Special Section
Europe and the Lost Generation

Collective Bonapartism – Democracy in the European Crisis

By Hauke Brunkhorst[*]

A. Introduction

My paper has two parts. In the first part I will outline an evolutionary model for analyzing the relation of democracy, cosmopolitanism and conflict. In the second part I will apply it to the case of European constitutionalization, and its failure.

B. Two Mindsets – Opposed and in Need of Each Other

A couple of years ago Martti Koskenniemi introduced the important distinction between two different constitutional mindsets: the Kantian and the managerial.[1] The differentiation between the Kantian and the managerial mindsets is one of the many variants in the eternal struggle between Mr. Hyde and Dr. Jekyll that has been fought throughout the whole of Koskenneimi's work. This epic struggle began with Kantian *utopia* vs. managerial *apologia*.[2] He followed that effort with his outstanding *Gentle Civilizers of Nations*, which theorized a number of struggles, including those between Kelsen and Schmitt, Lauterpacht and Morgenthau, and finally the Dr. Jekyll embodied by Wolfgang Friedmann—the last hero of the gentle civilizers—and the many Mr. Hydes who were the embedded jurists from the American State Department.[3] These Hyde-like lawyers from the State Department justified the invasion and replacement of a democratically elected government in the Dominican Republic in the spring of 1965.[4] The fight between Dr. Jekyll and Mr. Hyde was renewed in Koskenniemi's 2003 essay "What can International Lawyers Learn from Karl

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[1] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN LAW 9 (2006).

[2] MARTTI KOSKENNIEMI, FROM APOLOGIA TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989). The *German Law Journal* published a special issue marking the re-issue of the book by Cambridge University Press in 2006. *See* Morag Goodwin & Alexandra Kemmerer, *Editorial: The Same Performance, and so Different: Marking the Re-publication of From* Apology to Utopia, 7 GERMAN LAW JOURNAL 977 (2006).

[3] MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 413-415, 494-509 (2002).

[4] *ID.*.

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Marx?"[5] At that time the good Dr. Jekylls of the world had said "No" to the infringement of international law by the Americans (and their willing coalition of states and international lawyers)—again playing the part of Mr. Hyde—who were determined to wage a second war in Iraq War.[6]

I begin with a rough juxtaposition of the *meaning* of the two mindsets: The *Kantian mindset's* key-words are autonomy, egalitarian self-determination, representative government and universal rights. Law shall enable government *of* and *by* the people, and that means the emancipation from any law to which we have not given our assent.[7] The language of the Kantian mindset is the *normative* language of the constitutional revolution, the *pouvoir constituant*, and the rhetoric of radical change. The Kantian mindset is, as Marx put it, the "legislature" that "produced the French Revolution."[8] At the center of the Kantian mindset is the internal relation of *law and democracy*.

By contrast, the *managerial mindset* is more about *law and economics*. Keywords are rule of law, judicial review, possessive individualism, and—in the ironic formulation of Marx—the "peaceful competitive struggle."[9] This mindset is superintended by a competition commissioner and some judges, such as in the EU (or in the WTO-IMF-World Bank regime of global economic governance). This, of course, is the approach that has been taken to Europe's debt and banking crises. The managerial mindset is performed by incremental decision making, gradual change, muddling through a jungle of hegemonic opinions, negotiating a complex mix of ideal and material class-interests, and the mitigation of unexpected evolutionary hazards and coincidences. The managerial mindset's language is the *technical* language of courts, committees, conferences and all kinds of agencies that are implementing and stabilizing the pluralized powers of the *pouvoir constitué*. Managerial government—from Lenin to Angela Merkel—is government *for* or *against* the people. The Kantian and Marxist (and American presidents') rhetoric of changing the world is displaced by negotiation, diplomacy, compromise, new public management, and the noiseless implementation of "structural reform." In the world of the managerial mindset public contestation is, as Angela Merkel dryly put it "just not helpful." In the same way, parliamentary rule is restricted to its lesser-self, including "market-conformity" and

[5] Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx*, 17 LEIDEN JOURNAL OF INTERNATIONAL LAW 229, 245 (2004).

[6] *Id.*

[7] Alexander Somek, *Europe: From Emancipation to Empowerment* (unpublished manuscript, 2012).

[8] Karl Marx, Kritik des Hegelschen Staatsrechts, in 1 Karl Marx/ Friedrich Engels - Werke 203, 260 (1976) (English quoted from Karl Marx, Critique of Hegel's Philosophy of Right 57 (Joseph O'Malley ed., 1970)).

[9] KARL MARX, DER 18. BRUMAIRE DES LOUIS BONAPARTE 97 (1852) (English quoted from: http://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm).

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"parliamentary participation."[10] Again, these are the words of Angela Merkel, who has emerged as the mastermind of the present European managerial class of politicians, bankers, chief-economists, jurists and embedded journalists. These are the masters of the crisis.

If you want paradigms, then you cannot do better than the European South today. The Troika-enforced replacement of elected governments by technocrats and bankers such as Mario Monti or Lucas Papademos is a paradigmatic case of the functioning of the managerial mindset. By contrast, the Italian elections in February 2012, which ended technocratic government, are a paradigmatic case of the functioning of the Kantian mindset. In both cases the results can be catastrophic. Mr. Hyde, who wants the bad, can be the trigger for the good, but without any Mandevillean metaphysical guarantees. And Dr. Jekyll, who is the bearer of the Kantian Good Will, can be the trigger for the bad. But it need not turn out this way.

Both mindsets have different meanings. They also have different *socio-linguistic extensions*. Whereas the Kantian mindset speaks the *universal* language of everybody, the extension of the managerial language is the exclusive medium of understanding between professional experts and the political and economic class. The *specialization* of their language allows them to draw a sharp distinction between the internal systemic discourse and the human beings out there in the environment of the system. The "Lost Generation" might be better characterized as the "Absent Generation" or the "Overlooked Generation" or the "Neglected Generation." The borderline between system and environment is watched and observed by simple codes (such as legal/ illegal) and complicated programs (such as EU-laws, ESM-norms, Troika soft-law etc.). For the human beings out there—the young, unemployed Spaniards in their hundreds of thousands—the programs are translated into the hopelessly under-complex language of the kitchen-morality of the "Swabian housewife" and her "housekeeping money." This is how Angela Merkel has sought to explain the new, harsh economic conditions to the Greeks.[11] From the point of view of his own Kantian mindset, Kant himself would have called the members of the managerial class *sorry comforters*.[12]

From the point of view of the managerial mindset, however, the opposite is true. As Niklas Luhmann (a true Mr. Hyde) argues, the Kantian constitutional mindset is just another empty signifier offering little more than "Illusions of manageability," "solemn

[10] See Angela Merkel, Über die Marktkonforme Parlamentarische Demokratie (Sept. 3, 2011), available at https://www.youtube.com/watch?v=VLfQn7vie6c&noredirect=1.

