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Democracy vs. Capitalism - The Consequence for Europe

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Democratic welfarism has transformed capitalism. Great parts of the means of production have been socialized or partly socialized. Finally, the latter did not become socialism but democratic capitalism instead of capitalist autocracy (or defective democracy). However, democratic social welfare capitalism has suffered from two problems: secular stagnation and horizontal exclusion. Aggressive neoliberalism, politically and theoretically well prepared, took its chance and changed the direction of the evolution of world society. The last 40 years witnessed a great transformation from full-fledged market-controlling to defected market-conform democracy. Then came the disruption of the greatest world economic crisis since the world economic crisis of 1929. Does democratic socialism and social Europe have an unexpected new chance?

Modern capitalism, as it was described and explained by Marx and Weber (in different, but much more complementary than exclusive versions), is the most productive economy ever invented, whilst at the same time the least sustainable and most catastrophic ever invented by social evolution. My first section is on the partial success of democratic welfarism in overcoming the capitalist system and to make it slightly more sustainable and less catastrophic (I). However, this period only lasted for 40 and 50 years after the end of the Second World War. It came in crisis in the 1970s because of two structural problems that democratic welfarism could not solve quickly enough (II). Therefore, the third chapter is on the neoliberal turn of world society (III). Following this is the hope and the question, could democratic socialism come back and establish an economy that is as productive as capitalism but contrary to capitalism sustainable and less catastrophic? (IV) The question remains open, and the final part is on Europe's constitutional crisis (V).
In the aftermath of the global economic crisis of 1929 and WWII, the nation state became a *democratic social welfare state*. – first in Europe and North-America but then and rapidly, nearly all over the world and especially is the emerging postcolonial world, even if it was implemented very differently, and often it appeared only in constitutional textbooks and not in reality. It was the first successful realization of a politically and socially inclusive democratic regime with a *mixed economy* that was a hybrid between capitalism and socialism.

1. The relations of production were regulated by constitutionally enabled democratic class-struggle.[1]Art. 14 of German Basic Law from 1949 codified private property, but Art. 15 explicitly allowed the socialization of the means of production (codified in Marxist vocabulary: "*Vergesellschaftung der Produktionsmittel*"), and Art. 20 made the social republic a basic goal of the state, and the (liberal or socialist) way of its realization due to democratic will formation alone.[2] Instead of the dialectical tension between liberalism

1 Korpi, W. (1983) *The Democratic Class Struggle,* Routledge, London; Hoss, D. (1972) *Der institutionalisierte Klassenkampf*, Frankfurt: EVA.

2 Abendroth, W. (1968) Zum Begriff des demokratischen und sozialen Rechtsstaats im Grundgesetz der Bundesrepublik Deutschland, in: *Rechtsstaatlichkeit und Sozialstaatlichkeit*, ed. Ernst Forsthoff, Darmstadt Wissenschaftliche Buchge-

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(Art. 14 GG) and socialism (Art. 15 GG) the EU-Treaties have constitutionalized competition law (Art. 2 EC), and that means the market-conform prevalence of private property over the democratic socialization of the means of production.

2. The re-interpretation of the US-Constitution since the mid-1930's had the same revolutionary result.[3] The meaning of the *due process clause* and the *commerce clause* of the constitution were reversed completely. They turned from legal means to stabilize capitalist freedom into an instrument to save the peoples freedom from capitalism. However, since the 1980s, Congress-legislation has watered down many New-Deal advances and Supreme-Court judgments such as *Citizens United* (2010):

3. The one and only form of private property that was established by the French Code Civil Code in 1804 (already mentioned two time in the *Declaration of Civic and Human Rights* from 1789, and was even sacrificed in the last Art. 17) became a borderline case (now § 903 BGB).[4] It was broken up into hundreds, if not thousands of forms of property between public and private property.[5]

4. Social differences declined. The rich could no longer pay for their palaces in Newport and Long Island, which now are used as schools and universities (because these summer houses are reminiscent of European Castles but were much bigger). The Fordist constellation still consisted of huge class differences. But "with a growing pie, one could give to the poor without taking too much from the rich."[6] The differences were effectively compensated by mass-consumption and a quickly expanding educational system that allowed much more social mobility than ever before.[7] The typical worker drove a small car, his boss a big car, both sticking in the same traffic jam, driving to the same holiday coast, sending their kids to the same public school. In the 1960's and 70's social class mobility in the U.S. was relatively high; and required by the expansion of the educational system and shrinking social differences. Today there is no longer such measurable social class mobility. As in 1900 family income alone determines class affiliation.[8]

I

The successful establishment of the social welfare state that in countries like Sweden came close to democratic socialism, has and have impressively demonstrated that there are not only *bureaucratic,* but also *democratic* alternatives to the capitalist mode of production. Even if there is (up to now) no democratic alternative to the functionalist formation of society (*Gesellschaftsformation*) and to a form of life that is based on the great

sellschaft pp. 114-144. In the 1950's, Abendroth's position was eccentric, today it is mainstream in German constitutional law („herrschende Meinung"), see: Möllers, C. (2016) *Staat als Argument*, Munich: Beck.

