THE BEHEADING OF THE LEGISLATOR: THE EUROPEAN CRISIS – PARADOXES OF CONSTITUTIONALIZING DEMOCRATIC CAPITALISM

// A DECAPITAÇÃO DO LEGISLADOR: A CRISE EUROPEIA – PARADOXOS DA CONSTITUCIONALIZAÇÃO DO CAPITALISMO DEMOCRÁTICO

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>> ABSTRACT // RESUMO

The European Union today finds itself in the midst of its greatest crisis. The crisis is due not only to one of the greatest breakdowns in the history of the global economy, but also to the fascinating internal evolution of the European constitution since its beginning, shortly after World War II. Parallel to the growth of constitutional law, latent legitimation problems began to arise and grow cumulatively. However, once the big global banks, corporations and hedge-funds began a concerted attack on the European periphery, the long lasting neoliberal turn from democratic capitalism to capitalist democracy has reached whole Europe, and the legitimation crisis becomes manifest. // Atualmente, a União Européia encontra-se no meio de sua maior crise. A crise se deve não somente a um dos maiores colapsos da história da economia global mas também à fascinante evolução interna da constituição européia, desde o seu início, logo após a Segunda Guerra Mundial. Paralelamente a expansão do direito constitucional, problemas latentes de legitimação começaram a surgir e crescer, cumulativamente. Todavia, uma vez que os grandes bancos globais, as corporações e os fundos de retorno absoluto iniciaram um ataque concertado na periferia da Europa, a perdurável virada neoliberal – de capitalismo democrático a democracia capitalista – alcançou toda a Europa e a crise de legitimação se tornou manifesta.

>> KEYWORDS // PALAVRAS-CHAVE

Kantian mindset; managerial mindset; constitutional evolution; normative constraints; existing concept; crisis; ordoliberalism. // mindset kantiano; mindset gerencialista; evolução constitucional; limitações normativas; conceito existente; crise; ordoliberalismo.

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1. INTRODUCTION

In the beginning was not the affirmation of *peace*, the protection of which now is the reason why the European Union got the Nobel Prize (although, at the same time, the Union or its Member States were at war in several parts of the world). In the beginning was not peace but the *negation of fascism*: that is the *emancipation* of Europe from the dictatorship of the Third Reich. In the beginning was not the *managerial mindset* of possessive individualism and "peaceful competitive struggle"[1]. In the beginning was political autonomy. In the beginning was not rational choice and strategic action enabled by *rule of law*, but the *emancipation from any law that was not the law to which we have given our agreement*[2].

Martti Koskenniemi calls the latter the *Kantian mindset* in contrast to the managerial mindset:[3] For Kant in his time the scandal of so called absolutism was not a lack of *Rechtsstaat* or rule of law. Kant had no doubt that the contemporary monarchy was a state of law. For Kant the scandal of that monarchy was its lack of political "autonomy" and "self-legislation", and the absence of "structures of political representation".[4] Historically the Kantian constitutional mindset is the mindset of the French Revolution as it once was expressed strikingly by the young Karl Marx in one short sentence: "*Die gesetzgebende Gewalt hat die Französische Revolution gemacht*" – *The legislative power has made the French Revolution*.[5]

2.

Today the memory that it was the same constituent legislative power of the peoples of Europe, that has made the European Union between Fall 1944 (that was the last year of World War II in Europe) and 1957, has been repressed and displaced by the managerial mindset that became hegemonic already during the 1950s. However, the European unification did not begin with the Treaties of Paris and Rome in 1951 and 1957, but with the *new constitutions* that all founding members (France, Belgium, Italy, Luxemburg, Netherlands, West-Germany) had given themselves between 1944 and 1948. Moreover, the foundation of the first Communities in 1951 and in 1957 was an effect of a *global revolutionary transformation of national and international law* that was as deep as that of the French Revolution.[6] All constitutions of the founding members were made by *new representatives* of the respective peoples.

1. All founding members had *changed their political leaders* and had *replaced great parts of the former ruling classes* with former resistance fighters or emigrants who had defected. They gained a power that did not exist before or during the time of the Nazi-occupation. Rebels, guerrillas and exiled politicians became heads and members of government. They risked their lives, not solely as patriots, but as democrats or socialists who had struggled for certain rights and universal constitutional principles.[7]

2. All constitutions of the founding members were *new* or in important aspects *revised* and *more democratic than ever before*. Only now did *all* of them stipulate *universal adult suffrage*.
3. All had *eliminated* the remains (or after 1918 newly invented structures) of *corporatist political representation* of society. For the first time the system of political democracy was completely autonomous and could *cover and control the whole society through parliamentary or popular legislation alone* (as it was the case with Kelsen's Austrian constitution of 1918 that then was a lone exception).[8] The German *Grundgesetz* even constituted a completely *new state*.[9]
4. All constitutions of the founding members expressed a strong emphasis on *human rights* and had *opened themselves* (more or less) *to international law*. The founding members of the European Communities designed their newly constituted states as *open states* – open to the incorporation of international law and international cooperation; an important example of this is, in the German Basic Law (*Grundgesetz*), the obligatory *Völkerrechtsfreundlichkeit* (*openness to international law*) established in Art. 24(1).[10]
5. Finally, and crucially for the foundation of Europe: the new constitutions declared the *strong commitment of their respective peoples to the project of European unification*, which was to be realized in the near future (for example: Preamble in combination with Art 24(1) of Basic Law). All founding members of the European Communities bound themselves *by the constituent power of the people* to the project of European Unification, which then, from 1951 onwards, became constitutive for all European constitutional (or quasi-constitutional) treaties.[11] The only instance of a constitution of a founding member that made no declaration about Europe, the Constitution of Luxemburg, is in itself a revealing case. In 1952 in Luxemburg its *Conseil d'État* decided 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.[12]

