

**ON THE POLITICAL
ECONOMY OF THE
TRANSNATIONALIZATION OF
POPULAR SOVEREIGNTY**
// SOBRE A ECONOMIA POLÍTICA
DA TRANSNACIONALIZAÇÃO DA
SOBERANIA POPULAR

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>> **ABSTRACT // RESUMO**

Transnationalization of popular sovereignty is Jürgen Habermas' answer to the "postnational constellation". His position of a supranational constitutionalization has been criticized from the perspective of popular sovereignty by political theorist Ingeborg Maus. Although from the view of democratic theory of highest interest, this debate has so far focused primarily on articulating prospective institutional and procedural designs or criticizing existing ones but has neglected to sufficiently address the problem of effective democratic access to the economic sphere. The aim of this paper is to strengthen popular sovereignty theory by confronting the two competing positions with insights from political economy on the background of the "new constitutionalism". We show that Maus' idea to cut back "new constitutionalism" to the form of international agreements without supranational institutions runs into the same problems of equality between states that Habermas faces with his idea of "global governance without government". We show also that a further unification of Europe as envisioned by Habermas is undermined by structural obstacles of capitalist economy that Habermas does not take into account. Therefore, both models, although contrary positions, share similar problems. It is our result that popular sovereignty theory must counter legitimacy and socio-economic challenges simultaneously. // A transnacionalização da soberania popular é a resposta de Jürgen Habermas para o fenômeno da "constelação pós-nacional". A posição de Habermas sobre a constitucionalização supranacional foi criticada, sob a perspectiva da soberania popular, pelo teórico da ciência política Ingeborg Maus. Até agora, na visão da "teoria democrática de maior interesse" esse debate se manteve focado em articular propostas de designs institucionais ou procedimentais, ou em criticar articulações já existentes. No entanto, a discussão acabou negligenciando o aspecto fundamental do acesso democrático efetivo à esfera econômica. Esse artigo tem por objetivo fortalecer a teoria da soberania popular ao tratar das duas posições concorrentes, sob a visão da economia política, em um contexto do "Novo Constitucionalismo". Mostramos que a ideia de Maus para restringir o "Novo Constitucionalismo" aos acordos internacionais, sem instituições supranacionais, acaba se deparando com as mesmas questões de igualdade entre Estados com que Habermas lida em seu projeto de "Um governo global sem governante". Nós mostramos também, que uma unificação mais profunda da Europa, como Habermas idealizou, acaba enfraquecida por obstáculos estruturais da Economia capitalista, que o autor não leva em conta. Portanto, os dois modelos, mesmo que em posições contrárias, possuem problemas em comum. A conclusão que obtivemos é a de que a teoria da soberania popular precisa opor, ao mesmo tempo, desafios de cunho "legitimador" e "sócio-econômicos".

>> KEYWORDS // PALAVRAS-CHAVE

Political Economics; Transnationalization; Popular Sovereignty; Jürgen Habermas; Democracy. // Economia Política; Transnacionalização; Soberania Popular; Jürgen Habermas; Democracia.

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>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

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1. THE CHALLENGE TO POPULAR SOVEREIGNTY THEORY

Popular sovereignty theory represents the revolutionary beginning of our democracies in the 18th century and it is normatively valid until today. It is a cornerstone of modernity because it claims that the political and the social order are subordinated to the principle of political equality. For two decades, popular sovereignty theory was engaged in finding institutional settings that can cope with the legitimacy need for political cooperation beyond the nation state as a reaction to globalization. Today popular sovereignty theory has to face the question whether its institutional models of a transnationalization of popular sovereignty can be put into practice on the background of the existing global economic structure and allow for a democratic intervention in these structures that abolish the principle of political equality. Only if popular sovereign theory can address this challenge, it will be able to prove its validity after 200 years of its revolutionary beginning.

Popular sovereignty means the competence of the people, i.e., all later subjects of the law, to make that law — be it constitutional or ordinary law.¹ The concept of the power of the people to give themselves a constitution as a written document that determines the further procedures of democratic law production makes it the antagonist of liberal theories. They determine that competence of the popular will in the limits of natural individual rights while popular sovereignty sees these natural rights as rights that have to become positive law — which can be expressed only by the popular will². Therefore, we hold popular sovereignty theory to be the only democratic theory that can give an appropriate answer to the problem of the violent force that is expressed in law. If someone has given his or her consent to the law that is reinforced violently, then her or him is done no harm. This presupposes strong egalitarianism in lawmaking and a hierarchic order of the branches of the state with the legislative body as only accepted source of law on top. Additionally, popular sovereignty theory proclaims the omnipotence of the legislative body to intervene in social and economic structures.

But the assumption that only the people or its representatives are legitimized lawmakers poses a serious challenge for theories of popular sovereignty when it comes to global law. While liberal theories with its orientation on human rights and rather thin procedural requirements can accept juridical law formation even on supranational levels, popular sovereignty theory has to find a way to track the chain of legitimation³ from the popular will formulated in the national parliaments to the emerging laws of the supranational level. Since Habermas diagnosed the “postnational constellation” he has done this by seeking for ways of a “transnationalization of popular sovereignty.”⁴ At the same time his Frankfurt colleague Ingeborg Maus is challenging all attempts of a supranational constitutionalization from the perspective of popular sovereignty.⁵ But this debate has so far focused primarily on articulating prospective institutional and procedural designs or criticizing existing ones and has neglected to sufficiently address the problem of effective democratic access to the economic sphere

under existing conditions. In Habermas' recent debate with Wolfgang Streeck⁶ about the future of the Euro it became obvious, that precisely this form of globally unleashed capitalism has not yet been granted sufficient attention and analytical efforts.⁷ The main challenge popular sovereignty theory faces today, is to take the economic conditions at hand into account.