3 Ackerman, B, Alstott, A. (2001) *Die Stakeholder-Gesellschaft. Ein Modell für mehr Chancengleichheit*, Frankfurt am Main: Campus ; Brunkhorst, H. (2014) *Critical Theory of Legal Revolutions – Evolutionary Perspectives,* New York, London: Bloomsbury.

4 § 903 reads: „Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen." The law ("Gesetz") and the basic rights of third parties ("Rechte Dritter") then became the mean to leverage the ratchet of private property through legislation and constitutional jurisdiction (the famous "Drittwirkungslehre" of the German Constitutional Court).

5 Bellomo, M. (1995) *The Common Legal Past of Europe 1000-1800*, Washington: The Catholic University of America Press; Denninger, E. (1984) *Von der bürgerlichen Eigentumsgesellschaft zum demokratischen Rechtsstaat,* in: *Funkkolleg Praktische Philosophie/Ethik. Studientexte*, Band 3, herausgegeben von Karl-Otto Apel, Dietrich Böhler und Karl-Heinz Rebel, Weinheim/Basel: Beltz.

6 Herzog, H. (2016) The normative stakes of economic growth. *The Journal of Politics* 78, no. 1: 50-62.

7 Rawls argues rightly that the class-differences and the factual power of the elites over the people (see Wright-Mills, C. (1956) *The Power Elite,* Oxford: Oxford University Press) Rawls, J. (2003) *Gerechtigkeit als Fairneß – Ein Neuentwurf* Frankfurt: Suhrkamp.

8 Wilkinson, R, Pickett, K. (2010) *The Spirit Level: Why Greater Equality Makes Societies Stronger,* New York: Bloomsbury; Judt, T. (2010) *Ill Fares the Land,* New York: Penguin Books; Nachtwey, O. (2016) *Die Abstiegsgesellschaft. Über das Aufbegehren in der regressiven Moderne,* Berlin: Suhrkamp.

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inventions of the technological revolution such as running water and chemistry), the organizational principle (*Organisationsprinzip*) of capitalist forms of property can be changed.[9]

Since the 1930s's, bourgeois class rule has been constrained by trade union power, technocratic elites, electoral campaigns and majority decisions. Stakeholders prevailed over shareholders. Now it is the other way around. A hundred years of heavy class struggles and struggles over democratic rights in Western societies between 1850 and 1950 were finally successful in civilizing modern capitalism. We had capitalism with a human face for half a century between about 1935 and 1985, at least within the Western hemisphere. In terms of justice this was a "great progress".[10]

II

However, during the course of the 1960's it became evident that the solution to the systemic problems of a functionally differentiated capitalist economy by the democratic social welfare state suffered from two *structural problems*. One was economically, the other was both culturally and socially.

First, democratic welfarism came into an *economic* critical situation with the *end of high growth rates* that threatened modern capitalism with *secular stagnation* – a challenge modern capitalism never had to face before. Between 2000 and 2016 *real terms investment* in Germany (one of the biggest winners of globalization and Europeanization) decreased by 20%.[11] Secular stagnation is not at all due to the presumably "creative destruction" (Schumpeter) of World War II but, as Robert Gordon has shown:

to the *finalization of the great technological inventions* of electricity, running water, the internal combustion engine, the chemical rearrangements of molecules (pharmacy), and mass-communication already in the year 1940.[12]

Moreover, the critical situation of the world economy was reinforced by the aggressive return to market-radicalism since the late 1970's that led to a *secular increase of inequality*. It is now back to the historical peak of 1900 (Piketty).[13]

The great electronic inventions of the present, the internet, the mobile phone and the personal computer, are all at best *low-growth inventions* with dramatically *negative effects on the future of academic employment* (Collins).[14]

The *second* problem was cultural, and a trigger of social and political inequality beyond the sphere of production. The *vertical emancipation* of the lower classes and the working class was not accompanied by the *horizontal emancipation* of oppressed sexes, religious

9 On the distinction see Habermas, J. (1973) *Legitimation Crisis* Frankfurt, Suhrkamp.

10 Marx was referring to the Jewish emancipation (legal equality and full citizenship) in: Marx, K, Engels, W. (1976) *Bd. 1 (MEW 1),* Berlin: Dietz.

