism in the place of democracy impedes the concrete implementation of human rights and of solemn democratic declarations. However – according to my seventh theory – even human rights and democratic constitutional rhetoric that can be implemented only in a distorted way from the standpoint of organisational law are, to cite Kant, not philanthropy but rights,[32] and therefore cannot with impunity be included in legal and constitutional instruments. They can backfire.[33] Even the hegemonically juridified and constitutionalised world society has in common with 18th century constitutional law and the Western legal tradition the fact that it possesses a dual structure, being simultaneously the immune system of society and the medium of its transformation; at the same time serving the dominant interests and allowing scope for the formation of emancipatory interests (theory 2). For as long as the constitution of the world society (and all state constitutions are partly constitutions of the world society) is not democratically organised, its particular structure combining juridification and deformalisation, equal rights and inegalitarian organisational norms, indeed leads to the rapid development and stabilisation of informal governance.[34] However, the same law that establishes the new, trans-national class rule on a stable footing and enhances its power, also makes possible a counter-hegemonic policy of global protest[35] and a reform based on principles,[36] which pushes for the formalisation of undemocratic organisational law, so that global law ultimately is indeed transformed into a law that in legally protected areas[37] enables democratic politics.[38]

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Law, http://law.duke.edu/journals/lcp. Christoph Möllers/Andreas Voßkuhle/Christian Walter (Hrsg.), Internationalisierung des Verwaltungsrecht 2007; Bernstorf, Procedures of Decision-Making, 22; Möllers, Transnationale Behördenkooperation; Andreas Fischer-Lescano, „Transnationales Verwaltungsecht“, in: Juristen-Zeitung 8/ 2008, 373-383. On the globalisation of executive power: Klaus Dieter Wolf, Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft, Baden-Baden: Nomos 2000; Petra Dobner, “Did the state fail? Zur Transnationalisierung und Privatisierung der öffentlichen Daseinsvorsorge: Die Reform der globalen Trinkwasserpolitik", at the following link: http://www.dvpw.de/dummy/fileadmin/docs/2006xDobner.pdf.; Gertrude Lübbe-Wolf, Die Internationalisierung der Politik und der Machtverlust der Parlamente, erscheint in: Brunkhorst (Hg.), Demokratie in der Weltgesellschaft, Sonderheft der Sozialen Welt 2008.

32 Kant 1977b, 213f.

33 Müller 1997, 56.

34 Nickel 2007.

35 Brunkhorst 2002a, 184ff; Buckel 2007; Buckel/ Fischer-Lescano 2007.

36 Cf. subsequent to Kant: Langer 1986; Brunkhorst 2008, 32ff. On the link between protest and reform see also: Prien 2008. Papers given by Bogdandy and Koskenniemi in Zürich, May 2009.

37 Maus 1994.

A faint hope, and moreover one that is perhaps a little too flattering for jurists, since they invariably believe they already know that only binding law brings freedom from informal governance.[39] There is some truth in the assertion that without the rule of formal law there is no egalitarian democracy, corresponding not merely to (inegalitarian) rule of the majority over the minority but to self-determination or "governance by the governed".[40] However, this possibility can only be realised if the law itself is democratically enacted law. The issue is not how to get out of this circle of law and politics (described in different ways by Luhmann, Kelsen, Habermas and Maus), whereby there is no political action that is not either legal or illegal, and no legal norm that is divorced from political change, but how properly to get into it (cf. Heidegger) and above all if one has fallen out of it, how to get back into it, that is with the equal inclusion of all those subject to the law.

Obama's election campaign, which led to a turnout of over 90% of black voters, only 25% of whom would otherwise have voted, shows that it is possible. However, the difficulties he has encountered in obtaining a majority within his own Democrat Party in favour of a health care reform which, for the first time, includes a large part of the lawfully resident under-classes (and thereby recognises them as democratic subjects), shows how hard things are in a country, which is indeed democratically constituted, but where 80 to 100 million people are excluded (as a provisional estimate) including 40 million illegal aliens, and in which the President constantly underlines that those present illegally, but legally working, will receive not a single cent. This is the situation, and not just in the United States. It is not made any easier by the fact that any reverse move back to the nation-state would amount to a catastrophe. The coming democracy - or to use Derrida's less forceful term the "democracy to come" - will be cosmopolitan, or it will not exist at all.

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[38] ; Möllers 2003

[39] Möllers.

[40] Möllers, Brunkhorst, Maus.