What we will do in the following is to confront the two competing positions of a transnationalization of popular sovereignty with insights from political economy. We begin our argument with a description of the current global legal order which accentuates its most significant characteristics as a “new constitutionalism” whose core lies in limiting the power of democratic politics to shape policy. This analysis includes the current form of legal constitution of global society in its political interconnections with the economy (II.). From this perspective, the problem with which popular sovereignty theory is confronted today comes into especially clear focus. We are presenting Maus's strategy of “democratic anti-constitutionalism” (III.) and Habermas' strategy of “progressive constitutionalization” (V.). Then we examine each of their scenarios in terms of its viability in light of the insights gained from critical political economy (IV. and VI.). We show that Maus' idea to cut back “new constitutionalism” to the form of international agreements without supranational institutions runs into the same problems of equality between states that Habermas faces with his idea of a “weltinnenpolitik” negotiated between global actors. As it is well known Habermas' model rests especially on the development of the European Union to a supranational actor with strong political institutions.⁸ We show also that a further unification of Europe is undermined for economic reasons that Habermas does not take into account (VII.). Therefore, both models, although contrary positions, share similar problems. This analysis yields the result that a transnationalization of popular sovereignty must counter legitimacy and socioeconomic challenges simultaneously (VIII.).

2. “NEW CONSTITUTIONALISM” AS FRAME OF THE POLITICAL AND ECONOMIC ORDER OF WORLD SOCIETY

Our point of departure in describing the current political-economic order of world society is the interpretation of neoliberally dominated global legal order(s) as “new constitutionalism.”⁹ Steven Gill's neo-Gramscian analysis elucidates why the questions about the democratic form and the political-economic structure of global society are so closely interwoven. He characterizes disciplining neoliberalism as applying pressure on individuals and states, from IMF structural adjustment to transnational private law. The concept of “new constitutionalism” encompasses the complex interlinkages of national, supra-, inter-, and transnational legal orders which often have the effect of legally curtailing democratic and social achievements attained at the national level. Law generated and administered within the “new constitutionalism” is formulated and decided outside any democratic process that is open to scrutiny. As the scope of this law

expands, the potentials of democratic policies, and therefore also of social policies, are diminished to an ever greater extent.

Designating the totality of these first and foremost juridical or at least juridically induced orders as “new constitutionalism” is in the view of popular sovereignty theory absolutely appropriate. The “old” constitutionalism of the 19th century aimed at limiting the power of monarchies by means of a legal constitution in order to permit the structures of bourgeois society to develop.¹⁰ “New constitutionalism” is based upon a comparable intention. Here, too, the purpose is to secure the functional structures of bourgeois society, but its opponent is no longer the rule of the monarchy, but the historically achieved extent of the rule of democracy in the Western welfare states, where it was possible to establish those social advances that are being withdrawn from democratic discussion and decision-making in the framework of the “new constitutionalism” by transferring authority to the transnational level. While the “old” constitutionalism is often interpreted as a necessary transitory stage on the way to the modern democratic constitution,¹¹ popular sovereignty theory, in contrast, considers constitutionalism only as a possible, not a necessary phase of transition.¹² The goal of the “new constitutionalism” is to put this successor of the old in its place, albeit without doing away with its democratic form, thereby producing post-democracy.¹³ Therefore, it is hardly surprising that “new constitutionalism” became a reality beyond the democratic state in supra-national and transnational regimes based on international law.

The most important elements of the “new constitutionalism” are the various levels of transnational free trade orders: the WTO at the global level, and especially NAFTA and the EU at the regional level. Committed to reducing tariffs and regulatory barriers to trade, all three regimes exert legal pressure to deregulate at the national level, which is intensified and made dynamic by the courts’ institutionalized production of law. Above and beyond these free trade commitments, the “new constitutionalism” also includes manifold forms of protections of property used for economic purposes, which are guaranteed by international law. There are, first, the practically multilateralized regime of bilateral investment protection agreements, including the arbitration system¹⁴ essential for its functioning, then the various international legal regimes concerning the global exploitability of “intellectual property,” and thirdly the international commitment to recognizing an autonomous contractual order created by a transnational economic arbitration system. And finally in this context, the imposition of discipline on national monetary and fiscal policies, culminating in “monetary and fiscal constitutions” whose normative center is monetary stability as well as balanced budgets, is of central importance. This imposition of discipline takes place either by means of the direct economic power of the “financial markets” (i.e.: financial capital), previously liberated from regulation, being exerted over states encumbered with debt with the help of the credit and financing conditions of the IMF and the World Bank, and in particular in the European Union by the legal coercion of European law¹⁵ which the Member States of the Eurozone must now internalize in constitutional law as well.¹⁶

3. DEMOCRATIC ANTI-CONSTITUTIONALISM

The counter-strategy of Maus' democratic anticonstitutionalism rests on a comprehensively reconstruction of popular sovereignty as the sole competence of the people (those subject to the law) to generate constitutions and laws.¹⁷ The constitution has the task of placing the exercise of this competence in a hierarchical system of the separation of powers. By means of functional separation of powers, all state power is subordinate to democratic law. The central structural aspect of the sovereignty of the people is a political egalitarianism that lends all individuals subject to the law the same rights in the democratic process and that alone permits the reconciliation of the idea of individual autonomy with the required force of the law. The following additional aspects should be mentioned, which involve a fundamental skepticism concerning disengaging the concept of the constitution from its national frame of reference and to transfer it to supranational forms of government¹⁸ that has itself been critically discussed.¹⁹

Making one's own laws requires that the members of the legislature understand the social world that they desire to shape through their laws, and that they are able to foresee the consequences of their attempts to guide developments by means of the law at least to some degree. It follows from this that the social world must not become too complex; it must still permit appropriate understanding by lawmakers. If democratic theory, not only popular sovereignty theory, does not want to deliver itself up to the systems, it must insist normatively on their being readily comprehensible, in contrast to the view that the complexity of the social world requires that it be left to regulate itself. The expansion of the political framework to an ever higher level, covering an ever greater geographical area, on the other hand, results in an increase in complexity that, in terms of formal democracy, would involve a loss of democratic means of control.