[11] See Patrick Bernau, Die Schwäbische Hausfrau, Frankfurter Allgemeine Zeitung (May 16, 2010), available at http://www.faz.net/aktuell/wirtschaft/schulden-die-schwaebische-hausfrau-1979097.html.

[12] IMMANUEL KANT, *Zum ewigen Frieden*, *in* XI WERKE 191, 210 (1977).

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declarations," and "revolutionary chants."[13] And he's right about this, at least as far as declarations and constitutions are *only* legal *texts* and not yet legal *norms*.[14] Luhmann's thesis is this: That legal and constitutional concepts have become *evolutionary advances* with a certain cash-value it is a consequence of *adaptive cognitive learning* that is performed by the managerial class, or independently by social systems that have completed their self-referential closure to become learning or Turing machines.[15]

Legal and constitutional advances are good examples of this. A functionally differentiated, hence self-referentially closed legal system produces itself (autopoiesis) through the combination of *normative closure* with *cognitive openness*.[16] From the perspective of cognitive or systemic learning, normative expectations and moral points of view are merely learning blockades that are used for the functional purpose of reducing environmental complexity. Constitutions fulfil the functional requirements of structural coupling and thereby contribute to the enhancement of the adaptive capacities of modern society through cognitive learning alone. This, however, is a categorical turning-away from the Kantian mindset. All that has to be done must be performed by managerial incrementalism, legal experts, career politicians and bureaucrats.

I agree and I disagree with this part of Luhmann's program. Let me begin with my disagreement. Social evolution is not only characterized by *cognitive learning* that enhances adaptive capacities. It is also characterized by *normative learning* that is not adaptive but instead channels and constrains systemic adaptation.[17] In particular, the normative closure of the legal system through constitutional law is not just functionally adjusted to adaptive cognitive and systemic learning, it is also an *embodiment of normative*

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[13] Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 8 RECHTSHISTORISCHES JOURNAL 176 (1990) (using the German phrases "Machbarkeitsillusionen," "feierliche Erklärungen," und "Gesänge".).

[14] On the distinction *see*, FRIEDRICH MÜLLER, "RICHTERRECHT" – ELEMENTE EINER VERFASSUNGSTHEORIE IV 13, 34, 38, 47, 88 (1986); FRIEDRICH MÜLLER, "DEMOKRATIE ZWISCHEN STAATSRECHT UND WELTRECHT. NATIONALE, STAATLOSE UND GLOBALE FORMEN MENSCHENRECHTSGESTÜTZTER GLOBALISIERUNG" – ELEMENTE EINER VERFASSUNGSTHEORIE VIII 52-53 (2003); FRIEDRICH MÜLLER & RALPH CHRISTENSEN, II JURISTISCHE METHODIK: EUROPARECHT 170, 185, 198-199, 363, 437-438 (2007).

[15] *See* Luhmann, *supra* note 13.

[16] NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 78-95, 555 (1993).

[17] For the sociology of rationalization, law and religion, *see* JÜRGEN HABERMAS, ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS (1976); JÜRGEN HABERMAS, II NACHMETAPHYSISCHES DENKEN 7-53 (2012); WOLFGANG SCHLUCHTER, DIE ENTWICKLUNG DES OKZIDENTALEN RATIONALISMUS (1979); Klaus Eder, *Collective Learning Processes and Social Evolution: Towards a Theory of Class Conflict in Modern Society*, 1 TIDSKRIFT FÖR RÄTSSOCIOLOGI 23 (1983); Klaus Eder, *Learning and the Evolution of Social Systems – An Epigenetic Perspective*, *in* EVOLUTIONARY THEORY IN SOCIAL SCIENCE 101 (M. Schmid & F. M. Wuketits eds., 1987); ROBERT BELLAH, RELIGION IN HUMAN EVOLUTION – FROM THE PALEOLITHIC TO THE AXIAL AGE (2011); HAUKE BRUNKHORST, CRITICAL THEORY OF LEGAL REVOLUTIONS – EVOLUTIONARY PERSPECTIVES (*forthcoming* 2014). For social history, *see* BARRINGTON MOORE, INJUSTICE – THE SOCIAL BASES OF OBEDIENCE AND REVOLT (1978). For the social-cognitive development of individual human beings, *see* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (M. Gabain trans., 1968); LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT (1981/1984).

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learning processes that have a *lasting internal relation to the minds, actions and bodies of all individual addressees of legal norms*. Because legal norms cannot evade their internal connection with the colloquial language and the moral self-understanding of their addressees, normative closure does not only enable cognitive and systemic adaptation but also the continuation of *normative learning*.

All public law is opened *cognitively* to its *environment*. But public law is also *normatively* opened to the general and diffuse *public sphere*. For example, normative learning (or unlearning) is instance possibility in landmark parliamentary or legal debates and decisions that will affect the general public.[18] Normative learning is at stake when new social movements emerge.[19] Normative learning is at stake in the public conflicts and struggles that involve assembling and uprising crowds that question the validity and the right interpretation of the law. Normative learning is at stake when words and cobblestones strike back, and discourses fly-off like sparks.[20] What appears as a learning blockade from the perspective of systems theory is itself the *result of evolutionary learning* that consists in an *increase and the categorical progress of moral insight*, measured in categories of social inclusion, moral universality, political egalitarianism, reciprocal understanding, justice as fairness and societal individualization (e. g. Kant's enthusiasm of moral progress, or Durkheim's modern cult of the individual).[21] The results of normative learning take root and spread throughout the whole system of positive law, in particular in constitutional rights and principles such as public and private autonomy, democracy, checks and balances, due process, social equality, human and civil rights. This, of course, is the whole list of solemn declarations and revolutionary chants: "The International unites the human race."[22] These are holistic statements and empty legal signifiers that *everybody* understands. Revolutionary declarations such as the declarations of 1776, 1789 or 1948 are seldom significant for professional jurists but they are often very significant for philosophers. And they are also significant for the people, especially when it comes to social conflicts that are structural. Why? Because they express a better, or at least presumably better, justified (or better interpreted) *idea of freedom* that seems to be more universal, more inclusive, more individualized and decentred than all former ideas of

[18] *See, e.g.,* HELMUT DUBIEL, NIEMAND IST FREI VON DER GESCHICHTE. DIE NATIONALSOZIALISTISCHE HERRSCHAFT IN DEN DEBATTEN DES DEUTSCHEN BUNDESTAGES (1999).

[19] *See* KLAUS EDER, GESCHICHTE ALS LERNPROZEß? ZUR PATHOGENESE POLITISCHER MODERNITÄT IN DEUTSCHLAND (1985).

[20] BRUNKHORST, *supra* note 17.