In all, the Founding Treaties of Paris and Rome were directly legitimated by the *constituent power of the peoples*.[13] Consequently, it can be concluded that, from the outset, the European Union was not founded as an international association of states. On the contrary, it was founded as a *community of peoples* who legitimated the project of European unification *directly* and *democratically* through their combined, but still national, constitutional powers (represented later in the *Council of the European Union* and the *European Council*). At the same time and with the same founding act, these peoples, acting plurally, constituted a single *European citizenship*, embodying *new rights for the European citizen*, which were different from the rights of the citizens of the respective member states (represented later by the *European Parliament*). These remained implicit for the first decades, but the European Court of Justice (ECJ) made them explicit in *van Gend en Loos* and *Costa* in 1963 and 1964. The community of European citizens as a whole thus now constitutes a second and independent 'subject of legitimization'.[14] From the beginning, the Treaties

were not just intergovernmental, but *legal documents with a constitutional quality*.

3.

However, as one can also observe in other cases of national or transnational constitutionalisation, the constitutional moment was followed by an unspectacular evolutionary incrementalism and a silent but gradual and steady process of ever denser integration. The *managerial mindset* took over soon after the first big changes. However, it has not only *replaced and repressed* the *Kantian mindset* of revolutionary foundation but – in a paradoxical move – also *stabilized* and *realized it step by step legally*.[15] In European law today the Kantian mindset is expressed in the reference of the preambles of the European Treaties to 'solidarity', 'democracy', 'social progress' 'human rights' and 'rule of law'. Solidarity is mentioned again and again, however, the Treaty also states that solidarity should be for free (as in David Cameron's first sentence when the crisis erupted: "No money for the Greeks!"). Nevertheless, the Kantian mindset is implemented 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. Moreover, the Kantian mindset also underlies legal precedents such as the famous cases Costa and van Gent en Loos from the early 1960s which refer to the subjective rights that we have *as* European citizens ('direct effect' plus 'European law supremacy'). Finally, the Kantian mindset found its way into numerous juristic commentaries and treatises: that is the emergence of a European *Rechtsdogmatik* (legal doctrine)[16], and became part of the European common law.[17]

At the end of the day, and after the symbolic re-establishment of state-sovereignty through the constitutional court of the European hegemon in Karlsruhe – the counter-hegemonic Czech constitutional court in its judgment on the Lisbon-Treaty stated that the *European Union today forms a complete and gapless system of democratic legitimization*, and rightly so.[18] Legally Europe no longer has a crucial democratic deficit. It is already a fully fledged democracy on both levels: the national *and* the transnational. The problem is that nobody knows it.

The problem is not just the managerial mindset but the *hegemony of the managerial mindset*, and the *reduction* of politics to technocracy that today allows the political and economic elites to bypass and manipulate public opinion and democratically legitimated public law *on both levels*: the European *as well as* the respective national level. At the same time as it is growing legally, the public power of the people and its representative organs is more and more deprived of real power and replaced by grey networks of *informal government*[19] – called 'good governance'[20] instead of democratic government, called 'administrative accountability'[21] instead of parliamentary responsibility, called 'deliberative democracy' instead of egalitarian decision making.[22] In a world where good governance

has replaced democratic government, where administrative accountability has replaced parliamentary responsibility, where deliberative democracy of educated middle-classes has replaced egalitarian procedures of decision making, in a world where the semantic of pluralized civil societies has replaced the unity of capitalist society, where competition has replaced cooperation, where the managerial mindset of individual empowerment has replaced the Kantian mindset of emancipation – public contestation over real issues, public debate and public struggle over substantial alternatives are just "not helpful" (*nicht hilfreich*), to say it in the matchless managerial language of Angela Merkel. In Angela Merkel's world deliberative democracy begins when the doors are closed.

Hence, and this is my *overarching thesis*, the Kantian mindset of revolutionary foundation has been concretized and stabilized throughout the gradual evolutionary process of constitutionalization. This evolutionary process developed under the lead of the managerial mindset of Europe's political elites and professional experts. However, the hegemony of the managerial mindset had the paradoxical result that the Kantian mindset at the same time was *preserved and repressed* (or displaced), *constitutionalized and de-constitutionalized* – again and again at every stage of the twisted paths of European constitutionalization.[23]

To demonstrate that, I will combine throughout the following chapters (4-7) Koskenniemi's Kantian inspired distinction between the two constitutional mindsets with Karlo Tuori's more managerial reconstruction of the constitutionalization of Europe as an incremental evolutionary process of stages of structural coupling of law with other social systems. Through this combination, Koskenniemi's more voluntaristic distinction is transformed into a set of "existing concepts" (Hegel) that are internal to the social evolution.[24]

4. STAGE I: ECONOMIC CONSTITUTION

As Tuori has shown, Europe now has not only many national (and subnational) constitutions but also many transnational constitutions that evolved gradually and in stages. The first evolutionary step was taken in 1957 with the establishment of a functional *economic constitution* that consisted in the *structural coupling* of the *legal* and the *economic system*. The establishment of the economic constitution was due to German Ordoliberalism. The Ordoliberals were a German-Austrian group of economists and jurists at the end of the Weimar Republic who all were more or less far right wing neo-conservatives but with few exceptions anti-Nazis. The centre of the school was the University of Freiburg in south-western Germany. Members of the School were Franz Böhm, Walter Eucken, Alexander Rüstow, Wilhelm Röpke, Alfred Müller-Armack and Friedrich August von Hayek.[25]

Originally the idea of an economic constitution was the invention of the German socialist left at the end of World War I, in particular Hugo Sinzheimer and his student Franz Neumann. Sinzheimer and