In addition, parliamentary democracies depend on a political-institutional infrastructure that makes it possible for political decisions to seem as if they are at least also the result of discourse in society.²⁰ This infrastructure includes in particular political parties, associations and mass media that must not merely exist in formal terms, but also vigorously fulfill their roles. The latter, however, usually requires a shared language. It must be a generally accessible language, that is, a language in which all strata of society can express themselves, not merely the functional elites who are able to adopt any appropriate *lingua franca*. If such a shared language as the basis for operating the political-institutional infrastructure of democracy is lacking, this automatically strengthens the power of the bureaucratic apparatuses, because in a situation in which the democratic infrastructure is institutionally weak, they can make unimpeded use of their advantages stemming from superior knowledge, lack of transparency and real power to shape policy.²¹

Finally, an untamed public that expresses itself via demonstrations, rallies, actions, initiatives and civil disobedience can only confront identifiable people bearing responsibility in comparatively manageable spaces.²² To date, "politically effective publics" whose discussions can be transformed

into institutionalized democratic decisions exist only in nation-states.²³ Future decision-making centers at the supranational or global level could only be reached by publics of this kind with enormous effort, in spatial terms alone. This forces the untamed public to reduce its concerns drastically. In addition, it is faced with the task of turning itself into a transnational public, which also increases not only its own costs of action in terms of expense and time, but also confronts it with the problem of communicating in different languages.

All these aspects indicate that a democratic constitution beyond the nation-state would have to struggle with a significant loss of democratic quality. William E. Scheuerman²⁴ objected to this finding by stating that these are merely empirical phenomena that do not make the prospects for a democratic constitution of global society look bad in principle, but only temporarily. Overall, all of these technological and societal factors of the ongoing compression of space and time were changeable over time; therefore, the same is true of what can be considered comprehensible or overly complex.²⁵ According to this argument, it cannot be ruled out that a global transnational public is forming, founded upon the internet. Just as little can it be ruled out that language barriers will be overcome in the future.

To us, it seems more likely that the existing transnational class of corporate executives, politicians, and experts will persist,²⁶ and that its members will always be able to keep the majority of the population at arm's length because of their greater bureaucratic and expert technical knowledge and their superior ability to express themselves verbally, which the remainder of the popular will never be able to attain. But we also consider it misguided to diagnose the problem of the complexity of a global government as merely empirical in nature and therefore maybe temporal. Whether or not governing the world is a more complex task than, say, governing France, is surely an empirical question, but it must certainly and always be answered in the affirmative. For there is every indication that citizens are already rather overburdened with democratically governing their capitalist welfare states. Of course, this circumstance is regrettable, and political science dealt extensively with it in the last quarter of the 20th century.²⁷ There is little reason to believe that the difficulties analyzed then have been overcome today. It seems more than likely that such problems are being successfully neglected as theory pushes toward political global governance. In no way can it be viewed as unproblematic from a democratic perspective to exponentially increase complexity once again by establishing a world government.²⁸

It must also be emphasized: At no point do the problems of a democratic constitution beyond the state mentioned here refer back to essentialist prerequisites of democracies, such as a prepolitical national identity which would be fed by, for example, a shared national, cultural or historical fate. The issue here is restricted to the strictly procedural conditions under which democratic constitutions operate.

Inasmuch as this line of argument designates the nation-state as, at the moment, the only functional sphere for democratic procedures, the

dissolution of the “new constitutionalism” can apparently look only like this: In order to regain policy-making opportunities for democratic constitutions at all, the already established forms of “new constitutionalism” must be reduced to forms that make them comprehensible as the expression of democratic self-determination. To this end, the inter-, trans-, and supranational regimes, detached from any democratic basis, must be stripped of their power and their regulatory authority must be returned to the democratic sites where law is produced in nation-states.²⁹ Then, in addition to national conflict of laws,³⁰ it is largely traditional international treaties that come into consideration as instruments for juridifying relations with other countries. The need to be ratified places the latter within the framework of a democratic constitution as a formal legislative act. Although international treaties are legal instruments based on compromise and consensus and negotiated by emissaries, they are formally and without reservation democratically codified law.³¹

Of course, the forms of “new constitutionalism” are also always founded on international treaties, from the global financial institutions such as the IMF and the World Bank through the free trade associations such as the EU and NAFTA to bi- and multilateral investment protection. We believe, however, that declaring these “new constitutionalism” regimes unproblematic in light of their formal democratic basis in parliamentary ratification of their constitutive acts would run counter to Maus’s intention. Any preference for the law of international treaties as a form of codification of relations with other countries must be linked to the requirement that the treaties must not in fact set in operation any constitutionalization beyond national democracy, either.

There would be no room for subjective rights whose content and applicability would be defined by non-state courts and which private individuals could directly exert against existing state law, as is the case in the EU and in the framework of international investment protection, for instance. However, problems of a constitutional character can result not only from international treaties having direct domestic legal effect, but also from their material content. Requirements to refrain from non-tariff barriers to trade, indirect discrimination against or impediments to transnational business activity, for example, are capable of subjecting most state law to juridical control on the part of non-state courts. Such controls, which have equal standing with any existing constitutional limits of democratic law-making and which at times apply at a much deeper level than these limits do, makes the leeway available for democratic shaping of policy smaller, not just in marginal areas, but across the board. In other words, along with the conflict of laws, a non-constitutional law of international treaties in the sense outlined here constitutes the relevant form of shaping law that is compatible with democracy beyond the nation-state.