[21] I am thankful for a controversial discussion with Rudolf Stichweh on this point at a conference that Marcelo Neves organized in Brasilia in September, 2013.

[22] *See* https://www.marxists.org/history/ussr/sounds/lyrics/international.htm. The German text refers directly to *human rights*: "Die Internationale erkämpft das Menschenrecht." This translates in English into: "The Intenationale fights for human rights." (https://de.wikipedia.org/wiki/Die_Internationale#Deutscher_Text_.28Emil_Luckhardt.2C_1910.29).

freedom. Hegel has called the historical sequence of these ideas, complete with their corresponding public discourses, *progress in the consciousness* (or understanding) *of freedom*.[23]

Constitutions are not only *evolutionary*. They are also *revolutionary advances*. Revolutionary advances, such as human rights and democracy, are neither *designed* as improvements of adaptation nor can they be *explained* as improvements of adaptation.[24] For the latter purpose they emerge far too rapidly, in the same was as bursts in the evolution of living systems.[25] Instead of improving adaptation, revolutionary advances *constrain* the morally neutralized adaptive mechanisms of society *normatively*. As *normative constraints* they limit adaptation in a similar way as the construction plans (*Baupläne*) of animals limit the adaptation of living organisms to their environment. The "role of historical and structural constraints" consists in "channelling directions of evolutionary change."[26] The same must be said about the role of normative constraints in social evolution. Constraints that are normative do not only *close* a legal system for the purpose of adaptive improvements. Normative constraints also *disclose new evolutionary paths* for cognitive and normative learning. As products of successful normative learning, the normative constraints of systemic adaptation contain the whole *emancipatory potential* of a respective society.[27] The emancipatory potential that is embodied in constitutional textbooks and legal practices "can be halted and inhibited" by selective pressures, such as: (a) functional (and in particular economic) imperatives, (b) dominating (and dominated) class-interests, and (c) hegemonic (and counter-hegemonic) mindsets. But the emancipatory potential "cannot be eliminated."[28] Because they are *normative*, the constraints of blind evolutionary adaptation can be violated, neglected, derogated. These offenses can happen again and again. The violation of a legal norm is the proof of its existence. But, if they "will not be forgotten,"[29] then they can "strike back."[30] This

[23] G. W. F. HEGEL, 12 WERKE 32 (1970).

[24] To be sure, all revolutionary advances are existing only because they are adapted. Nothing that is not adapted, exists. To be adapted, modern constitutions must fulfil functional requirements of structural coupling.

[25] *See* Steven Jay Gould, *Darwinian Fundamentalism*, 44 NEW YORK REVIEW OF BOOKS 10 (1997); Steven Jay Gould & Richard C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm* (April 4, 2012), *available at*: http://www.aaas.org/spp/dser/03_Areas/evolution/perspectives/Gould_Lewontin_1979.shtml.

[26] STEVEN JAY GOULD, THE STRUCTURE OF EVOLUTIONARY THEORY 26 (2002); Steven Jay *Gould*, *A Developmental Constraint in Cerion, with Comments of the Definition and Interpretation of Constraint in Evolution*, 43 EVOLUTION 516, 517 (May, 1989). For an application to legal evolution, but without recognizing the *normative* character of constraints in the social evolution, *see* MARC AMSTUTZ, EVOLUTORISCHES WIRTSCHAFTSRECHT 267-270 (2001).

[27] *See* BRUNKHORST, *supra* note 17.

[28] Somek, *supra* note 7, at 8.

[29] IMMANUEL KANT, *Streit der Fakultäten*, XI WERKE 361 (1977) (author's translation of the German phrase "vergessen sich nicht").

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distinguishes all revolutionary documents—beginning with the *Dictatus Papae* from 1075—from mere words, celebrations and chants.[31] It is the emancipatory progress of revolutionary advances that made Kant's "enthusiasm" and "moral rapture" *vis-à-vis* the French Revolution enduring, even at the height of Jacobean terror.[32] Once revolutionary advances have become a "Sign of History,"[33] once they are implemented in constitutional law (its legal practice and mindset), then revolutionary advances are no longer empty signifiers but Hegel's *existing Notions*.[34]

To this point, I am more or less in agreement with Koskenniemi. But now comes my disagreement with him and my partial agreement with Luhmann. This is where the managerial mindset seems convincing to me. Kant's *enthusiasm vis-à-vis* the hot search-light of the revolution led him to marvel that revolution makes "men and things seem set in sparkling diamonds" and "ecstasy (…) the order of the day."[35] But the euphoria is regularly followed by "a long *Katzenjammer* [hangover]." What remains is a "sober reality," managed by "its own true interpreters and spokesmen."[36] Thus, "the Says, Cousins, Royer-Collards, Benjamin Constants, and Guizots"[37] managed in the aftermath of the French Revolution in the same way as Europe today is managed with the Method Monet.[38] In a

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[30] FRIEDRICH MÜLLER, "WER IST DAS VOLK? EINE GRUNDFRAGE DER DEMOKRATIE" – ELEMENTE EINER VERFASSUNGSTHEORIE VI 56 (1997).

[31] HAROLD BERMAN, LAW AND REVOLUTION. THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

[32] Pauline Kleingeld has argued in a recent essay, in the middle of the last decade of the 18th century Kant became more radical, cosmopolitan, egalitarian and republican than in his earlier writings. Pauline Kleingeld, *Kant, Conflict, and Colonialism* (paper presented at John Cabot University (Conference on Cosmopolitanism and Conflict), Rome, Oct. 13, 2013). The reasons seem to be (1) theoretical and (2) historical. First, in that time Kant worked out the consequences of his theoretical and practical philosophy for a theory of public and republican law, and he developed his ever more *republican* but *modern* (hence individualistic) theory of popular sovereignty. *See* INGEBORG MAUS, ZUR AUFKLÄRUNG DER DEMOKRATIETHEORIE (1992). Second, only *after* the victory of the Jacobean troops over the reactionary European coalition (1792), and *after* Jacobean rule and the beheading of the king (1792-1794), it became historically evident all over Europe that a modern republican regime (that is no longer monarchic) was *empirically possible*. Therefore, only then, *after* the final triumph of the revolution, did it become evident that the French Revolution was a Sign of History (*Geschichtszeichen*) that never ever will be forgotten. This was due to Jacobean rule and the trial against *citoyen* Louis Capet, and despite the moral and legal injustice of the trial against the sovereign who counterfactually represented the people (in a provisional state of law).

[33] KANT, *supra* note 29, at 361.

[34] G. W. F. HEGEL, WISSENSCHAFT DER LOGIK II 424 (1975). *See* Hegel, *Lectures on the History of Philosophy*, *available at* http://www.marxists.org/reference/archive/hegel/works/hp/hparistotle.htm.

[35] HEGEL, *supra* note 34.

[36] MARX, *supra* note 9, at 101.

[37] *Id*. at 97.