Neumann strictly followed the Kantian presupposition that the political constitution and the parliamentary legislator should keep the absolute supremacy over the economic constitution. The economic constitution should have a mere service function: It should improve the possibilities of the democratic legislator, to place the markets, and in particular the private sphere of domination within the capitalist firm, under democratic control.[26]

At the end of the Weimar Republic *Ordoliberals* "rather hi-jacked" the idea of an economic constitution from Sinzheimer and Neumann, watered it down and reversed it severely.[27] During the 1950s they turned the idea upside down, trans-nationalized the economic constitution, decoupled it from the national political constitution and subsumed the latter to the former. Now the whole society should be "subsumed" under the "principle of market-compliance", as the (at that time pious) former Nazi Alfred Müller-Armack wrote[28] in 1960.[29] In 1957 treaty negotiations the German Ordoliberals under the lead of Müller-Armack, and strongly supported by the American government, finally won the battle against the recalcitrant French government that, at the time, defended a constitutional project that was much closer to the original ideas of Sinzheimer and Neumann.[30]

With the establishment of the economic constitution in 1957 a Schmittian constitutional *Grundentscheidung* (basic decision) was made. It consisted in the radical "negation of a political constitution of Europe".[31] Instead of subsuming the economic under the political constitution, the political constitution was subsumed under the economic constitution, and therefore *Wettbewerbsrecht*, competition law became the "axis of the economic order".[32] In case of doubt the 'concrete order' of *law and economics* trumps the formal constitution of *law and democracy*.[33] Whereas formal constitutional law still adhered to the Kantian priority of democratic legislation, the concrete order of *law and economics* became Europe's informal prerogative constitution – Europe's "hidden curriculum".[34] The legal link between visible constitutional law and the invisible prerogative constitution was Art. 2 TEEC (Treaty establishing the European Economic Community).[35] One of the most crucial effects was that the negation of any transnationalization of the political constitution. The hegemony of the hidden curriculum stimulated and reinforced the Europeanization of big enterprises and employers' federations, but at the same time strictly limited unions activities and employee organizations to the sphere of the national state.[36]

Ordoliberals today are proud of the fine differences that distinguish them from Neoliberals. But it was indeed Ordoliberalism that disclosed the historical path to the latest great transformation of globalization that has lasted since the 1980s. If we resume the three basic ideas of Ordoliberalism, it becomes evident, that only one idea is different. Therefore, the relation of Ordo- and Neoliberalism resembles more a cooperative historical division of business than a fierce opposition:

- The *first* basic idea of Ordoliberalism is to *get markets rid of state-control*. The spectre of 'socialism' and 'communism' must be banned

as long as it is haunting Europe under the mask of macroeconomic state interventionism. Here Ordo- and Neoliberalism meet from the beginning. Today's representatives of the power elite, such as the President of the German *Bundesbank*, Jens Weidmann, or the former judge of the *Verfassungsgericht*, Udo Di Fabio are accusing even the President of the ECB (European Central Bank), Mario Dragi of creeping socialization (*schleichende Sozialisierung*) and planned central states economy (*planwirtschaftliche Zentralität*) – Dragi, the creeping socialist who learned his job at the communist cadre training centre Goldman & Sachs.[37]

- However, Ordoliberalism not only distrusts the (bureaucratic) state but also big size (that is bureaucratic) capitalism and its tendency to concentration and centralization of capital that has led to monopoly capitalism since the beginning of the 20th century.[38] Therefore the *second* basic idea of Ordoliberalism is to *get rid of monopoly capitalism*. Competition law shall keep the economic chances of *all* market participants equal *any time*. This idea is called market justice, but it is a very poor idea of justice.[39] From the beginning it was mere ideology. In fact (as Kelsen has demonstrated in his scathing criticism of Hayek already in 1955) it worked in favour of the haves who disposed over the means of production, and at best regulated *their* competition.[40] However, in this respect Ordoliberalism is clearly different from Neoliberalism. Neoliberalism bluntly has abolished competition law and reduced so called market justice to shareholder value that then has been identified with the common good by Milton Friedman and others.[41] That's why we can no longer side step the bright lights of the latest stock market news everywhere we go.
- The *third* (and in terms of constitutional law most crucial) basic idea of Ordoliberalism is *to get rid of democratic legislative control*. Here again Ordo- and Neoliberals meet in applying the categorical imperatives: Give the judges what you have taken from the democratic legislator and the parliamentary controlled government! Promote the Judges to the guardians of functional *Ordnungsrecht* (regulatory law)! In the words of Ernst Joachim Mestmäcker: "*Die wichtigsten Aufgaben obliegen nicht der Legislative oder der Regierung, sondern der Rechtsprechung*." ('The most important decisions have to be taken not by the legislator or the government but by the judges').[42] The beheading of the legislator is the true end of the French Revolution and the Kantian political era.[43] If it really comes true, it will be the final triumph of the counter-revolution that in this case is the counter-revolution against 1789: Never again shall a legislator be able to effect a revolution. That was Margaret Thatcher's actual message. In 2000 Alec Stone-Sweet could only state that in "today's multi-tiered European polity, the sovereignty of the legislator, and the primacy of national executives, are dead. In concert or in rivalry, European legislators govern with judges."[44] One has to add that in combining transnational and national constitutional jurisdiction have reinforced one another, and in a way the European *Verfassungsgerichtsverbund*

> (Udo Di Fabio) has reserved for itself the most basic functions of all three classical state-powers – at least in normal times of incremental and managerial evolutionary constitutionalization.[45]

