Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism

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The usefulness of Dewey's conception of a public for contemporary International Relations (IR) theory lies in its explication of an expanding network of problem-solving communities ('deliberative democracy'). The idea of a weak and deliberative public endowed with growing moral influence fits well with the globalisation of communicative media and attention to human rights. Still, inclusive discussion and deliberation combined with political protest movements do not amount to egalitarian democracy. The latter presupposes not only the right to free expression but also constitutional access to processes of representation and decision making. Against the emerging background of global law, this article investigates the question of whether global society has a constitution, and gives a twofold answer. While global society can be said to have a constitution with respect to constitutive core elements of equal rights, it lacks a strong public as well as a democratic constitution. However, the existing global weak public can be optimistically interpreted as a 'strong public in the making'. This interpretation corrects the institutional and legal weakness of Deweyan pragmatism, lending his notion of a public some new relevance for IR.

Let me begin with a well-established distinction in theorising democracy, one that is well-known in contemporary social science through the works of Nancy Frazer and Jürgen Habermas—the distinction between weak and strong public.[1] In the following I will use, redefine and try to advance this distinction. Returning to John Dewey's articulation of this distinction as starting point, the aim of my argument is to develop a taxonomy of different types of public in order to fully account for the conditions of possibility for democracy in a globalising era. I suggest that the notion of 'weak' and 'strong public' can indeed best be understood with reference to John Dewey and in particular his idea of a growing, flexible, socially inclusive and

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1. Nancy Fraser, 'Rethinking the Public Sphere', in Habermas and the Public Sphere, ed. Craig Calhoun (Cambridge, MA: MIT Press, 1992), 109-42, esp. 132-34 and Jürgen Habermas, Faktizität und Geltung (Frankfurt/M.: Suhrkamp, 1992), 373-82.

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experimental democratic discourse.[2] However, Deweyan pragmatism alone cannot be the paradigmatic reference here, as it is deficient in its account of institutions. I try to remedy these weaknesses by tying in different strands of legal, sociological and political thinking.

I present my argument in four steps. First, I elaborate my concepts and taxonomy of weak and strong public by relating Dewey's concepts to legal, sociological and politico-theoretical thinking. In so doing, I draw on the distinction between rights and the organisational norms of a constitution in legal theory, on Talcott Parson's differentiation between symbolically generalised medias of power and influence,[3] and on John Rawls' separation of well-ordered hierarchical and well-ordered egalitarian societies.[4] Confronting the issue of how a global political order can and should develop, I then use my concept of a strong public—a public framed by a constitution in a well-ordered egalitarian society—as a benchmark for assessing the current state of global politics. After a brief account of the idea of a 'constitution without a state', I further tackle the question of whether the current global society actually has or could have a constitution. Here again, the critical power of Dewey's idea of the egalitarian input-legitimation of democratic regimes comes into play, and this finally brings me to the optimistic conclusion that we witness a 'strong global public in the making'.

Strong Versus Weak Public

Following Parsons' distinction between 'influence' and 'power', a strong public is that which has moral influence as well as political—or in Habermas's words—administrative power.[5] In a strong public, inclusive discussions and binding egalitarian decisions are structurally coupled via legal procedures.[6] The structural coupling of inclusive discussion and egalitarian binding decision presupposes both a working system of basic rights (e.g., human and civic rights) and a working system of norms that

2. John Dewey, The Public and Its Problems, in The Later Works, 1925-1953, Vol. 2: 1925-1927, ed. Jo Ann Boydston (Carbondale, IL: Southern Illinois University Press, 1984), 235-381.

3. Talcott Parsons, Zur Theorie der sozialen Interaktionsmedien (Opladen: Westdeutscher Verlag, 1980).

4. John Rawls, 'The Law of the Peoples', in On Human Rights, eds. Steven Shute and Susan Hurley (New York: Basic Books, 1993), 41-82.

5. For the difference between 'power' and 'influence', see Parsons, Zur Theorie der sozialen Interaktionsmedien, 183-201.