[38] Jaques Delors, *Entwicklungsperspektiven der europäischen Gemeinschaft*, B1 AUS POLITIK UND ZEITGESCHICHTE 3-9 (1993); Möller, *Die Europäische Sozialunion*, Lexikonartikel (manuscript 2013).

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long period of managerial incrementalism and gradual adaptation society learned (after Napoleon's final defeat as well as after the Treaty of Rome) "to assimilate the results of its storm-and-stress period soberly."[39] This means that the *managerial mindset of law and economics* had to be legally implemented and soberly assimilated. It also means that the *Kantian mindset of individual and public self-determination* also had to be assimilated. Cognitive and systemic adaptation never stops. But neither does normative learning., Therefore, there is a revolutionary normative discourse and there is a continuing normative discourse that operates in the aftermath of revolutionary change. This is exemplified by the practical discourses that found a voice after the French Revolution. These discourses were interested in "absolute freedom and terror," in the wide spread and long-lasting public debate and praxis of "socialism and communism," or in the powerful scientific, legal and popular controversies concerned with "constitutions and representative government."

During the long *Katzenjammer* Mr. Hyde's evil genius was needed to stabilize Dr. Jekyll's high-flying plans for a just society.[40] But Dr. Jekyll was also forced to defend against his other self, his Mr. Hyde. The enduring struggle between Dr. Jekyll and Mr.Hyde leads to several monstrous outcomes: the reduction of socially related *human emancipation* giving way to professionally specialized *political emancipation*,[41] *egalitarian mass-democracy* giving way to *facade democracy*,[42] *constitutional advances* in the consciousness of freedom giving way to constitutionalism as *kitsch and cliché*.[43] Still, Mr. Hyde has not always had the last word of history.

In the technical language of Systems Theory one can say that during the process of managerial adaptation and stabilization that follows revolutionary advances, the difference between Mr. Hyde and Dr. Jekyll again had to be copied into the character of Mr. Hyde.[44]

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[39] MARX, *supra* note 9, at 101.

[40] JÜRGEN HABERMAS, II THEORIE DES KOMMUNIKATIVEN HANDELNS 228 (1981); ARMIN NASSEHI, DER SOZIOLOGISCHE DISKURS DER MODERNE 126-127 (2006).

[41] KARL MARX, *Zur Judenfrage*, *in* I MARX-ENGELS STUDIENAUSGABE 31-60 (1966).

[42] Peter Bofinger, Jürgen Habermas & Julian Nida-Rümelin, *Kurswechsel für Europa. Einspruch gegen die Fassadendemokratie*, FRANKFURTER ALLGEMEINE ZEITUNG (August 3, 2012), *available at* http://www.faz.net/aktuell/feuilleton/debatten/europas-zukunft/kurswechsel-fuer-europa-einspruch-gegen-die-fassadendemokratie-11842820.html.

[43] Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 113, 122 (2005).

[44] The functionalist language of *reflection*, *copy*, *projection*, *recursion*, *system*, *code*, *program*, and so on is philosophically problematic and philosophically much less advanced than those terms use in sociology. It still depends on the optical metaphor (*see, e.g.*, RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1980)). In comparison the language of *reciprocal, intersubjective and interactive understanding*, of *reciprocal role-taking* and *generalizing significant others* that constitutes the *social* relation between Dr. Jekyll and Mr. Hyde, is much more

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Mr. Hyde cannot just get rid of the revolutionary established normative constraints of the Kantian constitutional mindset because he must interact and argue with Dr. Jekyll from within a *shared* holistic frame of inferential, normative and discursive *relations*.[45]. Mr. Hyde has to cope with Dr. Jekyll whether he wants to or not. They are becoming effective as his own *existing contradiction* ("daseiender Widerspruch").[46] Here we can see that – in accordance with the reading of negative dialectical logic by Marcuse, Adorno or Theunissen – Hegel's existing notion only exits as contradiction and conflict within and against that which exists, and that the existing Notion *only as* existing contradiction can become the driving force of normative learning, and evolutionary as well as revolutionary progress.

This, in fact, is the reason why *normative learning* – different from Luhmann – *does not end with the hangover after the revolutionary job has been done*. A good example is the global popular protest against the Iraq War of 2003. In his essay "What Should International Lawyers Learn from Karl Marx?" Koskenniemi implicitly argued that the cleavage between the international lawyers from the US-State Department and elsewhere (who justified the intervention with legal expertise) and the global peoples' lound "No!" indicates a learning process that was anticipated more than 150 years ago by Karl Marx when he criticised the bourgeois reduction of national constitutional law from *socially related* human emancipation to *de-socialized and functionally specialized* political emancipation. In taking the "emancipatory promise" of international law serious the "peoples" – *We, the Peoples of the United Nations* (Preamble UN) – "condemned" the American war of aggression univocally as a "universal violation" of international law. The *socially related* constituent voice of the peoples silenced the *functionally specialized*, constituted voices of political leaders, of "diplomats and academics" – demanding the inclusion of all human beings in international legal discourse and decision-making, to enable a radical and democratic reinterpretation of international law.[47] The normative learning process here was twofold: one from *politically* specialized to socially related *human emancipation*, and one from *national* to *transnational* constitutional law (and constituent power).

C. Combining Two Finish Mindsets

In my second part I will try to combine the Kantian mindset of the Finish jurist Martti Koskenniemi with the managerial mindset of another Finish jurist, Kaarlo Tuori. I will apply the combined lessons they have to teach to the evolution of European constitutional law.

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compatible with modern pragmatist and linguistic philosophy (*see* ERNST TUGENDHAT, SELBSTBEWUSSTSEIN UND SELBSTBESTIMMUNG (1979)).

[45] *See* ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING & DISCURSIVE COMMITMENT (1994).

[46] HEGEL, *supra* note 34, at 59.

[47] Koskenniemi, *supra* note 5, 245. *See* MARX, *supra* note 41.

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Tuori has proposed a highly plausible schema of a general and incremental development of a plurality of European constitutions.[48] Koskenniemi constructs a non-dialectical, unbridgeable, and therefore too fundamentalist opposition between the two mindsets that only allows for a gestalt switch between closed linguistic universes (and not for contradictory *but inferential* relations such as in Hegel's normative logic). As a complement to Koskenniemi's position, Tuori neglects and represses the action of the Kantian mindset within the managerial praxis, and in particular he ignores the Kantian constitutional and cosmopolitan mindset that prevailed at the outset of the European unification process. I will try to combine both in a way that avoids the blind spots with respect to the other's position.

The European Union was founded on the battle fields of the Second World War.[49] It was founded by the *Kantian constitutional mindset* of peoples and social classes who *emancipated* themselves from fascist rule over Europe, or at least participated in their emancipation (which quickly became new dependence on the two super-powers). The battles and struggles were fought in the name of comprehensive democracy and social self-determination. Liberating violence was transformed into the constituent power of a *new foundation* and the unification of Europe.[50] It was the *new foundation* that replaced the classical *Peace Treaty* that was no longer possible after the European and Asian atrocities of the former Axis Powers.