11 Offe, C. (2016) *"The Dynamic of Secular Stagnation',* paper presented at a conference on the topic Jenseits des Kapitalismus in Wuppertal.

12 Gordon, R. (2017) *Rise and Fall of American Growth: The US Standard of Living since the Civil War*, Princeton: Princeton University Press 2 New York, Princeton University Press.

13 Piketty, T. (2014) *Capital in the Twenty-First Century,* Cambridge, MA: Harvard University Press.

14 Wallerstein, I, et al. (1975) *Does Capitalism have a Future, 9-36; Herbert Marcuse, "Der Kampf gegen den Liberalismus in der totalitären Staatsauffassung, in: Marcuse, Kultur und Gesellschaft I*, Frankfurt: Suhrkamp.

Note: Although there is room for debating that digital technology has had its productivity boom, and if progression is slower now they might be still far from reaching their productivity potential. The scientific community is divided about the point, and sociologists and historians like Gordon and Collins rightly argue that the productivity boom of AI is far beyond that of the industrial age, and they give a couple of further reasons that it is over, and that computerization of everything will lead to (especially academic) mass-unemployment of measures like that of artisans in the 19th century. Many economists object, but even if they have much more precise models with a lot of math their models are by far not complex enough to compete with sociology and history. However, nobody surely knows the future, and prognosis is impossible in a society that evolves as quickly as modern societies.

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and sexual orientations, ethnic minorities and people of color.[15] National welfarism was *white*, *male* and *heterosexual*. Egalitarian democratic solidarity ended everywhere at the *color line* and the *gender line*, with all social consequences of unpaid work and unequal wages.[16] In the public consciousness of democratic welfarism all that did not matter. It was repressed and silenced. Both, the existing discourse in literature, and academics articulating the latent authoritarianism of affluent democracies were marginalize-d. Moreover, the exclusion of women, homosexuals, people of color from *public discourses*, and the repression of the colonial past were stabilized by a *public law* that in many respects resembled (and in many places, was) an apartheid regime.

Habermas in the 1960s's rightly made the diagnosis of a "depoliticized" and "desiccated public sphere".[17]

However, for a democratic constitutional regime that claims universal "exclusion of inequalities" not only for human rights but also for democracy (Art. 16 *French Declaration*) this becomes a *serious problem of legitimization* and *motivation* once it is politicized.[18] In terms of justice this was the dark side of democratic welfarism, and its deeply unjust side.

The Re-politicization of the public sphere came in the 1960's, unexpected and unpredictable. Due to consumerism and prolonged adolescence, the hegemony of the achievement principle – the social-psychological cornerstone of "modern capitalism" (Weber) – was successfully challenged for the first time in history since the invention of the protestant ethics.[19]

The successful challenge of the achievement principle triggered a *crisis of motivation* in the name of a new utopianism and hedonism (Hippies, Woodstock etc.) The latently authoritarian structure of existing Western democracies triggered a *crisis of legitimization*.[20]

Latent authoritarianism was revealed with the first sentence of a speech by Mario Savio (the speaker of the protesting students of Berkeley who triggered the global students' movement of the 1960's) on a police car that was blocked by a sit-in on Berkeley campus, October 1, 1964. The two police officers in the car had allowed Savio to take off his shoes and give a speech from the top of their car. His first sentence was: "They're family men, you know. They have a job to do! Like Adolf Eichmann. He had a job to do. He fit into the machinery."[21] Many sentences, newspaper articles, scientific essays and books pro and con followed together with an entire industry of new and old, rediscovered and newly invented literature on authoritarianism and anti-authoritarianism. A new public discourse was created.

Another, even shorter sentence revealed that the color line was not a problem of African Americans but all Americans and the entire human race, when the boxing champion Muhammed Ali in April 1966 justified his rejection of the official call to Vietnam with the words: "They (the Vietcong) never called me nigger." Suddenly the oppression and sup-

15 The helpful distinction of horizontal and vertical emancipation goes back to the theory of societal disparities by Claus Offe et. al., for an actualized version see: Nachtwey, O. (2016) *Die Abstiegsgesellschaft. Über das Aufbegehren in der regressiven Moderne,* Berlin: Suhrkamp.

16 Katznelson, K. (2005) *Twentieth-Century America,* New York-London: W.W. Norton, 2005; Gurminder K. Bhambra, G. (2014) "Postcolonial Europe in Crisis" Online resource.