For these reasons, the implementation of the Euro without political government was not just a mistake, or the worst possible compromise – that it was, at least from the perspective of the negotiating parties[46] – but actually nothing else than, as Wolfgang Streeck says, the "frivolous experiment" to realize a "market economy emancipated" from all political bonds and to establish "a political economy without parliament and government".[47] The implementation of the Euro finalized the prerogative constitution and perfected the hidden curriculum of European governmentality by "immunizing the markets against democratic corrections"[48] [49]. This immediately resulted in an increase of the social differences between the rich North and the poor South. When finally the crisis came, European *Ordnungsrecht* derogated national as well as transnational *constitutional law*.[50] As a result, the social gap that separates the North from the South grew dramatically in favour of the northern hegemon: that is Germany.[51]

Hence, by beheading the legislator Ordoliberalism opened the evolutionary path for the neoliberal globalization of capital beyond state-control. Intentionally or not doesn't matter. Ordoliberalism had done its job, Ordoliberalism could go. Once Neoliberalism was over, the *great transformation* of the last thirty years could begin: the transformation *of state-embedded and state-controlled markets* into *market-embedded and market-controlled states*.[52] The new world order of market-embedded states makes it extremely hard for any political actor to get rid of the pressure to market compliance, to gain independence from the whims of a highly sensitive class of investors, and to return to macroeconomic steering, be it national or transnational.

5. STAGE II: JURIDICAL CONSTITUTION

For all that, economic constitutionalization is not the only evolutionary formation of European constitutional law, and even if it remains the hegemonic constitution to date, it was and is not the last stage of Europe's constitutional evolution. The latter is, as we have seen, conducted by the managerial mindset of *law and economics*. However, once the Kantian mindset has been constitutionalized and integrated into the public authority of European law, it counteracts the managerial mindset of blind evolutionary adaption *as* a *normative constraint*. However weak it may be, it operates no longer as a Kantian (allegedly) *empty ought* but as a Hegelian *existing concept* (as a moment of objective spirit).[53]

In the European constitutional history, the Kantian mindset of autonomy came back already in the early 1960s, together with the rapidly increasing volume of European regulations. It came back in the reduced and, for professional lawyers, manageable form of individual lawsuits over issues of *private autonomy*. In two landmark decisions of the

European Court from 1963 (*van Gent&Loos*) and 1964 (*Costa*) the *emancipatory* side of the legal form flared up. As public authority with binding legal force the Kantian mindset remained, it is true, *privatized*. However, to establish only private autonomy, the judges (in a bold teleological interpretation of the Treaties) had to create an autonomous European *citizenship* and European *citizens' rights* as rights of an autonomous legal community.[54] The two decisions from 1963 and 1964 therefore emphatically were described (by European law jurists) as "the declaration of independence of Community law".[55]

However, the Kantian moment of the two landmark decisions would have disappeared immediately from the trajectory of constitutional evolution, if the two decisions had not been followed by thousands of cases appealing to European Law in national courts of all member states (and the backing of the national courts by the ECJ submission procedure under Art. 267 TFEU).[56] In this case the old evolutionary insight became true that not the elites but the *masses* make the evolution, and here I mean the masses of negative legal communications that filled the variety pool of the legal evolution, and finally engendered a new constitutional formation: the European *Rechtsstaatsverfassung*, the juridical constitution of Europe. The European *Rechtsstaatsverfassung* consists in the (reflexive) *structural coupling of law and law* – or may be better: the structural coupling of *law and subjective rights*.[57] The European *Rechtsstaat* finally has transformed Europe into *one single*, internally differentiated legal order, negatively described as fragmented, positively as pluralized[58] – and it is an order that is not toothless, as just recently Hungary came to experience.[59]

However, all these legal advances remained limited to legal experts and individual plaintiffs. On the rule-of-law-stage-II of the constitutional evolution of Europe the Kantian mindset was *constitutionalized under private law* (in a kind of Teubnerian *Zivilverfassung*[60]). However, at the same time it was repressed and displaced again[61] in public.[62] On the second stage of constitutional evolution we can get aware of a paradox: *Constitutionalization at once advances and is de-constitutionalized by its own advances*.

This paradoxical structure is due to the emergence and continuation of *formal constitutional law* together with its opposite: that is *informal prerogative law*. Both constitutional formations constitute a European *double-state*.[63] Whereas, for example, the Kantian mindset of the formal constitution is reflected by the court's interpretation the basic freedoms of EU-Law as *anti-discrimination norms* that are constraining the *basic freedoms* through the *basic rights* of *all* European citizens – the managerial mindset of the informal constitution is reflected by the court's interpretation of the *basic freedoms* (in particular of big money and big capital) *as constraints of basic rights* (*Walrave*, *Bosman*, *Viking* and *Laval*).[64] It is this contradiction between the formal and the informal constitution of Europe that causes a latent *crisis of legitimization*. The contradiction between the two constitutional mindsets is productive as long as it becomes a driving force of further constitutionalization.

6. STAGE III:POLITICAL CONSTITUTION.

Since the middle of the 1970s the long latent conflict between the ever closer united executive powers of Europe and the parliamentary legislative bodies became more and more manifest. At the same time the European Court of Human Rights turned into an active court. Now backed by the ECJ's doctrines of *European law supremacy* and *uniform application*, it radicalized its human rights jurisdiction.[65] This was important for the process of democratization because – different from civil and economic law – human rights have an internal relation to democracy and cannot be dissociated from public autonomy and public self-determination.[66] The pressure to reduce the growing democratic deficit of Europe finally compelled the political and professional power elites to take in account the Kantian mindset's commitment to public autonomy. Again it became evident that the *Kantian mindset* of emancipation can be repressed, "can be halted or inhibited, but it cannot be eliminated" once it is constitutionalized.[67]

Since the first direct elections of the European Parliament in 1979 the power of the Parliament increased consistently. The managerial mindset and stubborn incrementalism of every-day parliamentary work for over a quarter-century, made the weak and restricted European Parliament a *controlling and law-shaping parliament* that now is one of the strongest institutions of the EU.[68] The final step to the *parliamentary legislative procedure*, taken in the Treaty of Lisbon, largely completed the political constitution of Europe.[69] The third stage of structural coupling of law and politics was achieved.