European unification did not begin with the Treaties of Paris and Rome in 1951 and 1957, and it did not begin with the *Method Monet*. European unification began with the *new* constitutions that all the founding members (France, Belgium, Italy, Luxemburg, the Netherlands, and West-Germany) gave themselves between 1944 and 1948.[51] The constitutions of all of the founding members strongly emphasized human rights and *opened* the rejuvenated and liberated post-war states (explicitly or implicitly) *to*

[48] Kaarlo Tuori, *The Many Constitutions of Europe*, *in* THE MANY CONSTITUTIONS OF EUROPE 3 (Kaarlo Tuori & Suvi Sankari eds., 2010).

[49] I use European Union as a notion that covers both the former European Communities and the present European Union.

[50] *See* Somek, *supra* note 7. Even the present President of the European Commission, José Manuel Barroso of Portugal, owes his job to a late effect of the emancipation of Europe from fascism.

[51] Chris Thornhill, A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Persppective 327-71 (2011); JOHN ERIK FOSSUM & AUGUSTÍN JOSÉ MENÉNDEZ, THE CONSTITUTION'S GIFT – A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION (2011). On the two basic ideas of a constitution (power-foundiung vs. power-limiting), *see* HAUKE BRUNKHORST, SOLIDARITY – FROM CIVIC FRIENDSHIP TO THE GLOBAL LEGAL COMMUNITY 67 (2005); *Christoph Möllers*, Pouvoir Constituant – Constitution – Constitutionalization, in Developing a Constitution for European 131 (Erik O. Eriksen *et al.* eds., 2004).

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international law.[52] They were committed to the egalitarian project of mass-democracy and social welfare. Even the programmes of conservative parties advocated ideas of democratic socialism. Already in 1941, in the Manifesto of Ventone,[53] the communist or socialist freedom fighters Spinelli, Rossi and Colorn outlined the project of a European federal social welfare state that preceded the later foundation of the national welfare states.[54] At the end of the war, and immediately after the war, there was strong intellectual support for European unification and the project of a United States of Europe. This notion spanned the full spectrum of European elites, from Churchill to Arendt and Sartre to Helmut Kohl.

Finally, and most crucially for the foundation of the European Union, all founding members of the European Communities *bound themselves by the constituent powers of their peoples to the project of European Unification*. Only Luxemburg had no explicit commitment to Europe in its constitution but their constitutional court decided that it was implicit. With this in mind Fossum and Menendez appropriately speak of Europe's *synthetic constitutional moment*.[55]

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[52] For the German case, which was not exceptional, *see* RAINER WAHL, VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUNG (2003); UDO DI FABIO, DAS RECHT OFFENER STAATEN. GRUNDLINIEN EINER STAATS- UND RECHTSTHEORIE (1998).

[53] Ernesto Rossi & Altieri Spinelli, *Manifesto von Ventotene* (August, 1941), available at http://www.europarl.europa.eu/brussels/website/media/Basis/Geschichte/bis1950/Pdf/Manifest_Ventotene.pdf (Das Manifest bringt "den Kern einer Zeitdiagnose zum Ausdruck, die damals die meisten politischen Kräfte des antifaschistischen Widerstands teilten." Kolja Möller, Die Europäische Sozialunion (April 24, 2012), available at http://www.europa-in-bremen.de/fileadmin/user_upload/henmue/pdfs/EUDEinladung20120202_Moeller.pdf. *But see* ALTIERO SPINELLI: FROM VENTOTENE TO THE EUROPEAN CONSTITUTION (Menéndez ed., Arena Report 1/2007).

[54] *But see* Möller, *supra* note 53. Lutz Leisering hat ähnliche Beobachtungen generalisiert und gezeigt, daß der *international welfarism* der Entstehung des modernen Wohlfahrtsstaats vorhergegangen ist. *See* Lutz Leisering, *Gibt es einen Weltwohlfahrtsstaat?*, *in* WELTSTAAT UND WELTSTAATLICHKEIT 185 (Mathias Albert & Rudolf Stichweh eds., 2007). *But see* Ulrike Davy, *The Rise of the Global "Social" – Origins and Transformations of Social Rights under UN Human Rights Law*, 3 INTERNATIONAL JOURNAL OF SOCIAL QUALITY (2013). Die Bindung des Verfassungsgedankens an den Staat ist neueren Datums, unterschlägt aber die weit zurückreichende und auch noch für die Herausbildung von protodemokratischem National- (19. Jhd.) und demokratischem Sozialstaat (20. Jhd.) konstitutive Co-Evolution von kosmopolitischer und nationaler Konstitutionalisierung, wie neuere Studien zeigen. *See* Thornhill, *supra* note 51; Brunkhorst, *The Co-evolution of Cosmopolitan and National Statehood – Preliminary Theoretical Considerations on the Historical Evolution of Constitutionalism*, 47 COOPERATION AND CONFLICT 176 (2012); BRUNKHORST, *supra* note 17.

[55] FOSSUM & MENÉNDEZ, *supra* note 51, at 80, 175. The only instance of a constitution of a founding member that made no declaration about Europe, the Constitution of Luxemburg, is of itself a revealing case. In this case, the Luxemburg *Conseil d'Êtat* decided in 1952 that the Constitution implicitly committed the representatives of the people to join the European Coal and Steel Community, and to strive for further European unification. It is argued that, even if the constitution of Luxemburg did not contain anything vaguely resembling a proto-European clause, the *Conseil d'Êtat* constructed its fundamental law along very similar lines. When reviewing the constitutionality of the Treaty establishing the Coal and Steel Community, the *Conseil* affirmed that Luxembourg, not only could, but also should, renounce certain sovereign powers if the public good so required. *See* Report on the 1952 judgment of the *Conseil d'Êtat*.

All of this suggests that, from the very outset, the European Union was *not* founded as an international association of states. On the contrary, it was – speaking in legal terms – founded as a *community of peoples* who legitimated the project of European unification *directly* and *democratically* through their combined, but still national, constituent powers. At the same time and with the same founding act, these peoples, acting in plural, constituted a single *European citizenship*. Therefore, from the very beginning, the Treaties were not just intergovernmental. They were *legal documents with a constitutional quality*. But the long Katzenjammer of gradual incrementalism and the *Method Monet* followed in the wake of this revolutionary achievment. Following Tuori, the evolutionary narrative is structured by a sequence of evolutionary stages.