6. The distinction between 'structural' versus 'loose coupling' goes back to Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft', Rechtshistorisches Journal 9 (1990): 176-220 and Die Gesellschaft der Gesellschaft (Frankfurt/M.: Suhrkamp, 1997), 92-120. In the language-game of systems theory, the structural coupling between discussion and decision can be put more generally as a structural coupling between 'spontaneously emerging spheres of communicative action' (discussion) and

governs the democratic organisation of legislature, government, administration and jurisdiction, of legal and political competences, division of powers, and so forth. In brief, a strong public relies on a public sphere framed by the norms of a constitution. Such a constitution is not only a set of abstract norms coalesced in 'dry' legal code and therefore only a 'symbolic', or 'nominalistic', constitution—as set out, for example, in Karl Löwenstein's constitutional theory.[7] A working democratic constitution is not only a legal textbook, but also a legal 'norm of action'—not only 'law in the books', but rather 'law in practice'.[8]

Key elements of a strong public are not only—and here I depart from Frazer and Habermas—democratic parliaments and other spaces of highly formalised discourse such as court procedures and decisions, but also a diverse network of public debates, publications, advertising, television talk-shows, teach-ins, political demonstrations, protest movements, associations, political parties, unions, cooperative public administration and the like. This public network constitutes a strong public—and here I leave Dewey's conceptual framework—because here the deliberative process of problem-solving is legally bound to procedures of decision making through rights and organisational norms. A strong public is a weak public plus the political and administrative power enabled and organised by a constitution.

In contrast, a weak public has moral influence but no legally regulated access to political or administrative power. Following Habermas, whose thought combines elements of Hannah Arendt's, John Dewey's and Talcott Parsons' thinking, we can say that a weak public is characterised by 'communicative power', but lacks 'administrative power'.[9] However, the communicative power of a weak public can have profound political impact and can lead to political reforms and even revolutions, as in Eastern Europe and South Africa in 1989 or, to take a paradigm establishing case, as 1789 in France.

This revolutionary potential of a weak public is the key concept within Dewey's notion of a democratic public. With his emphasis on the revolutionary capacity of a democratic public, Dewey approaches Hannah Arendt's notion of the public power of joint action. However, contrary to Arendt, Dewey puts this notion in an evolutionary language: the influence

'administrative and economic bodies of organisation' (decision) within functionally specialised social systems; see Gunther Teubner, 'Das Recht der globalen Zivilgesellschaft', Frankfurter Rundschau, no. 253 (2000): 20.

7. Karl Löwenstein, Verfassungslehre (Tübingen: Mohr, 1997), 148-53; see also Marcelo Neves, Verfassung und positives Recht in der peripheren Moderne (Berlin: Duncker & Humblot, 1992), 45-64, 65-71.

8. See Friedrich Müller, Richterrecht (Berlin: Duncker & Humblot, 1986), 13, 34, 38.

9. Habermas, Faktizität und Geltung, 182-87, 431-67 and Hannah Arendt, Macht und Gewalt (München: Piper, 1970).

and indirect impact of a network of public communities tends to overstep borders or parameters of social class, race and even national territories. Its influence depends directly on the potential and variety in which public communication evolves.[10] Instead of evolutionary 'variation', Arendt speaks of a 'plurality' of actions to distinguish the power of 'acting in concert' (Edmund Burke) from the violence that can follow from administrative or military orders.[11] However, Dewey's and Arendt's ideas of a weak public coincide when it comes to the argument that there is no freedom or democracy without their performance in public action and communication. Both Dewey's and Arendt's concepts of freedom therefore can best be described as 'performative' concepts of freedom.[12]

Yet, there is a second core element in Dewey's notion of a democratic public that fundamentally distinguishes his notion of public from Arendt's idea of joint action, one that brings him in line with theorists of communicative action like Karl-Otto Apel and Habermas. For Dewey, a political public is only an 'extension of the pragmatist conception of the community of scientific inquirers'.[13] Public communication has not only extensive productive and revolutionary energy, but also a cognitive value of its own.

The growth of democratic communication for pragmatists like Dewey is the condition of possibility for the solution of social, political and economic as well as scientific and technological problems. The Deweyan approach linking technology and solidarity, knowledge and praxis makes democratic deliberation, to quote Hilary Putnam, 'the precondition for the full application of intelligence to the solution of social problems' and 'a requirement for experimental inquiry in any area'.[14]

Yet, insight and blindness are closely related in this case. Dewey and most pragmatists, by defining a democratic public as a problem-solving community, usually neglect the differences and diversities of social systems and communicative value spheres which emerge within the wide spectrum of public communication. To identify democracy with the inclusive communicative procedures of problem-solving obfuscates the distinction between deliberation and decision making. Therefore, pragmatists and most followers of the (more or less pragmatic) idea of 'deliberative

10. John Dewey, Demokratie und Erziehung (Berlin: Westermann, 1949), 121.

11. Hannah Arendt, Vita activa (München: Piper, 1981), 14-15, 164-80, 229-43.

12. Mathew Festenstein, Pragmatism and Politics (Cambridge: Polity, 1997), 68-69. The same idea of performative freedom, although not related to democracy, can be found in Martin Heidegger, Sein und Zeit (Tübingen: Niemeyer, 1977).