4. ON THE POLITICAL ECONOMY OF A WORLD SOCIETY FRAGMENTED INTO DEMOCRATIC STATES

How then does the strategy of democratic anti-constitutionalism appear in the light of political economy? In the present context, world-systems theory promises to be particularly enlightening.³² For on the one hand, the theory's central unit of analysis is the world system, understood as an integrated system of highly different states, with its structure and hierarchy the result of a global division of labor for reproduction of global society.³³ That is why world-systems theory can shed much light on material disparities among states, posing a problem for democratic anti-constitutionalism. On the other hand, the nation-state continues to play a prominent role in world-systems theory analyses.³⁴ The dynamics of the world systems are to be explained most of all on the basis of relations states have among each other. Thus, the theory's analytical framework is not all that far removed from the categories of democratic anti-constitutionalism.

From the perspective of global systems theory, the central structural aspect of capitalism has always been (not only since the beginning of what is often called “globalization” and said to date from the late 20th century) the coexistence of a limitless, or global, economy and limited, or spatially fragmented political orders. In the absence of an overarching political order, the system is held together as a system only by an “axial” international division of labor.³⁵ The axial international division of labor brings us to a hierarchy of states that can be roughly divided into three tiers: the center, the periphery, and the semi-periphery. Especially in times of great crises, allocations to these categories can be organized anew, but states strive to defend or improve their positions within the hierarchy at other times as well.³⁶ Within each of the three tiers, this gives rise to hierarchization referring to a stable or threatened position or the prospect of moving up the ladder to the next tier, whereby the most powerful position is that of the hegemony at the center, a position which is, however, not always occupied.³⁷ The relationships between states are thus characterized not only by competition for a (better) position in the international division of labor, but are essentially determined by the unequal initial conditions in this competition. States — and therefore democracies — at a higher tier in the hierarchy tend to be in a position to dictate conditions to the states — and therefore democracies — at a lower tier.

This structure can be illustrated especially in the period preceding that of the new constitutionalism, to which the political order of global society in the form of democratic anti-constitutionalism corresponded, at least roughly. We refer here to the period of the relatively favorable post-World War II “golden age” of democratic self-government in the state framework.³⁸ Although there was considerable leeway for democratic policy-making thanks to fixed exchange rates, controls on flows of capital and controlled world trade, this room to maneuver existed from the outset only for the Western industrialized nations, and even for them, it was dominated by the structures of U.S. Hegemony,³⁹ what becomes especially clear in light of the transformation of the global financial system;⁴⁰ both aspects

place even the “golden age” in deep contradiction to the image of democracies on equal footing sketched out above in conceptual terms.

To the extent that democratic anti-constitutionalism signifies framing the international division of labor politically through straightforward treaties regarding international law, the political-economic problem comes into stark relief: This non-constitutionalist international law may, as emphasized above, indeed rest on a formal democratic foundation. But if there are serious imbalances between the contracting parties, the democratic freedom to conclude international treaties is just as illusory as the freedom of private individuals to conclude contracts. While in the latter case, the results of the imbalances are controlled by legal means (contract law), in the case of the law of international treaties there is unrestrained autonomy. The limiting norms of modern *ius cogens*⁴¹ are far removed from even touching on the problem of socio-economic asymmetries.

That is why the conditions of inequality and exploitation inscribed in the international division of labor of the global capitalist system cannot be overcome by means of simple international-law treaties; yet they are the only ones permitted by democratic anti-constitutionalism. This perpetuation of inequality and exploitation, thus linked with democratic anti-constitutionalism, is, however, not only a problem of trans- or international justice.⁴² It is a problem of democratic self-determination. Viewed from the perspective of the states the internal democratically constituted self-determination of the stronger party becomes the heteronomous limit of the democratically constituted self-determination of the weaker party. Democratic anti-constitutionalism would apparently be neutral toward the given hierarchically structured world order. In contrast to the case of neutrality of the democratic constitutional order, whose purest form is characterized exactly by fundamental neutrality vis-à-vis the outcomes of the democratic process,⁴³ no democratic process would be available in the international context that would at least open up the possibility of addressing or eliminating existing international socio-economic power relationships. Fundamental transformations aimed at a relevant change or even abolition of international hierarchies and power relationships are not possible within such a framework. Creating an egalitarian global order in the sense of equal material freedom of states to shape the world around them is referred here to a social transformation perspective which could precisely not be maintained in the course of ordinary democratic shaping of law.

This finding does not yet mean that the strategy of democratic anti-constitutionalism loses all its persuasiveness. It simply means that it still has not provided an answer as to how its intention to secure democratic freedom can be cope with the problem of the economic structure of world society.

5. PROGRESSIVE CONSTITUTIONALIZATION OF THE WORLD SOCIETY

This finding motivates to explore the possibilities of an alternative strategy for the transnationalization of popular sovereignty, the strategy of progressive constitutionalization⁴⁴ of Jürgen Habermas. His ambitious project is that of a “political constitution for the pluralist world society”. The elaborate derivations and flourishes relating to that constitution of a world society, undertaken anew time and again, will not be taken into consideration here;⁴⁵ rather, we will limit our analysis at this point exclusively to the structure of Habermas’s proposal. His model is founded upon mirroring a differentiation between juridical supranationalism and political intergovernmentalism derived from the theory of European integration⁴⁶ at the global level. Externally, juridical supranationalism shares the formal characteristics of the “new constitutionalism” by limiting the sovereignty of the states by legal means. However, its reach is strictly limited to peacekeeping and securing elementary human rights. The global organization has a hierarchical structure, makes binding laws and has the power to enforce them directly. In light of its limited responsibilities, namely preventing states from committing human rights violations internally and from waging war externally (which, as contents of (potentially) democratic self-determination, can in any case be defended only with difficulty), the need for democratic legitimation is low here.⁴⁷ Therefore, the purely juridical constitutional forms suffice.