I. Stage I

The Kantian mindset of emancipation from fascism was repressed by the rhetoric of peace, reconciliation and anti-communism. The *first stage* of the constitutional evolution was triggered by the invention of the *economic constitution* of Europe that consisted in the *structural coupling of law and economics*.[56] In 1957 treaty negotiations German Ordoliberals – then strongly backed by the conservative American government – took the chance to realize their old dream of a mere *technical constitution without government and legislator*.[57] The economic constitution was centered in competition law that was to be watched over by the Court. If we look back from today, the beheading of the legislative power that once produced the French Revolution, exactly represented the overlapping consensus between (otherwise very different) German-Austrian Ordoliberals from the Freiburg-school and the later Neoliberals from the Chicago-school of economics. In the words of Ernst-Joachim Mestmäcker, the leading legal theorist of the Freiburg-school, "The most important powers in economic concerns should be reserved for the judiciary, and taken away from legislation and government."[58]

[56] German Ordoliberals already in the early 1930[s] had "hijacked" the idea of an economic constitution from the political left, from Hugo Sinzheimer and Franz Neumann. *See* Kaarlo Tuori, *Multi-Dimensionality of European Constitutionalism: The Many Constitutions of Europe*, *in* THE MANY CONSTITUTIONS OF EUROPE 3, 16 (Kaarlo Tuori ed., 2010). The hijacking was organized by Franz Böhm.

[57] *See* Wolfgang Streeck, *Zum Verhältnis von sozialer Gerechtigkeit und Marktgerechtigkeit* 8 (unpublished e-manuscript of a lecture, Verona September 20, 2012).

[58] *Ernst-Joachim Mestmäcker*, Einführung, in Wettbewerb und Monopolrecht 5, 9 (Franz Böhm ed.) (author's translation). The same argument seems to fit the present crisis. *See* Mestmäcker, *Ordnungspolitische Grundlagen einer politischen Union*, FRANKFURTER ALLGEMEINE ZEITUNG (Nov. 9, 2012), at 12. In the same way Milton Friedman and the Chicago School argues that the main threat to political and economic freedom "arises out of democratic politics" and must be "defeated by political action." *See* Gabriel A. Amond, *Capitalism and Democracy*, 24 POLITICAL SCIENCE AND POLITICS 467 (September 1991).

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Retrospectively the program of economic constitutionalization appears as an immunization of free market capitalism against democratic control in two great steps. First, Ordoliberals took Europe, then Neoliberals took the rest of the world. First, the transnational constitution of Europe had to be conquered, then the transnational constitution of the WTO was detached from national political constitutions. The basic constitutional idea that finally unites Ordo- *and* Neoliberalism is the idea that law should be changed from functioning as the *immunity system of society* into law that functions as the *immunity system of transnational capitalism*, triggering an autoimmune disease by declaring civil war against the rest of the societal body and its legislative organs.[59] The immune system of the many stakeholders and their clients should become an immune system of the few shareholders.[60] Hans Kelsen was the first who made the democratically catastrophic, legal and constitutional implications of Ordo- and Neoliberalism evident in his 1954 critique of Hayek.[61] It is here (by the way) where Luhmann's fear of a loss of freedom through de-differentiation and Habermas' fear of a loss of freedom through colonization of the life-world coincide. In 1957 Mr. Hyde had won the first round against Dr. Jekyll. But, until the 1980[s] the national social welfare regimes were strong enough to cope with the slowly emerging, transnational *liberalization machinery* of Marx's "peaceful competitive struggle." A quick knock out of Dr. Jekyll seemed impossible.

II. Stage II

The early ordoliberal hegemony was not without contestation. Mr. Hyde had to cope with the copy of Dr. Jekyll within himself. Caused by a growth of legal conflicts over newly created European law, the *second stage* of European constitutionalization was reached. It consisted in the establishment of a *rule-of-law constitution* (or rights-constitution) that – in a reflexive manner – *coupled law and rights structurally*.[62] The growth of European norms and legal conflicts urged European *and* national courts to construct, apply and implement *European rights*, to give European law *direct effect*, and to give force to *European*

[59] Thanks to *Willis Guerra Filho* for this hint (in a discussion on a conference "Problemas Juridicos e Constitucionais da Sociedale Mundial," Brasilia, September 18, 2013). For comparative points of view (investment law, Latin-America), *see* David Schneidermann, *Compensating for Democracy's "Defects": The Case of International Investment Law* (paper given at the Workshop Conflict-Law Constituionalism v. Authoritarian Managerialism, Loccum October 7, 2013).

[60] *See* COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM (2011); Harm Scheppel, *Free Movement of Capital and so called "Finacialism"* (paper given at the Workshop Conflict-Law Constitutionalism v. Authoritarian Managerialism, Loccum October 7, 2013).

[61] HANS KELSEN, *Demokratie und Sozialismus*, *in* DEMOKRATIE UND SOZIALISMUS – AUSGEWÄHLTE AUFSÄTZE 170 (Norbert Leser ed.,). For an old but still brillant analysis and representation of Kelsens position, *see* Peter Römer, *Die reine Rechtslehre Hans Kelsens als Ideologie und Ideologiekritik*, 11 POLITISCHE VIERTELJAHRESSCHRIFT 579 (1971).

[62] Tuori, *supra* note 56 (discussing a *juridical constitution* and the structural coupling of law and law).

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citizenship. At the end of this process European and national law became one single (albeit fragmented or pluralized) legal order.[63]

The counter-hegemonic Kantian point here is that *subjective rights* no longer can be normatively neutralized by law that is technical, such as competition law, and all the other branches of law and economics. To implement European subjective rights for mere economic purposes of private autonomy it was necessary – at least counterfactually and anticipatorily – to construct a full-fledged European citizenship. There is no private autonomy without public autonomy, which Rousseau rightly argued. The opposite view was the great illusion of classical, ordo- and neoliberalism.[64] In a famous essay on Eros and the civilization of European citizenship Joseph Weiler once argued that "you could create rights and afford judicial remedies to slaves" because "the ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen."[65] I think, Weiler is wrong, even if there are many empirical cases of rights bearers who are denied full citizenship. He is wrong because once I go to a *public* court I must – if I want it or not – participate in Kelsen's judicial "concretization" of the respective legal norms. That means that I must participate in a procedure of creating and changing law. For this purpose I must make myself an active citizen. Therefore, the legislative power of the people does not end once a statuary law is ratified by parliament, and therefore on every level of concretization there is need of direct democratic legitimization and further public contestation. Christoph Möllers rightly speaks of *individual legitimization* through legal actions that are *part and parcel of the whole procedure of democratic legitimization*. Thus, the *existing notion* of European rights *contradicts* (as an "existing contradiction") the status of slavery *once the slave makes use of them* (if he or she has any *right*, however fragile and partial it is, such as the right of Dred Scott to go to court in Missouri in 1847, and who's case became one of the triggers of the Civil War).