However, even this time the managerial mindset prevailed again. The polling stations and the market places remained empty. To the same extent as the shaping power of the parliament increased its public legitimacy decreased dramatically from election to election.[70] The most crucial act of the Kantian mindset, the political implementation of representative government based on fierce public debate ("*Freiheit der Feder*"), had the paradoxical effect of generating *democratic public legislation without democratic public life*. The increase of *constitutionalization of public legislation* again came at the price of a *de-constitutionalization of public discourse*.

Here again we encounter the managerial mindset: the *bloc* of ever closer united executive bodies in concert with the politico-economic power elites, supported by the omnipresent chief-economists of the big banks , by the willing legal and political experts, and by co-opted journalists (who are much better paid than ever before and trained in the same economic vocabulary, at the expense of freelance journalists who are much worse paid than ever before) – seems to prevail over the Kantian 'power of the people'.[71] Public debate is not suppressed or limited but – more effectively – bypassed by political and economic power as "not helpful". Again *Ordnungsrecht* derogates constitutional law and stabilizes the new collective Bonapartism of Europe.[72]

7.

However, these days, we witness the return of the repressed. The *economic* crisis, and in particular the *banking* crisis can no longer be displaced by the *budget* crisis. As a consequence, the long latent *crisis of political legitimization* suddenly becomes manifest. The Kantian mindset re-emerges in the streets, in Athens, in Madrid and elsewhere.

It appears that the structural coupling of law with the systems of social welfare and security can no longer be performed silently behind closed doors and at low costs. The crisis makes it evident: that there is *no modern mass-democracy* without the *rough equality of stakeholders*, at the very least.[73]

The national state looked like the big winner after the outbreak of the global economic crisis in fall 2008 (and many political theorists and analysts proclaimed, such as once Erich Honecker, the last prime minister of the GDR: *Totgesagte leben länger* – "The condemned live longer"). But in fact the state was already weak, and therefore became one of the greatest losers of the crisis. Wolfgang Streeck rightly headed an essay two years later with: *Noch so ein Sieg und wir sind verloren* ("Another victory like that and we are lost"). The great crisis of 2008 has proven that the national state already was deprived of its most basic alternatives in economic and social politics.[74]

The national state's capacity to act and shape the future always relied on the existence of *two major instruments* to get modern capitalism under control, and to enforce the legislative will of democratic majorities: either the stick of the law, or the carrot of money.[75]

However, it seems that from the beginning of the present crisis, the national states were no longer able to perform *macroeconomic steering* through an effective mix of stick and carrot, of legislation and investment. The political actors had already lost most of the legislative power that is needed to regulate and control capitalist economies. They have not regained it at the global level. On the contrary, during the last 30 years of neoliberal global hegemony, the fragile balance of power between democracy and capitalism has shifted dramatically in favour of capitalism.

As long as a modern, functionally differentiated economy (with capitalist markets) is embedded in democratically controlled state-power, the parties of the have-nots, either the exploited social classes, or the nations who are the losers of the global economic competition between states and regions, have two means to enforce *rough compensatory justice*.[76] They can perform macroeconomic steering in times of crisis: (a) *nationally* by legal regulation and investment, in particular increasing taxes for high incomes and assets, and/ or (b) *internationally* by means of devaluation of their national currency.[77] In Europe today they have lost both.

Globalization (a') has transformed tax-collecting states into debt-depending states, hence reversed the direction of control between states and capital. The *taxing state* that is in control of capitalism has become a *borrowing state* that is controlled by capitalism.[78] The implementation of

the Euro (b') has taken away all means of resistance poor countries have in their unequal competition with rich countries.

Franklin D. Roosevelt's New Deal administration in the 1930th, supported and pushed by a fighting working class with young and strong Unions that had nothing to loose, finally regulated and controlled Wall-Street, increased taxes for the rich, cut back banks and industrial corporations, created jobs administratively, printed money. In this way those politicians and other social democrats and socialists in advanced societies were able to square the circle: that is to *socialize the means of production within the capitalist mode of production*.

However, this seems no longer possible. After 2008 nowhere were taxes increased in measure comparable to the US and other western countries in the 1950s and 1960s. Not one of the banks deemed 'too big to fail' was nationalized or divided. Except for Lehmann all were bailed out again and again. Moreover, in Europe the common currency excluded all possibilities of currency devaluation. Deprived of its legislative power to regulate the economy, the state no longer had an alternative, except spending the rest of its money.[79]

Therefore the state has become susceptible to blackmail, and Margaret Thatcher's lie, that there is no alternative, became true as a self-fulfilling prophecy.[80] Former democratic governments are now in the hands of bankers and their staff of technocrats – directly or indirectly. In states where the bankers have not yet taken the lead, their advice resembles the advice of the old Roman Senate, the *senatus consultum*. That was an advice without any legally binding force: soft law. But whoever did not follow it, was already a dead man, even if he left the room alive. Therefore the national state must execute the neoliberal programme with micro-economic means and "devalue labor and the public sector", "put pressure on wages, pensions, labor market regulations, public services"[81] – and then sell the whole think as 'reform', 'modernization', 'new public management' and 'individual empowerment', best served by Third Way labour parties, reformed social democrats and red-green coalitions.[82]

Unfortunately neither Keynesians nor Marxists have ever tried to develop transnational continental and global alternatives to national state power. They have socialized the means of production not only within the capitalist mode of production but also within one country. They never even envisaged a plan to establish a transnational *political power* that could measure up to global big money and the unleashed forces of the world market that are at once productive and destructive. The Ordo- and Neoliberals (and that is the historical truth of Neoliberalism) had such a plan, as we have seen, and it worked, with catastrophic results. Only that explains the strange non-death of Neoliberalism – after a crisis that (if we follow the prognosis of the Chicago doctrine of neoliberal economy) should happen only all 50.000 years.