13. Festenstein, Pragmatism and Politics, 7.

14. Hilary Putnam, 'A Reconsideration of Deweyan Democracy', in Pragmatism in Law and Society, eds. Michael Brint and William Weaver (Boulder, CO: Westview Press, 1991), 217 and 'Interview', in The American Philosopher, ed. Giovanna Borradori (Chicago: Chicago University Press, 1991), 64, emphasis in original.

democracy' usually underestimate the problem attending the fact that there is no democracy at all without egalitarian procedures of decision making. Both types of procedure—deliberation and decision making—have to be sharply distinguished as they are in permanent dialectical tension and sometimes even irreconcilably opposed.

A weak public, as we have seen, cannot enforce decisions by legal procedures (e.g., via voting procedures or court procedures as, for example, in the case of the American 'rights revolution').[15] Therefore there merely exists a 'loose coupling' between discussion and decision. In case of a weak public—such as in pre-revolutionary France, in the Soviet-Union under Nikita Krushchev or Mikhail Gorbachev, or in most 'third world' countries today—relations between different public spheres and political legislation, administrative implementation, juridical application and law enforcement are neither ruled by norms of (sufficient and effective) democratic self-organization, nor granted (sufficiently and effectively) democratic access to the legal system. Therefore, following Rawlsian terminology these societies have to be classified not as 'egalitarian' but 'hierarchical'.[16] All law in a hierarchical society tends to become hegemonic law, i.e., a law whose content is determined only by the ruling social class or group, but that binds everybody equally. Hegemonic law is not legitimated—as in Dewey's idea of input-legitimation—of or by the people, but at best—as in concepts of elitist output-legitimation—only for the people, and at worst of, by and for the ruling social class or group only.

Such a society can more or less be a well-ordered hierarchical society or a rule of law regime, a Rechtsstaat. The more established a background of basic rights, institutionalised as hard law or jus cogens, the better ordered such a hierarchical society is. It is less well ordered if the rights citizens enjoy are only respected as soft law without any binding force. In any case there must be some acknowledged degree of basic rights to call a society 'well-ordered'.[17]

To sum up, a weak public is a public sphere enabled by the existence of basic rights established as soft or hard law. Such rights are a necessary but not sufficient condition for the emergence of such a public. Sufficient conditions are: the existence of mass media, political culture, political associations, etc. Without the organisational norms of a constitution, a public can only be weak, having some moral influence loosely coupled with

15. For the latter, see Cass Sunstein, After the Rights Revolution (Cambridge, MA: Harvard University Press, 1990).

16. Rawls, 'The Law of the Peoples', 48-55.

17. Otherwise we are confronted with a totalitarian society that allows no public at all to emerge; see Hannah Arendt, Elemente und Ursprünge totalitärer Herrschaft (München: Piper, 1991), 522, 591.

administrative power. However, if rights and constitutional norms coincide we can then talk of a strong public.

Publics / Media	*Strong Public*	*Weak Public*
Administrative power	+ Organisational Norms of a Constitution	- Organisational Norms of a Constitution
Moral Influence	+ Rights	+ Rights

Figure 1: A taxonomy of weak and strong publics

Following our distinctions so far, I arrive here at my first point: a strong public has historically existed only within the borders of modern nation-states. But at least since the League of Nations, the Briand-Kellogg Pact and especially since the foundation of the United Nations (UN) in 1945, a weak global public can be said to exist. The constitutional precondition of this weak public is realised in the existence of a core of binding legal rights and general principles of international law that are globally held. Its social precondition is enabled by the media of global communication and by a transnational network of associations.

The Global Political Order—A Constitution Without a State

A society is not necessarily congruent with or bound to a state, although this assumption has been rather widespread in some political theory, and particularly in social-contract theories.[18] Modern society can no longer be defined as a subsystem of the state, however, as was the case in the 19th century and in Hegel's philosophy of law.[19] Today, the modern state is only one of the subsystems of global society.[20] This has repercussions on how we assess the global process of constitutionalisation. The revolutionary constitutions of the 18th century were not constitutions created by pre-existing states, as were the constitutions in Prussia and the German Empire

18. If Rawls, for example, refers to well-ordered societies, he usually means nation-states, as in his Theory of Justice (Cambridge, MA: Harvard University Press, 1971).