Alongside this global supranationalism for securing peace and basic human rights, there is to be a regime that deals with global problems which require states to cooperate in order to come to grips with them. This is the well-known “global governance without a world government.” Habermas makes basically the two following statements about this regime: The decisive actors are not today’s nation-states, but a much smaller number of global players. These form a “system of negotiation” of which it is certain that “government representatives generally bear the responsibility and have the final word” within it and which therefore does not “provide a forum for legislative competences and corresponding processes of political will-formation.”⁴⁸

While we are told little about the institutionalization of international negotiations besides being given an additional description as a “central negotiation system” with “generalized competencies,” or a non-hierarchical “organization that works multilaterally,”⁴⁹ Habermas provides all the more information about the global actors decisive in this system. Most of them are continental-scale entities for action that have yet to be created. According to Habermas, only entities of this magnitude (the U.S. and China are acknowledged as being capable of acting for themselves, possibly also India or Russia) are in a position to act globally, and only a relatively small negotiating group consisting of the continental global actors is capable of solving the urgent political problems of a global nature. In the final analysis the global actors are apparently to have the political form of states (although Habermas refuses to use this term, and calls them “global

players” or “continental regimes” instead). They have the political form of states, as on the one hand, they are to retain the use of force to enforce laws internally and on the other, they guarantee the democratic legitimation of the positions and outcomes of negotiations at the transnational level.

This imperative to form state-like global players, derived from Habermas’s response to the problem of a constitutionalization of world society, also characterizes his position on the European Union. There, he advocates that the European Union should become a collective actor with the characteristic powers of a modern state to intervene internally, namely in the fields of taxes, economic regulation and social equity, as well as externally through typical external state functions. The project of making Europe a state is of such eminent importance that in the final analysis, Habermas has called for nothing less than a revolutionary breach of legality that aims explicitly at excluding the United Kingdom and at least accepts the possibility of expulsion of the Central and Eastern European countries.⁵⁰

6. POLITICAL ECONOMY AND THE POLITICAL CONSTITUTION OF WORLD SOCIETY

If we take another direct look at the image sketched by Habermas, disregarding supranational constitutionalism concerning questions of peace and protection of basic human rights and concentrating on the political questions that require legitimation, then, in the final analysis, the following image emerges: state-like continental regimes, which are not necessarily democracies, negotiate. Now, it is not apparent how such transnational negotiation of legal norms is to differ from the negotiation of international treaties. Viewed dispassionately, this is the same picture drawn by democratic anti-constitutionalism. The decisive difference is merely that it is not based on the universe of states as they exist today, but demands that they be ordered anew as a system of continental states, so that the decisions will have the necessary authority and effectiveness. However — implicitly reflecting the objection to democratic anti-constitutionalism developed above — it is apparently hoped that making the continents into state-like regimes will result in a balance of powers, which, in contrast to the system of states as it exists today, could justify the expectation of reasonable and fair negotiation results. Here the same situation as in democratic anticonstitutionalism occurs and with it the same problems.

In one of his most fundamental publications about Europe in which Habermas specifically takes up the question of transnationalization of popular sovereignty anew,⁵¹ he also addresses the discussion about the possible state-like characteristics of global governance and modifies its supranational embeddedness.⁵² His solution is to embed transnational global governance more strongly in the context of constitutionalized global society. He does this by stating that the supranational global organization is also to “oversee the factual balance of power ... in the transnational negotiation body” and to set binding minimum standards for the fields of

global governance as part of its task to concretize the human rights which are to be guaranteed by the states.⁵³

By this, Habermas expands the competencies of the global organization to include global governance. While the global organization itself does not undertake material rule-making, it does set a material framework for law-making by imposing minimum standards and a procedural one by controlling bargaining power. The global organization has virtually delegated material rule-making to global governance, within material limits and under procedural conditions. Because the world organization takes on this dual control of global governance, it takes over responsibility for it. At this point the world organization can no longer be differentiated from a world republic that delegates certain questions to global governance as the suitable forum for negotiation.

By approaching the idea of a world republic so closely, Habermas undermines the strict limitation of the world organization's tasks which is of central importance to him in terms of the theory of legitimation. Only because the world organization was to be limited conceptually to the fields of war and peace and the protection of fundamental human rights, underpinned by universally shared moral norms whose application Habermas believes is less political than juridical in nature, was a lowering of the standards of legitimation possible at all.⁵⁴ Now, if this boundary is removed, democracy's fundamental requirement for equal and effective participation by all will also demand realization. The impossibility of it being realized at the global level, which Habermas himself recognized,⁵⁵ is the final objection to this revision of his model.

7. EUROPE AND THE TRANSNATIONALIZATION OF POPULAR SOVEREIGNTY

Let us turn to the other side of this sketch of progressive constitutionalization, the prospects for the formation of continental state-like regimes, and concentrate on the prime example of the Europe Union, as does Habermas. European integration currently has to grapple with two structural difficulties commonly known as the "democratic deficit"⁵⁶ and the "social deficit."⁵⁷ The current crisis of the euro has only made the two deficits more visible, more relevant and more painful. And it has led, with the euro bailout funds, the "fiscal compact," and new measures of macroeconomic surveillance, to considerable exacerbation of these deficits.⁵⁸ But basically, the structure of the problem, as it is presented here, has remained the same.