Now national state power is over, at least as the power of the so called sovereign state. To take up a metaphor of Eyal Benvenisti (an Israelian international lawyer): in the process of globalization the state politically, legally, economically and culturally has been transplanted completely

from a detached villa into a condo in the middle of a house of 200 condos with many different and overlapping forms of real estate ownership.[83] However, the network of transnational public law and politics, and the already emerging formation of transnational statehood[84] is far too weak to get the global markets under control again. The coordinated state powers together with international organizations at best can *make* the global market (negative integration) but nowhere are capable to *constrain* it *normatively* that is in the general interest of all of us (positive integration).[85] In thirty years of globalization the most powerful (for good *and* for bad) states of history – Western democracies – have been turned, in the words of Streeck, "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"[86]

The only way out seems to be the *reinvention of democratic class struggle* on the transnational level. The chances are very small but must not be overseen. Unions of southern Europe for the first time in history are beginning acting and striking transnational and beyond borders. Together with a European Parliament that now becomes publicly visible for the first time, they finally could trigger a new democratic class struggle for profane aims: a European unemployment assurance to solve the biggest social problem of Europe today that consists in the highest unemployment rate of the young people of the south ever since the great depression of the late 1920th and 30th.[87] The next step then could be a massive change against the deadly ailment of neoliberalism that is called austerity. There is a simple and effective alternative to cutting expenditures, and that is raising taxes.[88] The chances seem small but without renewed democratic class struggle that is transnational, there is no way out of crisis, and now towards a political union of Europe that is worth of the name democracy.

>> ENDNOTES

[1] Marx, 1852:98.

[2] Somek, 2013.

[3] Koskenniemi, 2006:9-36.

[4] *Ibid*, p. 26.

[5] Marx, 1972: 203-333. Because of the indeterminacy of law-application also the application and concretization of legal norms is not simply a politically neutralized business of managerial experts but, as Kelsen, Merkel and Heller rightly have argued already in the 1920th, that any "determining the content of the legal norm [is] a political question" (Koskenniemi, 2006:29).

[6] See Brunkhorst, 2012.

[7] Osterhammel/Petersson, 2007:85; Hobsbawm,1994:185-187. This does not mean that there did not remain strong continuities in all countries, in particular in Germany the Nazi-continuities of the elites still were strong but silenced and displaced, strikingly described by Hermann Lübbe as "kommunikatives Beschweigen brauner Biographieanteile"), see Lübbe, 1983.

[8] See already: Jesch, 1961.

[9] See Kelsen, 1945:518-526.

[10] See Rainer, 2003; Di Fabio, 1998.

[11] Fossum/Menéndez/Augustín José, 2011:175.

[12] It is argued that, even if the constitution of Luxemburg did not contain anything vaguely resembling a proto-European clause, the *Conseil d'État* 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 should, renounce certain sovereign powers if the public good so required. See the Report on the 1952 judgment of the Conseil d'Êtat and Fossum/Menéndez, 2011.

[13] *Ibid*, 2011.

[14] On the double legitimization of the EU by the community of peoples of the member states and the people of the European Union see Habermas, 2011. For a striking comparison with the development of the United States founded by a similar kind of 'double sovereignty' (which still is a technical term of constitutional law in the US), see Schönberger, 2005. Augustine Menendez has made an important contribution to that thesis, comparing in a case study the implementation of federal taxes in the US and the EU, demonstrating the striking parallels: Menéndez, 2004.

[15] An illuminating case study is: Madsen, 2012:43-60. On the general need of the 'Kantian' mindset of normative social integration for systemic and 'managerial' stabilization see: Habermas, 1981:228; see: Nassehi, 2006:126-127.

[16] A good explication of the Kantian democratic and even cosmopolitan mindset of the Lisbon Treaty is: Von Bogdandy, 2012: 315-334; see already (with respect of the Maastricht-Amsterdam Treaty and in particular the Constitutional Treaty that failed in 2005 but to a large extend is identical with the Lisbon Treaty): Callies, 2005:339-421.

[17] What German lawyers observe as the emergence of an *autonomous legal doctrine* is reflected by a Scottish observer as the emergence of *European common law* that transcends the *pacta sunt servanda* validity of international law. European "institutions and organs", Neil MacCormick argues, "have had a continuous existence over several decades and through many changes of personnel. They have become central institutional facts in the thinking of Europeans. Citizens and officials throughout Europe have interpreted the norms of and under the treaties as having direct effect on private persons and corporations as well as on states. Over more than four decades this has proceeded with impressive continuity" (MacCormick, 1999:139).

[18] Cf. Ley, 2010:170.

[19] Möllers, 2005: 351-389; Möllers, 2003. On the accumulation of fexible and decentred power see Hardt/Negri, 2002; Prien, 2010; Fischer-Lescano/Teubner, 2006; on white, grey and black networks see: Matiaske, 2012.

[20] See Zürn, 2004.

[21] See Grant/Keohane, 2005:29-43.

[22] For a sound criticism of these tendencies see Rieckmann, 2010:120-139.

[23] On the stages see Tuori, 2010:3-30.

[24] I have tried to explain that further in: Brunkhorst, 2013 (forthcoming). On the "existing concept" see Hegel, 1969:481. On the (very one-sided) critique of the empty, or as Hegel says: "abstract" ought see Hegel, 1971: 369-372. Kant is not that far away from modern historical and evolutionary thinking as his critics since Hegel regularly assume, see already Vorländer, 1921: 100. Such a concept then can work in both directions dialectically: as a mechanism of stabilizing the so called Sittlichkeit (ethical life) of the social systems of bourgeois society, capitalist or bureaucratic class-rule and authoritarian economic government, or – in dialectical retaliation – "can strike back" (Müller, 1997:56). It can strike back because law, and in particular constitutional law can be used by the have-nots, by peripheral states and lower classes as a legal principle, a legal claim, or even as a legal remedy to contradict its own interpretation and implementation that is in the service of the respective ruling classes.