17 Habermas, J. (1989) *The Structural Transformation of the Public Sphere*, translated by Thomas Burger. Cambridge, MA: MIT Press; Habermas, J. (1989) "Technology and Science as 'Ideology'." In *Jürgen Habermas: On Society and Politics*, edited by Steven Seidman, 237-265. Boston, MA: Beacon.

18 Stichweh, R. (2000) *Die Weltgesellschaft,* Frankfurt aM: Suhrkamp Verlag.

19 Nunner-Winkler, G, Döbert, R. (1975) *Adoleszenskrise und Identitätsbildung,* Frankfurt: Suhrkamp.

20 Habermas, J. (1973) *Legitimation Crisis* Frankfurt, Suhrkamp.

21 Rorabaugh, W.J. (1989) *Berkeley at War: The 1960s,* New York, Oxford: Oxford University Press; Kemp, T. (2012) *Regionale, nationale und globale Aspekte einer Studentenbewegung. Eine qualitative Studie zur Kieler Studentenbewegung* 1967-1969, Master Thesis, Oslo: University of Oslo 32.

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pression of the "other heading" came to the fore, and became a problem of justice for the entire society.[22] Wearing guns publicly and visibly, the Black Panthers at the same time performed a speech act that referred to the constituent power of the people enshrined in the First and Second Amendment of the US-Constitution, and with this single act they revealed that bearing constituent power was no longer solely a white privilege.

There were many other world-disclosing paintings, sentences, poems, movies, actions and happenings like that, opening new perspectives, giving one sphere of silenced and suppressed discourses after the other a voice, and triggering ever new, anarchic, wild, expressive, emotional, and rational public discourses and a great variety of social movements.[23] The lines of color, gender and heterosexuality that divided the West horizontally, came under pressure all over the world, and the new social movements resulted in one of the greatest cultural revolutions ever. In particular, the beginning of women's emancipation challenged the legitimacy of thousands, and hundred thousand of years of paternalism, and not much different was the emancipation of homosexuals from hegemonic heterosexual repression. Even if we consider that factually repression of homosexuals (and even legal discrimination in concerns of marriage) is far to have come to an end (even in the Western World); in this case, as in the case of women's lib the cultural revolutionary breach of history is so evident that one could turn the famous aphorism of Nestroy the other way around and say, that progress is greater than it looks like.[24]

III

However, the national welfare state could not solve the problem of growth alone, and the cultural revolution was transnational from the beginning. The territorial borders of the welfare state became the limits of its efficiency and functionality. National welfarism was not deemed fit for globalization. Neoliberalism was. Neoliberal globalization and reform have *turned the relations of dependency between public power and private money upside down*. Since the 1980's the *tax state* that legally has taken the money away from the rich was replaced by the *debt state* that is dependent on the generosity of the rich. Since the 1990's ever more workers lost their right to strike *factually*, and in exchange got *credits unlimited* at the expense of a new form of debt slavery. Finally *state embedded markets* turned into *market embedded states*.[25]

Within the neoliberal political-economic regime high profit rates can be maintained only at the expense of *growing social differentiation*. However, this has deadly consequences for growth *and* democracy. Growth comes under permanent threat of *under-consumption*, and increasing social inequality causes increasing *political inequality*.[26] Democracy runs out of alternatives. Not absolute poverty but relative inequality *discour-*

22 Derrida, J. (1992) *The Other Heading,* Indiana: Indiana University Press.

23 This is a paradigm case of Habermas theory of deliberative democracy, see: Brunkhorst, H. (2016) *Deliberative Demokratie*, in: Peter Koller (ed.) Kommentar zu Faktizität und Geltung, Berlin: Akademie.

24 In his comedy "Der Zerrissene" Nestroy wrote that progress looks greater than it is.

25 Streeck, W. (2005) *"Sectoral Specialization: Politics and the Nation State in a Global Economy"* paper presented at the 37 World Congress of the International Institute of Sociology, Stockholm.