What many pro-European progressives, including Habermas, overlook is that the EU's democratic deficit is not simply a matter of the EU Commission's monopoly on legislative initiatives, or its missing parliamentary accountability, or the unequal footing between Parliament and Council, or the role of the European Council.⁵⁹ The democratic deficit amounting to a lack of political equality among European citizens is just as fundamental if not more so. The German Federal Constitutional Court rightly placed much emphasis on this aspect in its decision on the Treaty of Lisbon.⁶⁰

If it is correct that legal coercion is legitimate only if everyone subject to it participated equally in creating it, then it is no *quantité négligeable* that European citizens are represented highly unequally in the parliamentary law-making body depending on their nationalities. Europeans citizens are represented even more unequally at the level of creating or changing the constitution, and this holds both for the present situation and for many well-intentioned and well-considered proposals for democratization.⁶¹

In contrast, Habermas at least outlines the act of revolutionary constitution-building as a vote on the part of a European people,⁶² and one can imagine that he would approve of ensuring such powers to change the constitution in the future as well. He is silent concerning the modalities of parliamentary representation, however. And perhaps not by chance. For then, it would become all too obvious that from another perspective, the demand for democratization would reveal itself as an enormous increase in the power of the large Member States, in particular Germany. Against this background, it has rightly been emphasized that it belonged and still belongs to the prerequisites for the establishment and the continued existence of the Union that creation of a European constitution and laws is not carried out according to the principle of egalitarian representation.⁶³ If that is so, however, then one would have to distance oneself explicitly from postulates of democracy that always refer to egalitarian participation in the modern constitutional state-like regime without further qualification. Once that has been conceded, it becomes questionable at least for us whether one can still hold fast to the project of making Europe a state and whether one still desires to do so, on the basis that when it comes to the principle of egalitarian participation central to the democratic theory the European Union cannot but form an *aliud* to the modern constitutional state.

The unsolvability of the democratic deficit discussed here in terms of regarding European integration as the formation of a state-like regime, has political-economic underpinnings that have immediate application to the problem of the “social deficit.” In a nutshell: The Member States of the Union not only relate to each other as partners in a supranational-federal entity whose transformation to a federal state they must consider. Under the current conditions of European integration, they are also first and foremost competing states which must seek a competitive edge under the exacerbated conditions of integrated markets and expanded financial markets.⁶⁴ From this perspective, European integration was and is a framework with a dual function: It improves the overall situation of the Member States in comparison with the rest of the world, but at the same time, Member States can achieve advantages in comparison with the other Member States.⁶⁵ The latter results in the fact that the interests of the Member States are not aligned in relation to European integration, either. This manifests itself above all concerning true social policy in the sense of a policy with direct redistributive functions.⁶⁶ Here, within the Union too, economic interests and institutions of the social welfare state collide, which, as Fritz Scharpf in particular has shown time and time again,⁶⁷ make integration of the sectors of true social policy (including industrial relations, social insurance, social welfare, public services) very improbable.

The euro sovereign-debt crisis and the policies for dealing with it provide the most vivid evidence for these diagnoses.⁶⁸ The common currency had permitted Germany to reattain its strong competitive position within the Union, which it had lost at the beginning of the millennium, by means of coordinated restraint in increasing wages on the part of the collective bargaining agents. The other euro countries were neither in a position structurally nor were they willing politically to respond with the same tools of lowering wages and cutting social services and benefits. This resulted in the unfair situation — which was enormously advantageous for Germany — of the euro being undervalued relative to the German economy and it being overvalued relative to the economies of the countries in debt today. As a consequence, German balance of trade surpluses continued to rise, as did the public and private deficits in the debtor countries; both are two sides of the same coin, even if the bank bailouts are also partially responsible for public debt.

The current crisis would actually make real communitarization of labor, economic, and social policy necessary, which would open up real latitude for democratic policy at the European level.⁶⁹ At the end of this process of communitarization, the Union would be barely distinguishable from a modern federal state in terms of its competencies. (This would surely put the principle of equal participation on the constitutional-policy agenda with a new and considerable urgency.)

In other words: The macroeconomic pressure to cure the Union's social deficit is stronger than it has ever been in the history of the Union. But the development is moving in the opposite direction. Germany — and by no means only the German government — is not willing to put the economic advantages of the monetary union up for negotiation by means of such communitarization. Instead, the focus is only on equipping the EU with those regulatory means that are necessary for the functional imperatives of the monetary union to prevail over the democratic policies in the Member States. Today, these means include in particular the European Stability Mechanism⁷⁰ with its strict requirements for the recipient countries, the Treaty on Stability, Coordination and Governance⁷¹ as the crowning achievement when it comes to disciplining Member States' budgeting authority, and macroeconomic surveillance of Member States' labor, economic, and social policies.⁷² These instruments do not require democratic control at the European level because the substance of the macroeconomic functional imperatives of monetary union, which is to cope without communitarization of labor, economic, and social policy, is a foregone conclusion: austerity as well as reductions in wages, social services and benefits.⁷³ This architecture of the monetary union — if it does not ultimately result in the demise of the euro — is ideally suited for securing not only Germany's economic but also its political hegemony within the Union over the long term. Even today, it would be impossible to organize a political alternative to this German hegemony within the Union. Of course, we must admit that the other Member States are not seriously pursuing the goal of genuine communitarization of labor, economic, and social policy, either. We consider this to be further evidence supporting

our hypothesis: The Member States and at least the majority of their populations will continue to be inclined to continue safeguarding the ability to compete in Europe rather than agreeing to the uncertain adventure of communitarization.