Thus, the European Court in *Van Gent en Loos* rightly interpreted the Treaties as an "agreement between the peoples of Europe that binds their governments and not simply as an agreement between the governments that binds the peoples."[66] The construction of

[63] TANJA HITZEL-CASSAGNES, ENTGRENZUNG DES VERFASSUNGSBEGRIFFS. EINE INSTITUTIONENTHEORETISCHE REKONSTRUKTION (2012); *see* Karen J. Alter, *The European Court's Political Power*, 19(3) WEST EUROPEAN POLITICS 458 (1996); Karen J. Alter, *Who are the Masters of the Treaty?: European Governments and the European Court of Justice*, 52 INTERNATIONAL ORGANIZATION 121 (1998). On the perpective dependence of evaluating a legal system as fragmented or pluralized, *see* Christoph Möller, *Fragmentierung als Demokratieproblem?*, *in* STRUKTURFRAGEN DER EUROPÄISCHEN UNION 150 (Claudio Franzius, Meyer, Franz C. Meyer, Jürgen Neyer eds., 2010).

[64] See MAUS, *supra* note 32; JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG (1997).

[65] J. H. H. Weiler, *To be a European citizen – Eros and civilisation*, 4 JOURNAL OF EUROPEAN PUBLIC POLICY 495, 503 (1997).

[66] EUROPEAN UNION LAW, 5677 (Damian Chalmers, Gareth Davies, Giorgio Monti eds., 2010); *see* CLAUDIO FRANZIUS, RECHT UND POLITIK IN DER TRANSNATIONALEN KONSTELLATION 87 (2012); Claudio Franzius, *Besprechung von "Habermas,*

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European citizenship by the Court, thus, must be *derived from the synthetic constituent power of the peoples of Europe*. This brings the Kantian mindset back in for a simple reason. Once European rights and citizenship are created, a single people can no longer quit membership alone, out of its sovereign will. Not only must all other peoples, but also the European citizens as a whole must have a say in such a case. If Denmark quits the Union, then I (as a German and European citizen) lose my European rights in Denmark. This would include active citizenship rights such as voting for the Danish contingent of the EU-Parliament (if I live in Denmark). Therefore today the Treaty of Lisbon allows withdrawl of a nation only due to European procedural rules.[67]

Habermas rightly has called this a *civilization of state power* by overcoming state-sovereignty and individualizing popular sovereignty.[68] Thus, there is not only *existing justice of the national state* at stake once it comes to a transfer of sovereign rights from the national state to the European Union. There is also the already *existing justice of the European Union* at stake once it comes to a return of powers of the Union to the national state. There is not only a requirement of solidarity *between national states and their different demoi* but also a requirement of solidarity *between the individual European citizens as bearers of European rights*.[69] This could be called the European cosmopolitan moment.

What is so interesting with the two judgments (*van Gent en Loos* 1963 and *Costa* 1964) that marked the beginning of European citizenship and the direct effect and European law supremacy, is that the construction of citizenship clearly was progressive and democratic, even if the specific decisions were in favor of big money and in the interest of the economic ruling class. So, because of the construction of EU-citizenship and European civil rights it seems that the second round goes to Dr. Jekyll. The growing audience of European lawyers applauds. The two decisions of the Court (*van Gent en Loos* in 1963) and (*Costa* in 1964) emphatically have been described by jurists as "the declaration of independence of Community law."[70] Maybe a bit premautrely – because as long as there was no full-fledged political constitution of Europe, active citizenship remained virtual and arbitrary. Individual, or better, *private legitimization without public legitimization* remains structurally incomplete on the level of the rule-of-law constitution. Round two between Dr. Jekyll and Mr. Hyde is drawn, and the hegemony of the economic constitution prevails.

Die Verfassung Europas", 52 DER STAAT 317, 318 (2013); CLAUDIO FRANZIUS & ULRICH K. PREUß, DIE ZUKUNFT DER EUROPÄISCHEN DEMOKRATIE 16 (2012).

[67] The example is from BRUNKHORST, *supra* note 51, at 168.

[68] JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS – EIN ESSAY57 (2011).

[69] *See Sabine Frerichs*, *Gold or Guilt? Reconstructing the Moral Economy of Debt* (paper given at the Workshop Conflict-Law Constituionalism v. Authoritarian Managerialism, Loccum October 7, 2013).

[70] Tuori, *supra* note 56.

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III. Stage III and Crisis

We have arrived at the third round with impressive progress towards *European parliamentarization*.[71] In the *third stage* of constitutionalization the *political constitution* couples *law and politics* structurally, and even the beginnings of a European *social-welfare* and *security constitution* – a *fourth* and *fifth stage* of constitutionalization – can now be observed.[72] Again Dr. Jekyll is earnestly contesting the hegemony of the economic constitution and its liberalization machinery. The Czech Constitutional Court, in its judgment on the Lisbon-Treaty, very properly stated that the *European Union today forms a complete and gapless system of democratic legitimization*.[73] The Kantian mindset of comprehensive democracy now is legally articulated in many single articles and legal norms of primary and secondary European law, such as the famous Art. 6 of the Treaty of Maastricht, or the Articles 9-12 of the Lisbon Treaty. Von Bogdandy has correctly argued that these Articles contain the democratic substance of the Lisbon Treaty as well as a *cosmopolitan project*. I would not argue that they are "developing the democratic credentials not just of the EU, but of public authority beyond the state in general," as von Bogdandy has. He claims that this state of affairs shows "what lessons can be learnt for international organizations."[74] If one changes from this international lawyer's participant perspective, which is not completely free from Eurocentrism, to an evolutionary perspective, it is possible to argue that Articles 9-12 are not so much *credentials* and *lessons* for other global regions but manifestations of an *evolutionary universal* or an *evolutionary advance* (such as the brain, the eye, bureaucracy or constitutions) that probably has been realized elsewhere, and not only in Europe, and already long ago. An example might be the constitutional order that was established after the Papal Revolution of the 11th Century. Be that as it may, it seems as if the third round has been won by Dr. Jekyll.

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[71] *See* Phillip Dann, *Looking Through the Federal Lens: The Semi-Parliamentary Democracy of the EU*, 5 JEAN-MONNET WORKING PAPER (2002); Jürgen Bast, *Europäische Gesetzgebung – Fünf Stationen in der Verfassungsentwicklung der EU*, *IN* STRUKTURFRAGEN DER EUROPÄISCHEN UNION, *supra* note 63, at 173.

[72] *See* Tuori, *supra* note 56; SONJA BUCKEL, 'WELCOME TO EUROPE' – JURIDISCHE AUSEINANDERSETZUNGEN UM DAS STAATSPROJEKT Europa (2013).

[73] Isabelle Ley, *Brünn betreibt die Parlamentarisierung des Primärrechts. Anmerkungen zum zweiten Urteil des tschechischen Verfassungsgerichtshofs zum Vertrag von Lissabon vom 3.11.2009*, 65 JURISTEN-ZEITUNG 170 (2010).