26 Schäfers, A. (2015) *Der Verlust politischer Gleichheit; Warum die sinkende Wahlbeteiligung der Demokratie schadet* Frankfurt aM: Campus Verlag. On the theory of under-consumption see: Baran, P.A, Sweezy, P.M. (1966) *Monopoly Capital, An Essay on the American Economic and Social Order,* New York: Monthly Review Press. Prices are decoupled from markets, profits are stable, their increase rates are predictable and can be planned, the cyclic (sinus curve like) fall and rise of profits suddenly comes to an end, and the profit margins of the 500 biggest US-firms remain consistently high since 2008 – to the horror of Goldman & Sachs (Joe Weisenthal, Goldman & Sachs says it may be forced to fundamentally question how Capitalism is Working. The profit margins debate could lead to an unsettling conclusion, Bloomberg Markets Feb. 3, 2016, http://www.bloomberg.com/news/articles/2016-02-03/goldman-sachs-says-it-may-be-forced-to-fundamentally-question-how-capitalism-is-working). At the same time middle and lower classes do not have enough money to buy the most urgent consumer goods. The result is a crisis of under-consumption, as Marx described in *Capital*: "The ultimate reason for all real crises always remains the poverty and restricted consumption of the masses as opposed to the drive of capitalist production to develop the productive forces as though only the absolute consuming power of society constituted their limit." Mark, K. (1968) *Das Kapital* Berlin, Dietz.

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ages the people, resulting in a new but this time not utopian and hedonistic but a paralyzing and depressing *crisis of motivation* that explains the dramatic decrease of the voter turnout for lower middle and working classes that declined to 30% and less, whereas the turnout for upper classes almost reached 100%.[27] The result, leftist parties lose their voters, moving further right from election to election. Finally, we are left with the gloomy alternative between *right wing parties* of market fundamentalism with a culture of political correctness[28] and *far right parties* of market fundamentalism plus a neo-conservative cultural background that is nationalist, racist and religiously fundamentalist.[29] The fiction in 1979 that there was no alternative, soon became the social reality due to the consequences of the fiction. A paradigmatic case of the Thomas theorem of sociology: "If men define situations as real, they are real in their consequences".[30]

The disastrous increase of social inequalities also demolished the historical and actual justice of the global cultural and civil rights revolution. For the unemployed, previously convicted and lesbian African American, who lives in the homophobe and misogynist slum area of Baltimore with its racist police officers, the progressive new rights and freedoms *have no fair value* (Rawls). Therefore, they have become privileges, and the same is true with respect of the quickly growing banlieues of Europe.

Neoliberalism not only deconstructed welfarism, it also globalized the neoliberal state together with an ever-denser network of transnational private-law regimes. Private law that since its old Roman days is a law of coordination of the interests of the ruling classes, finally marginalized international public law, and stabilized the unequal relations between the global haves and the global have-nots.[31] The state was subverted by private-public partnerships, and – together with the turn from the debating and disputing temple of the General Assembly to the executive police of the Security Council – ever more power was transferred from the legislators to transnationally united executive bodies.[32] Legal formalism was replaced by legal dynamism, and legally bound formal rule by legally unbound informal rule.[33] The invention of the Eurogroup at the end of this period is paradigmatic. At the height of the Greek crisis the Group decided to expel the Greek minister of finance from an ongoing session. The minister asked for legal legitimation, the chief of the Group called for his lawyers. They told him that the Group did not exist in terms of European procedural law. Therefore, everything they did within the limits of the criminal code was legal.[34]

Again, this trend is stabilized by the constitutional treaties and the institutional structure of the European Union. Macroeconomic decisions are determined in advance by the treaties.[35] Price stability trumps full employment, labor market access trumps democratic

27 Schäfers, A. (2015) *Der Verlust politischer Gleichheit; Warum die sinkende Wahlbeteiligung der Demokratie schadet* Frankfurt aM: Campus Verlag.

28 From Clinton's Democrats and Blair's Labor Party over Schröder's social democrats and Merkel's Christian Democrats to Hollande's socialists.

29 AfD, Le Pen, G.O.P. British Brexit coalitions etc..

30 Thomas, W.I. (1928) *The Methodology of Behavior Study,* New York: Knopf.

31 George, E. (2016) *"Transnational Commercial Arbitration and arbitrators: Institutions, Actors, Dynamics, Transnational Law* panel contribution at Summer Institute, London: Kings College, Poon School of Law.

32 Koskenniemi, M. (2002) *The Gentle Civilizer of Nations,* Cambridge: University Press.

33 Ibid.

34 The Greek finance minister gave the following report about what happened after the Eurogroup had excluded him: "I asked for legal advice, from the secretariat, on whether a Eurogroup statement can be issued without the conventional unanimity and whether the President of the Eurogroup can convene a meeting without inviting the finance minister of a Eurozone member-state. I received the following extraordinary answer: "The Eurogroup is an informal group. Thus it is not bound by Treaties or written regulations. While unanimity is conventionally adhered to, the Eurogroup President is not bound to explicit rules." (Yanis Varoufakis, "As It Happened – Yanis Varoufakis' Intervention during the 27th June Eurogroup Meeting" 2015, https://yanisvaroufakis.eu/2015/06/28/as-it-happened-yanis-varoufakis-intervention-during-the-27thjune-2015-eurogroup-meeting (28.03.2017).