To explicitly counter any political voluntarism, we must emphasize the following: the problem is not predominantly rooted in lack of will on the part of current decision-makers, either in Germany or elsewhere; rather, this will, which is indeed lacking, merely reflects the underlying structural problem of the juxtaposition of competing states, each with its own economic structure. In general, an “internationalization of the state”⁷⁴ can be observed, for which European integration forms an important arena. But speaking quite generally, the internationalization of the state does not result in the cessation of competition between the states of the capitalist center, and this applies to the relationships between the important Member States of the European Union as well. For this reason, the prospects for a more democratic and social “Eurocapitalism” appear speculative. To put it pointedly: fragmentation into nation-states is a central characteristic of global capitalist socialization. The nation-state plays a central systemic role in it. Therefore, resolving the fragmentation into nation-states by forming a single world constitution logically amounts to transcending the conditions of capitalist socialization. But reducing political fragmentation by establishing a system of a few continental states would also encounter systemic resistance.

8. CONCLUSION

Our conclusion can initially be presented in form of a dilemma. We must postulate the restoration of the unity of liberal, democratic, and social contents which characterize the concept of the modern constitutional state in order to counter the “new constitutionalism” and find a political form for the transnationalization of popular sovereignty. One possibility would be to abolish any kind of constitutional function beyond the nation-state. Such an order in literally international form would, however, not offer any political-democratic leverage against the pervasive global socio-economic hierarchies and the power structures resulting from them. The formally guaranteed democratic autonomy of states would be a space of possibility for true self-determination at best for a handful of Western industrialized nations. This insight is one horn of the dilemma. But the course vigorously pursued to escape it merely ends at the other horn. The alternative of progressive — that is democratic and social — constitutionalization of world society proves to be unattainable, even in the favorable case of Europe. For within existing societal conditions, the nation-states occupy a central role, one that apparently cannot be eliminated.

To find a way out, our suggestion is to conceive of the two strategies not as in opposition to one another, but as complementary. That would mean first of all that they would each have to give up their claim to universal applicability. Neither a complete return to the nation-state nor progressive

constitutionalization can be satisfactory responses to the question faced by the theory of popular sovereignty. Instead, defensive and progressive aspects must be combined in a new strategy.

At this stage, it only seems possible to formulate some guidelines which could provide orientation for this strategy. Firstly, one would have to realize that frequently it is precisely the structures of the “new constitutionalism” which are ill-suited as precursors to democratic order, but instead have an opposite effect. In this respect, analysis must focus on the object and the substance of the constitutional regime; the form of constitutionalist legalization in and of itself can by no means be understood as progress. Every international-law regime with a constitutional character would have to be scrutinized as to its concrete contribution to the possibility of a democratic order of global society. The regime of the European monetary union contributes primarily to curtailing democratic self-determination in the countries involved and should urgently be replaced by a European monetary system based on the Bretton Woods model. Other negative examples include the regime of international investment protection or the various regimes of free trade in services.

On the other hand, as already suggested in the political-economy critique of democratic anti-constitutionalism, it does not seem possible to do without constitutionalist regimes entirely. On the contrary, they are indispensable in the following contexts: firstly, sustaining the potentials of social democracy at the state level, for example regulation of international flows of capital; secondly, smoothing out economic asymmetries by means of development aid, for instance regulation of patents on pharmaceuticals; thirdly, maintaining conditions for human life, for example climate protection regulation. The losses of democratic autonomy at the nation-state level that such regimes entail would in fact have to be addressed through elements of progressive constitutionalization, which, however, can in point of fact no longer push for a comprehensive political order in the form of a continental, let alone global state. The idea of democratization connected with such elements must therefore refer specifically to the international character of the constitutionalist regime and must refrain in particular from striving to emulate the blueprint of nation-state democracy. The model provided by the Community method of the European Union, according to which supranational law requires qualified assent by national government representatives, on the one hand, and the assent of an European Parliament with a degressive proportional composition, on the other, is not the worst model for this.

>> ENDNOTES

- ¹ Maus 1994a; 2011.
- ² Habermas, 1994.
- ³ Habermas, 2008.
- ⁴ Habermas, 2001; 2012.
- ⁵ Maus, 2006; 2010. In the following, we will discuss mainly Jürgen Habermas and Ingeborg Maus as advocates of popular sovereignty theory. Although both are German (and Frankfurt) theorists, viewed systematically, they are the representatives of two idealized strategies within the camp of popular sovereignty theory that entails theorists like William E. Scheuerman, Andreas Kalyvas, Hauke Brunkhorst, Thomas McCarthy, and David Held. About Habermas' and Maus' internal theoretical commonalities, see Niesen, 2011.
- ⁶ Streeck, 2011;2013; Habermas, 2013.
- ⁷ Biebricher, Vogelmann, 2014.
- ⁸ Habermas, 2012.
- ⁹ Gill 2002; 2008: 161-175.
- ¹⁰ Schonberger, 1997: 234, 239.
- ¹¹ Böckenförde, 2006.
- ¹² Maus, 1994b.
- ¹³ Crouch 2004.
- ¹⁴ Schneiderman, 2000.
- ¹⁵ Gill 1998.
- ¹⁶ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (so-called "Fiscal Compact"), available at http://european-council.europa.eu/media/639235/stootscg26_en12.pdf (9.11.2012).
- ¹⁷ Maus, 2011.
- ¹⁸ Maus, 2005; 2007; 2010; Grimm, 1995.
- ¹⁹ Eberl, 2011.
- ²⁰ Deliberatively accentuated popular sovereignty theory speaks plausibly of a structural coupling of inclusive deliberation and egalitarian decision, see Brunkhorst (2002, p. 676).
- ²¹ Habermas, too, always skeptical concerning substantialistic deliberations, recognizes the problem of linguistic diversity for a European public that does not exist as yet. Habermas hopes for a "transnationalization of existing national publics" (2009b, pp. 182 f.). Regarding the modest state of affairs and equally modest prospects see (Peters/ Brüggemann/ Königslöw/ Siff/ Wessler/ Wimmel 2005).
- ²² Maus,1992.
- ²³ Fraser, 2007.
- ²⁴ Scheuerman, 2011.
- ²⁵ Scheuerman 2011: 265; 2004.
- ²⁶ Brunkhorst, 2007.
- ²⁷ Scharpf, 1997.
- ²⁸ Even Habermas, who does not want the argument of increasing complexity due to larger territory to be understood necessarily as a change of "the quality of the process of opinion and will-formation" must concede that there is "the danger of systematic distortion to which the circuits of communication are subject in geographically extensive and heterogeneous political public spheres — especially under conditions of (almost) completely privatized media as in the United States." (Habermas 2012, p. 20 n. 28).
- ²⁹ Maus, 2010: 71