[25] Most of the school were conservative opponents to Nazi-fascism. Böhm was a declared anti-Nazi, especially an early defender of the Jews, and a member of the resistance with close relations to Bonhoefer and Gördeler. Eucken was a conservative Anti-Nazi who strongly opposed Heidegger as the first Nazi-Rektor of the University of Freiburg (over whose main entrance even in 2011 the 1936 dedication is still clearly visible. He was loosely associated with the conservative resistance. Rüstow was a member of the far-right shadow cabinet led by General Kurt von Schleicher. He engaged in a half-hearted attempt at an anti-Hitler coup d'état, and he had to emigrate in 1933. Röpke was attached to the conservative 'revolution' (Tat-Kreis) from the early 1920s. However, he strongly opposed German fascism as early as the late 1920s, and he emigrated (as did Eucken) to Turkey in 1933. Alfred Müller-Armack was a Nazi of the first hour. Hayek took a chair at the London School of Economics (LSE) and he left the continent by 1931. He was the most radical liberal opponent of Keynes, who already had at that time a chair at the LSE. Still the best criticism of Hayek is Kelsen, 1954:170-210. As a legal theorist Hayek was very close to Carl Schmitt. This point is made in Scheuerman, 2004:172-188; see Vatter, 2010:199-216.

[26] Cf. Neumann, 1978:70-74, 79-99.

[27] See Tuori, 1933:16. The hi-jeking was organized by: Böhm,1933.

[28] For a brief and powerful criticism of the imperial tendencies of ordo-liberalism see Teubner, 2012:30-34.

[29] Cf. Müller –Armack, 1960:11-12, 15.

[30] Cf. Wegmann, 2010: 91-107, at 93.

[31] Cf. Tuori/Sankari, 2010: 15.

[32] *Ibidem*, 2010, pp. 91-107, at 93.

[33] "Diese Asymmetrie ist bereits in den Gründungsverträgen angelegt, was sich daran zeigt, dass im Gegensatz zu den meisten Rechtsordnungen der Mitgliedstaaten die Wettbewerbspolitik der Union verfassungsrechtlich abgesichert ist, während die Bewältigung der sozialen Folgen den Mitgliedstaaten überlassen bleibt. Auf diese Weise fallen Deregulierung und Regulierung institutionell auseinander. Legitimationstheoretisch lässt sich das nicht begründen. Die Aufspaltung in eine bloß formelle Legitimation des gemeinsamen Marktes und

eine materielle, über die Mitgliedstaaten vermittelte Legitimation der Marktkorrektur macht angesichts der vielfältigen wechselseitigen Abhängigkeiten heute keinen rechten Sinn mehr. Will man Freiheiten über Grenzen hinweg ausdehnen, müssen auf Ebene der Union politisch hinreichend verantwortete Kompetenzen für eine Umverteilung geschaffen werden." (Franzius/Preuß, 2011:70).

[34] On the "hidden curriculum" see Offe, 2003:437-469, at 463. On the distinction between the two constitutional orders see Fraenkel, 1999:33-266 (published 1974, originally finished 1938); see Joerges, 2012:357-386, at 360-361, 366-367, 377-381.

[35] Wegmann, 2010:94. Art. 2 ECC: "It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States." Today it is replaced by Art. 2 EC: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States". On the term "invisible constitution" but with a bit different meaning see: Antje, 2008.

[36] See Sonja, 2012:20.

[37] See Weidmann, 2012b:33; Weidmann, 2012a:28 (quoting already the following article of Di Fabio); Di Fabio, 2012:9.

[38] See already Marx, 650-657.

[39] See Friedman, 1982:15-26, especially at 20-21.

[40] See Kelsen, 1967:170-210; Tugendhat, 1992:352-370; Streeck, 2012a.

[41] See Crouch, 2011.

[42] Mestmäcker, 2012:5-14, at 9; the same argument seems to fit the present crisis, see Mestmäcker, 2012:12. 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" (Amond, 1991:467-474, at 231).

[43] For the thesis that transnational law already has realized a mutation to a law that is no longer related to the legislative power see: Amstutz/Karavas, 2006: 14-30, at 20; sceptical: Ladeur, 2012:220-254; Albert/ Stichweh, 2007.

[44] Stone-Sweet, 2000:193.

[45] See Voßkuhle, 2010:175-198.

[46] See Enderlein, 2011.

[47] Cf. Streeck, 2012a:8.

[48] Streeck, 2012a:6. On the unity of ordo- and neoliberalism see also: Scharpf, 2011.

[49] *Ibidem*, 2012, p.8.

[50] See Rödl, 2012: 5-8; Joerges,; Böckenförde, 2011: 299-303; Grözinger, 2012. Grözinger calls "financial markets" strikingly "a second constituency".

[51] Paul Krugman rightly states: "Fifteen years ago Greece was no paradise, but it wasn't in crisis either. Unemployment was high but not catastrophic, and the nation more or less paid its way on world markets, earning enough from exports, tourism, shipping and other sources to more

or less pay for its imports." (Krugman, 2012).

[52] Cf. Streeck, 2005.