35 Dawson, M, de Witte, F. (2015) "From Balance to Conflict: A new Constitution for the EU", *European Law Journal* 21.

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class struggle, financial conditionality trumps solidarity, austerity trumps Keynesian solutions, market imperatives trump democratic decisions, and competitiveness trumps everything. Competitiveness is the "hidden curriculum" of the constitutional law of Europe.[36] This hidden curriculum has transformed democratic class struggle into a struggle of nations over the generosity of investors.

Thus, if in European macroeconomic choices "are taken in an institutional setting that provides near-perfect protection against the interference of input-oriented political processes and of democratic accountability in the constituencies affected."[37] The final touch of this institutional setting is, as Jelena von Achenbach has shown, the Trilog procedure that precedes the ordinary legislative procedure of the three European powers of Parliament, Commission and Council, and allows the leaders of these institutions to bypass the parliamentary public and the constitutional law of the parliament, depriving en passant parliamentary minorities from any influence.[38]

If there is a future of global capitalism with market-embedded states, the likelihood is extremely high that it will be a *new formation of authoritarian liberalism*.[39] We are already approaching a hypermodern dual state with a social separation of labour between authoritarian prerogatives and rule of law.[40] Ernst Fraenkel's and Franz Neumann's studies from the late 1930's are of gloomy actuality again. The new dual state consists of a strong tendency towards legal over-integration of the ruling classes and under-integration of lower classes and excluded populations. Whereas the former appears only as plaintiffs in court, the latter appear only as accused.[41] Prerogative law and the declared or undeclared state of siege are normalized. Paradigmatic is the emergence of smart and flexible border regimes, which are repealing all citizens living in the border region from most of their constitutional rights. In the US, these are already two third of the entire population (Coast Region and Great Lakes).[42] AfD, Front National, Victor Orban, Donald Trump, Stephen Bannon and Boris Johnson are the *logical consequence of market fundamentalism in permanent crisis*. "In case of doubt send the marines" (Tom Lerner) – or the bankers as in the Troika-rule over the Greek colony of the Eurozone. "The state is back in. But the state does not represent democracy at all."[43]

The only alternative to authoritarian liberalism is democratic socialism. My thesis is that any *democratic* solution to the five major crises of the functionally differentiated, capitalist world society – the crises of growth, social inequality, societal exclusion, environmental devastation and functional globalization – at least must take a large step in the direction of a *socialization of the means of production*. However, democratic socialism can be successful only if it solves all five crises at once, which today shake world society. This is not impossible but close to being impossible. The following classification of crises and solutions, which are compatible with democracies presupposes a theory of complex and

36 Offe, C. (2003) "The European model of ›social‹ capitalism: Can it survive European integration?", in: *The Journal of Political Philosophy* 11/4 pp. 437-469.

37 Scharpf, F. (2013) "*Political Legitimacy in a Non-optimal Currency Area"* Cologne: MPIfG.

38 Von Achenbach, J. (2016) *„Verfassungswandel durch Selbstorganisation: Triloge im Europäischen Gesetzgebungsverfahren",* in: Der Staat 55 pp. 1-39.

39 Heller, H. (2015) Authoritarian Liberalism, *European Law Journal* 3 pp. 295-301; Wallerstein, I, et al. (1975) *Does Capitalism have a Future, 9-36; Herbert Marcuse, "Der Kampf gegen den Liberalismus in der totalitären Staatsauffassung, in: Marcuse, Kultur und Gesellschaft I*, Frankfurt: Suhrkamp.

40 The dual state is a mix of (inclusive) norm-state (or *Rechtsstaat*) and (exclusive) prerogative state (or police-state), and there are more formations of the double state than pre-war fascist regimes, on the paradigm case of the latter see: Fraenkel, E. (1969) *The Dual State,* New York: Octagon.

41 Neves,G. (1999) 'Zwischen Subintegration und Überintegration: Bürgerrechte nicht ernstgenommen', *Kritische Justiz* 4 pp. 557-577.

42 Shachar, A. "New Border and Citizenship Constellations: Implications for Law and Justice", paper presented at the WZB Workshop 'Critical Theory and Constitutionalism', Berlin 11.12.2015.

43 Klug, H. (2016) *"Transnational Commercial Arbitration and arbitrators: Institutions, Actors, Dynamics, Transnational Law* Summer Institute, London: Kings College, Poon School of Law.

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divergent differentiation, and – as in Marx' political economy – the structural differences are the critical points where crisis emerges. All critical tendencies of globalized capitalism are related to *basic clusters of differentiation* in modern society.