[74] Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, 23 EUROPEAN JOURNAL OF INTERNATIONAL LAW 315, 317, 321-25, 333 (2012). With respect of the Maastricht-Amsterdam Treaty, and in particular the Constitutional Treaty that failed in 2005 but to a large extent is identical with the Lisbon Treaty, *see* Christian Callies, *Das Demokratieprinzip im Europäischen Staaten- und Verfassungsverbund*, in Internationale Gemeinschaft und Menschenrechte 399, 402-404 (Jürgen Bröhmer et al. eds., 2005).

Unfortunately, just at the moment when the hard issues of unequal distribution of wealth, unequal life conditions, and unequal life-chances have came to the fore, the bodyguards of Dr. Jekyll – the European Council, the German hegemon, and the hastily established Troika – have reached for their guns. The economic state of siege has been declared.[75] This is the moment in Koskeinnemi's historic struggle that looks like a technical knockout in Hyde's advantage. And the winner takes all. What happened? The economic constitution (stage I) was at the beginning of a long, and for a long time *democratically open process* of a transformation from *nationally restricted democratic class struggle*[76] to Marx's "*peaceful competitive struggle*" *between nations* for location advantages such as low taxes, low wages, and flexible jobs.[77] From the beginning there was ordo-, then neoliberal hegemony, but it was challenged by counter-hegemonic powers that constitutionalized more and more Kantian legal constraints, organs and competencies. Europe's liberalization machinery was one of many alternative programs. This trajectory changed, first after the global epochal watershed of the 1980s and *finally* after the unique introduction of a *common currency without legislator and government*. Especially this last achievement reinforced the ECB's priority on price-stability over pursuit of full-employment.[78] This was the best thing that could have happened to the transnational social class of investors, bankers and big business. They benefited from a bad political compromise that none of the political actors of the early 1990s ever wanted.[79]

In the effect democratically organized, national class struggle (based on strong trade unions and strong parliaments) was replaced with the international struggle between nations (based on weak and disempowered trade unions, and weak and disempowered parliaments). It has again become evident that there were two (and only two) generalizing mechanisms that enabled the establishment of a democratically *controlled* market economy in parts of the world of national states after World War II. For the first time in history egalitarian mass-democracy – now called *democratic* (meaning democratically controlled) *capitalism* – was successfully established. These generalizing mechanisms were,

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[75] See *Mung-Sung Kuo*, *The Moment of Schmittian Truth: Conceiving of the State of Exception in Global Governance in the Waken of the Cyprus Bailout Crisis* (paper given at the Workshop Conflict-Law Constitutionalism v. Authoritarian Managerialism, Loccum October 7, 2013).

[76] WALTER KORPI, THE DEMOCRATIC CLASS STRUGGLE (1983).

[77] Claus Offe*, Europe Entrapped – Does the EU have the Political Capacity to Overcome its Current Crisis?* (unpublished manuscript 2013).

[78] Wolfgang Streek, *Zum Verhältnis von sozialer Gerechtigkeit und Marktgerechtigkeit* (unpublished manuscript of a Lecture Verona Sept. 20, 2012). *See* Kerry Rittich, *Fragmented Work: Informality, Uneven Austerity and an Expanded Law of Work* (paper given at the Workshop Conflict-Law Constitutionalism v. Authoritarian Managerialism, Loccum October 7, 2013).

[79] Henrik Enderlein, *Grenzen der europäischen Integration? Herausforderungen an Recht und Politik*, DFG-RUNDGESPRÄCH IN ZUSAMMENARBEIT MIT DER FRIEDRICH-EBERT-STIFTUNG BERLIN (unpublished manuscript November 25, 2011).

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roughly speaking, *strong unions* and *strong parliaments*, backing each other reciprocally. They are no longer. What we now have is weak unions and weak parliaments within a system of *capitalist democracy*, and that means capitalist controlled democracy, or democracy that is "conforms to the market" and therefore rightly reduced to Merkel's "parliamentary participation." The neo-liberal deconstruction of unions and parliaments has reduced the *binding power of solidarity* to a level that is best expressed by an ironic line from one of Madonna's songs: "Hold me like your money!" A European sentiment, indeed! After the transformation of the national states "into debt-collecting agencies on behalf of a global oligarchy of investors, compared to which C. Wright Mills's 'power elite' appears a shining example of liberal pluralism,"[80] the race to the bottom became unavoidable, and the cold war between the Northern and the Southern States of the Union began. The austerity regime with constitutionalized debt breaks became the prerogative constitution of Europe.[81] The European constitutional situation now resembles that in of the Monthy Python sketch: "If you have guests, you can make games. All guests are divided in two teams, A and B. And A are the winners. (…) Well you can make it more complicated if you want to." The younger generation in the so-called crisis countries knows the team to which it has been assigned. The unemployment numbers and devastated education budgets make it pretty straightforward. The problem of democracy and cosmopolitanism today is how to make it more complicated again. But for this we need a renewal *and* transnationalization of democratic class struggle, no matter how unlikely that is. There will be no democratic cosmopolitanism without a turn from international economic differences to transnational social differences, from national identity politics to transnational redistributive politics.[82]

At least a first step has been taken. The cold war between North and South, between lost and found, has made the emergence of a European mass-public unavoidable.[83] It already exists. And that will bring democratic alternatives back in, such as the alternative between *keeping the Euro with government and legislator* vs. *returning to national currencies*. One need not be a prophet to predict that, at the price of a comprehensive and deep crisis of legitimization, such a decision can no longer be made behind closed doors, bypassing the

[80] Wolfgang Streeck, *Crises of Democratic Capitalism*, 51 NEW LEFT REVIEW 71 (2011). As a consequence, popular sovereignty has been fragmented and marginalized, beyond and within the national state, *see* THORE PRIEN, FRAGMENTIERTE VOLKSSOUVERÄNITÄT (2010).

[81] *See* Wolfgang Streek & Daniel Mertens*, Politik im Defizit. Austerität als fiskalpolitisches Regime*, MPIfG Discussion Papers 10/5, Köln 2010.

[82] But now a European public exists, and we can observe first changes of opinion that are going in the direction of the following last sentence. *See* Paul Statham & Hans-Jörg Trenz, *Understanding the Mechanisms of EU Politicization: Lessons from the Euro-zone Crisis* (electronic paper, Kopenhagen 2013).

[83] For early observations, *see* Hauke Brunkhorst, *Zwischen internationaler Klassenherrschaft und egalitärer Konstitutionalisierung – Europas zweite Chance*, *in* ANARCHIE DER KOMMUNIKATIVEN FREIHEIT 32-25 (2007).

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European public sphere. In such a case the national peoples *and* the European citizens must have a say, and that means voice and vote.

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