[53] On the "existing concept" see Hegel, 1969: 481. On the (very one-sided) critique of the empty, or as Hegel says: "abstract" ought see Hegel, 1971:369-372. Kant is not that far away from modern historical and evolutionary thinking as his critics since Hegel regularly assume, see already Vorländer/ Leben, 1921:100. Such a concept then can work in both directions dialectically: as a mechanism of stabilizing the so called Sittlichkeit (ethical life) of the social systems of bourgeois society, capitalist or bureaucratic class-rule and authoritarian economic government, or – in dialectical retaliation – "can strike back" (Müller, 1997:56). It can strike back because law, and in particular constitutional law can be used by the have-nots, by peripheral states and lower classes as a legal principle, a legal claim, or even as a legal remedy to contradict its own interpretation and implementation that is in the service of the respective ruling classes.

[54] See Chalmers/Damian/Hadjiemmanuil/Christos/Monti/Giorgio/Tomkins, 2006; Craig/De Búrca, 2007.

[55] Cf. Tuori; Sankari, 2010:17.

[56] See Alter, 1996:458-487; Alter, 1998:121-147; Hitzel-Cassagnes, 2012 (TFEU is the Lisbon Treaty on the Functioning of the European Union).

[57] *Ibidem*, 2010.

[58] On the ambivalence of the fragmentation diagnosis (that is true also for all larger national states) see Möllers, 2010: 150-170.

[59] ECJ Nov. 6, 2012, EU-Commission vs. Hungeria, quoted from: <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db11f305cc49ce45dbba9d83a1834337eb.e34KaxiLc3qMb40Rch0SaxuKbNbo?text=&docid=129324&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=9743> Acess in: 7. 11. 2012.

[60] Cf. Teubner, 2003:1-28.

[61] In cases such as Walrave, Bosman, Viking and Laval the European Court the basic freedoms prevail over basic rights. In an antidemocratic way basic rights are now constrained by the four basic freedoms, and in particular by the freedoms of big money, capital etc., and not – as it should be at least in an egalitarian democratic society – the other way round, see Buckel and Oberndorfer, 2009:277-296, at 285.

[62] Weiler writes: "[Y]ou could create rights and afford judicial remedies to slaves. 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. Long before women and Jews were made citizens they enjoyed direct effect." (Weiler, 1997:495-519).

[63] Cf. Fraenkel, 1974.

[64] Cf. Buckel/Oberndorfer, 2009:285.

[65] Cf. Madsen, 2012:55.

[66] See Maus, 1992; for the present legal-philosophical discussion see Besson, 2011:103-122, at 73-77.

[67] With reference to the historical concept of emancipation see Somek, 2013:8.

[68] See Dann, 2002; Fossum/Menéndez, 2011: 123.

[69] Cf. Bast, 2010:173-180.

[70] See "An ever-deeper democratic deficit", in: The Economist, quoted from: http://www.economist.com/node/21555927 Acess in: 18.11.2012.

[71] On the strangely sustainable triumph of ordo- and neoliberal economy in global media see Streeck, 2012b; Schulmeister, 2012:1, 12-13, at 12.

[72] Cf. Brunkhorst, 2007:1-6.

[73] Crouch, 2004; see also the quintessence of the last books of the economists Paul Krugman and Joseph Stiglitz: Hacker/ Pierson, 2012: 55-58; with instructive statistics and observations: Judt,

2010. On rough equality of stakeholders see Christiano, 2010:119-137, at 130-132; on "rough equality" as a necessary condition of modern mass-democracy see Crouch, 2004, Chapter 1.

[74] Cf. Streeck, 2010:159-173; Cf. Streeck, 2011.

[75] See Mayntz, 2010:175-187.

[76] On states as global economic actors see Brink, 2008.

[77] Offe, 2012:3; Streeck, 2012a.

[78] Offe, 2012:6. On the genealogy see Streeck, 2011. What is crucial for the neoliberal triumph and sharply recognized by Reagan and Thatcher and their economic advisers: that the Unions first are losing their formerly strong political influence, and then their organizational power, either by direct oppression such as in the UK, the US and in the low intense democracies of the formerly so called Third World, or by internal reform that makes them sometimes a powerful, quasi council-democratic participant in globally operating industrial enterprises such as Volkswagen, but at the price of the general interest of the working class. On the latter see the case study: Herrigel, 2008:111-133.

[79] See Mayntz, 2010; Streeck, 2010; see also the long time case study Streeck/Mertens, 2012.

[80] See Beckert/Wolfgang 2012:7-17.

[81] Cf. Offe, 2012:3. Scharpf, 2012.

[82] See Somek, 2013. See Brunkhorst, 1999: 28; Brunkhorst, 1999:54; Brunkhorst, 2007:22-25.

[83] Quoted from Bogdandy, 2012.

[84] See Albert/Stichweh, 2007.

[85] See Offe, 2003:457; on the concept of solidarity as the general or universal interest of all of us, see Brunkhorst, 2005; on normative constraints see Brunkhorst, 2013; on the distinction between 'positive' and 'negative integration' see Scharpf, 1999.

[86] Streeck, 2011. As a consequence popular sovereignty has been fragmented and marginalized, beyond and within the national state, see Prien, 2010.

[87] This goes back to a suggestion of Claus Offe after a highly pessemistic lecture of Wolfgang Streek on a conference at the New School for Social Research and the Deutsche Forschungsgemeinschaft on "Social Research in a Transforming World: Transatlantic Conversations", Feb. 28, 2013.

[88] Offe concludes: "(The) rich countries of Europe dictating the poorer ones the austerity cure in order for them to regain the trust of the financial industries. They do so in spite of all the evidence that austerity is a highly poisonous medicine, an overdose of which will kill the patient (rather than stimulate growth and expand the tax base), in which case the weakest Euro zone members (and eventually all of them) become ever more dependent on lenders and allow them to charge ever higher and ever more unsustainable rates. It becomes ever more difficult to envisage the bootstrapping act by which European political elites might escape from this vicious circle." (Offe, 2013:13-15)

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