The increasing *social difference* causes – as already described – a *crisis of motivation and legitimization*, and enhances the threat of *secular stagnation*. Thus, to save growth *and* democracy, *massive redistribution* of wealth to the lower and middle classes is the only realistic perspective, just because only these classes buy masses of consumer goods. Massive redistribution would kill two birds with one stone, the threat of *economic collapse* through stagnation, and the threat of *democratic collapse* through political inequality. Unfortunately, there are many more birds in the air over Bodega Bay.

The crisis of societal exclusion (that undermines functional differentiation[44]) has transformed the structural difference of *center and periphery* into the social difference between *included* and *excluded* populations. National exclusion rates increased since 2000 between 22% and 40%.[45] Whereas the degraded middle and lower classes have lost any chance to change their inferior social positon, excluded populations are excluded from access to all social systems (as the homo-sacer or the outlaw in old-European stratified societies).[46] The only promising cure is *massive investment in educational and socialization agencies together with a basic income*, high enough, for example, to pay tuition and the entire costs of study in the United States.[47]

The difference of *system and environment* causes ecological devastation. The only solution for the environmental problems (if there is any) is *green growth*. The enormous proportions of the problem come to the fore once we take into account only CO2-reduction through Carbon capture and storage, because this is possible only with far reaching infringements of land ownership worldwide.[48]

In principle, all that is feasible by parliamentary legislation on the national level, even if it needs therefore coordinated intergovernmental action, which is highly implausible. However, for the last problem no intergovernmental solution is available any longer.

Functional differentiation went global, and if we only take the most dangerous system of capitalist world economy in account, there seems to be no other effective mean against the blackmailing power of global capital than the transference of real power – still called with an outdated term 'sovereignty' – to *democratically legitimated and controlled transnational governmental structures* on regional and global levels.

This latest problem cannot be solved by national and intergovernmental means any longer. Therefore, what it needs, is democratic government on continental and – to a certain extend - also on the global level.

Any solution to the five crises of differentiation that is only approximate, would transform capitalism so radically that a system that is highly productive at the cost of unsustainability and catastrophes in its societal and natural environment, would become sustainable and, by the way, much more democratic than any previous democracy. Such a system still could be called democratic capitalism (in the meaning of democratically controlled capitalism), and it still would rely on the informative capacity of markets (that was Hayek's strong point). However, it would no longer resemble capitalism as we know it,

44 Brunkhorst, H. (2005) *Solidarity* Cambridge, MIT Press.

45 Offe, C. (2016) *"The Dynamic of Secular Stagnation',* paper presented at a conference on the topic Jenseits des Kapitalismus in Wuppertal.

46 Luhmann, N. (1997) *Die Gesellschaft der Gesellschaft,* Frankfurt: Suhrkamp.

47 Here are well calculated models available: Ackerman, B, Alstott, A. (2001) *Die Stakeholder-Gesellschaft. Ein Modell für mehr Chancengleichheit*, Frankfurt am Main: Campus; Grözinger, G. Maschke, M, Offe, C. (2006) *Die Teilhabegesellschaft. Modell eines neuen Wohlfahrtsstaates,* Frankfurt am Main: Campus.

48 Edenhofer, O. (2014) *"Die Gretchenfrage des Klimawandels, 'Nun sag, wie hast Du es mit dem Eigentum?'"*

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and therefore might become the first working formation of democratic socialism, which for the first time in history would unite horizontal with vertical emancipation.

IV

At least one major step on the road to global democratic socialism could be taken by the European Union. What is good about the European Union is that there is already the unique invention of a democratically elected transnational Parliament. Articles 9-12 of the Treaty of Lisbon constitutionalize the by far most advanced democracy of an international organization.[49] The Treaty already contains nearly everything needed for a (partial) continental solution of the five crises. The *ordinary legislative procedure* that binds the three European powers, the Parliament, the Commission and the Council together comes, as Jürgen Bast has shown, very close to a full-fledged *constitutionalization of European democracy*, because, as Franzius and Habermas have shown, it represents both, the *national peoples* and the *citizens of the Union*.[50]

Unfortunately, at present under Art. 9-12, even the parliamentary elections and the legislative procedure are constitutional 'kitsch' (Koskenniemi). The last elections were a caricature of democracy, Junker said, 'I prefer p', and Schulz contradicted, 'No, I am strongly against it, I prefer p, and therefore I call q.' The Monty Python Show. The agencies of the legislative procedure (Parliament, Council, Commission) are the true European legislator but half-informal and completely informal groups like the European Council and the Eurogroup. Since the so called Greek crisis the perfect protection of the united executive bodies of Europe is under public attack, from the right and from the left.