- ³⁰ On the conflict of laws as a democratic form of transnational juridification see (Maus 2006) and in depth (Rödl 2011).
- ³¹ On the loss of material power suffered by the legislature in the case of international treaties as against internal law-making see (Neyer, pp. 151ff.); on the interpretation of the link between international self-binding and internal loss of democracy as “new reason of state” see (Wolf 2000).
- ³² Hopkins, Wallerstein, 1982.
- ³³ Wallerstein, 2004: 16.
- ³⁴ For criticism, see Gill, 2004.
- ³⁵ Wallerstein, 1974: 66ff.
- ³⁶ Wallerstein, 1980: 74ff, 244ff.
- ³⁷ Wallerstein, 1980: 36ff.
- ³⁸ Margins, Schor, 1992; Hobsbawm, 1994; Crowch, 2004; Leibfried & Zur, 2005.
- ³⁹ Arrighi, 2009: 269ff.
- ⁴⁰ Helleiner, 1996.
- ⁴¹ Frowein, 2009. See. Art. 53 sentence 2, The Vienna Convention on the Law of Treaties. This includes the bans on aggression, the slave trade, and genocide as well as the requirement to respect basic human rights.
- ⁴² On the controversy about the conceptual locus of justice in the global framework, see Rawls, 1993 and Beitz, 1975 with opposing positions.
- ⁴³ Maus, 1994a, 235ff.
- ⁴⁴ We speak of “constitutionalization” instead of “constitutionalism” because we would like to reserve the latter term for projects that do not pursue democratic ambitions.
- ⁴⁵ Habermas, 1995; 2001; 2006; 2007; 2008a; 2008b; 2012.
- ⁴⁶ Weiler, 1991. In addition, Habermas is aware of the level of coordination of “technical” issues in a broader sense,” which he would like to place in networks of transnational experts (Habermas 2008a, p. 324 and Habermas 2008b, p. 446). Although we doubt that the fundamental differentiation between political and technical questions can be supported — it should be noted that Habermas considers the field of combating organized crime, sensitive in terms of basic rights, one of the technical questions — we leave this issue out here.
- ⁴⁷ Of course, much depends here on what one considers to be human rights violations. Convincingly narrow, in contrast, the concept in (Cohen 2006).
- ⁴⁸ Habermas, 2008a: 324.
- ⁴⁹ Habermas, 2008b: 446.
- ⁵⁰ Habermas, 2009a. In Habermas (2012: 50), the expansion of “political steering capacities” is limited to “core Europe,” that is the “members of the European monetary zone” as well.
- ⁵¹ Habermas, 2012.
- ⁵² See Maus, 2007.
- ⁵³ Habermas, 2012: 68.
- ⁵⁴ Habermas, 2012: 62ff.
- ⁵⁵ Habermas, 2012: 61f.
- ⁵⁶ Siedentop, 2001; Hix, 2008.
- ⁵⁷ Scharpf 2010; Hopner & Schafer, 2010.
- ⁵⁸ Fossum & Menéndez, 2014.
- ⁵⁹ Habermas, 2012.
- ⁶⁰ German Constitutional Court, decision of June 30, 2009 – 2 BvE 2/08, margin no. 268 ff., available at http://www.bverfg.de/entscheidungen/es20090630_2bve00208.html (September 12, 2010).
- ⁶¹ See also Offe, 2013: 608.

⁶² Habermas, 2009a: 103.

⁶⁵ Neyer, 2010: 905.

⁶⁴ Hirsch, 2005; See also Hurrelmann et al., 2008.

⁶⁵ The debates on the distribution of the costs of Greece's impending national bankruptcy and the macroeconomic effects of German low-wage policy are the most recent examples.

⁶⁶ Leibfried & Obinger, 2008.

⁶⁷ Scharpf, 1999; 2008; 2010.

⁶⁸ Scharpf, 2011 e Streeck, 2011.

⁶⁹ Habermas, Bofinger & Nida-Rümelin, 2012; Offe, 2013.

⁷⁰ Treaty establishing the European Stability Mechanism, available at <http://www.european-council.europa.eu> (last accessed: 12.11.2012)

⁷¹ See above note 2.

⁷² Regulation (EU) No. 1176/2011 on the prevention and correction of macroeconomic imbalances and Regulation (EU) No. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

⁷³ Current demands for democratization of these instruments are therefore fighting a losing political battle, or are induced to moderating demands for democratic self-determination to only call for direct election of the European executive leadership (Maduro et al. 2012).

⁷⁴ Hirsch, 2005; Sassen, 2006.

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