With every further day of crisis, it becomes ever more evident that the only way out is the *derogation of the Treaties*, the abolishment of the European Council and the Eurogroup, and a *new constitutional foundation of a Union of the Eurozone*, equipped with a legislative procedure that has comprehensive jurisdiction (Allzuständigkeit) on the federal level, and sufficient administrative power to enforce it.

The European Parliament needs the same *budgetary competencies* as the American Congress, and that includes the *right to impose taxes*. The slogan of the American Revolution is also true the other way around, "There is no representation without taxation". Taxation is a necessary (although not a sufficient) condition for any public law that is egalitarian and anti-hierarchical.[51] Moreover, the Union needs full competence in *foreign affairs* and a *European army*, or at least the command for all interventions beyond Europe's borders. This is even more important in times of an American government that is retreating from its European and NATO commitments. A model of federal foreign policies in Europe could be the German Empire of 1870, which still had autonomous foreign policies and armies on the state-level.[52] Most of the rest then can be taken away from Brussels and done by the national states and on subnational, regional levels, and it needs a possibility to increase and decrease the value of the common currency for member states and

49 von Bogdandy, A. (2012) The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations *European Journal of International Law* 23: 315–34.

50 Bast, J. (2011)"Europäische Gesetzgebung – Fünf Stationen in der Verfassungsentwicklung der EU." In *Strukturfragen der Europäischen Union*, edited by Claudio Franzius, Franz C. Meyer and Neyer M., 173-180. Baden-Baden: Nomos Verlag; Franzius, C. (2014) *Recht und Politik in der Transnationalen Konstellation*. Frankfurt: Campus; Habermas, J. (2012) *The Crisis of the European Union,* Oxford: Polity.

51 On the internal relation of egalitarianism and its anti-hierarchical direction in constitutional law see: MacKinnon, C. (2016) *"Substantive Equality: Hierarchy in Canada and the World*", paper presented at ICON Conference Berlin; and in the evolutionary prehistory and history of constitutional law see: Boehm, C. (2001) Hierarchy in the Forest. The Evolution of Egalitarian Behavior. Cambridge MA: Harvard University Press; Portela, F, Almeida, L. (2014) "The emergence of constitutionalism as an evolutionary adaptation", in: Cardozo Pub. Law, Policy and Ethics 1: pp. 1-96; Brunkhorst, H. (2016) "Sociological Constitutionalism – An Evolutionary Approach", forthcoming in: Paul Blokker and Chris Thornhill (Ed.): Sociological Constitutionalism, Cambridge: Cambridge University Press.

52 Fassbender, B. (2007) *Der offene Bundesstaat. Studien zur auswärtigen Gewalt und zur Völkerrechtssubjektivität bundesstaatlicher Teilstaaten in Europa* Tübingen: Mohr.

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regions under certain conditions of emergency, regulated by the European legislative procedure.

Nothing less powerful than a European federal regime with full budgetary, taxation and foreign policy competencies will be able to cope with the blackmailing power of global economy, and in addition to the military threats from regimes like Putin's Russia (or Trump and Bannon's America), and to solve the coming migration problems in accordance with human rights and democracy. The present way of solving the problem through the unconstitutional rule that in case of doubt security trumps human rights has led to a deep crisis of human rights in Europe, which are now coming close to Indian or Chinese standards.[53]

As empirical research shows, a majority of European citizens favor a federal union that gives the choice over political, economic and social alternatives back to the people.[54] People distrust political elites, and rightly so, but they trust each other beyond all borders. There are surprisingly large majorities even in favor of a transfer-union and a European social welfare state. More than 70% of the Germans would support such a union – even if they would lose money.[55]

However, because the institutional setting of the EU provides a near-perfect protection against any movement of input-democracy, the option for a European democracy with real choices literally has become utopian, and the commodified, now totally privatized old mass-media have desensitized themselves for everything that does not fit to the existing political system. Therefore, I know that I prefer social Europe but my neighbors do not, although many of my neighbors have the same feeling. However, legitimization crisis now begins to break the spiral of silence. The Far-Right winners of the European elections and Brexit have at least *one* democratic achievement, to present the European power-elites with the choice, either to watch passively their own agony, and to lose the majority in one parliament after the other, and to adapt and convert to authoritarian liberalism, or to take the bull by the horns and let the people decide themselves. The sooner the better are the chances of democratic growth and enlargement, and even if they decide against Europe – it would at least be their own deliberative and democratic choice.

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