19. Georg Wilhelm Friedrich Hegel, Grundlinien der Philosophie des Rechts (Hamburg: Meiner, 1955).

20. Niklas Luhmann, Gesellschaft der Gesellschaft, 'Gesellschaft', in Soziologische Aufklärung 1 (Opladen: Westdeutscher Verlag, 1970), and 'Weltgesellschaft', in Soziologische Aufklärung 2 (Opladen: Westdeutscher Verlag, 1975), 137-53; Helmut Willke, Ironie des Staates (Frankfurt/M.: Suhrkamp, 1992); and Mathias Albert, Zur Politik der Weltgesellschaft (Weilerswist: Velbrück, 2002).

in the 19th century.[21] On the contrary, the constitutions of the French and American Revolutions were created by civil societies and therefore turned nations into states—if one can in fact say that there was a state at all in the American case. What a constitution in the revolutionary meaning of the late 18th century presupposes is a nation or a civil society and not a state. This simple historical consideration at least shows that the modern notion of a constitution was never as closely bound to nation-states—even at its very beginning—as it has become in the last 200 years.

In our days—and in the last 50 years more generally—this recognition that there is no necessary tie between states and constitutions has regained importance. Consider such international organisations as the UN, the World Trade Organisation (WTO) or the European Union (EU). The founding treaties of these institutions often have an effect on international or supranational law similar to that constitutions have on national law. In fact, a great number of legal scholars call these treaties, along with their basic legal principles, a 'constitution' in the literal meaning of the word.[22] State bodies like the German constitutional court label the EU/European Communities' treaties a quasi-constitution (gewissermaßen eine Verfassung); other institutions, like the European Court of Justice, call them a fully-fledged constitution overruling even the conflicting constitutional law of member-states.[23] Others still address the United Nations Charter as the 'constitution of the international community'.[24]

Legal scholars like Gunther Teubner even use the term 'constitution' to refer to the system of basic rules governing the legal order of functionally differentiated social systems, which all have turned into global systems today. In legal discourses we can find reference to the constitution of the

21. For this crucial difference, see the path-breaking book of Christoph Schönberger, Das Parlament im Anstaltsstaat (Frankfurt/M.: Klostermann, 1997).

22. See, for example, Allan Rosas, 'State Sovereignty and Human Rights: Towards a Global Constitutional Project', Political Studies 43, special issue (1995): 61-78; Daniel Thürer, 'Der Wegfall effektiver Staatsgewalt: The Failed State', Berichte der deutschen Gesellschaft für Völkerrecht, no. 34 (1997): 15-41, esp. 10, 15-18 and '"Citizenship" und Demokratieprinzip: Föderative Ausgestaltung im innerstaatlichen, europäischen und globalen Rechtskreis', in Globalisierung und Demokratie, eds. Hauke Brunkhorst and Mathias Kettner (Frankfurt/M.: Suhrkamp, 2000), 177-207; and Stefan Oeter, 'Internationale Organisation oder Weltföderation? Die organisierte Staatengemeinschaft und das Verlangen nach einer "Verfassung der Freiheit"', in Globalisierung und Demokratie, 208-39. On the global economic constitution, see Stefan Langer, Grundlagen einer internationalen Wirtschaftsverfassung (München: Beck, 1994).

23. Joseph H. H. Weiler, 'The Transformation of Europe', The Yale Law Review 100 (1991): 2407; Angela Augustin, Das Volk der Europäischen Union (Berlin: Duncker & Humblot, 2000), 274 n. 248; and Dieter Grimm, 'Braucht Europa eine Verfassung?', in Die Verfassung und die Politik (München: Beck, 2001), 204.

24. Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', Columbia Journal of Transnational Law 36 (1998): 529-619.

global economy, the environmental constitution, the constitution of the internet, the constitution of the sport-system, the constitution of science, and so on.[25] This again highlights that it is no longer the nation-state only that claims to have a constitution in a narrow political and legal sense. The global society, supranational organisations like the EU, or functionally specialised global subsystems like the global economy and the global financial system have, in some respect, a constitution. Despite the great differences that still exist between nation-state constitutions and these 'post-national' constitutions, there exists no natural law that once and forever binds constitutions to states. Yet, the question remains of how to ascribe meaning to the term 'constitution' with respect to post-national political, legal and economic orders, and to the global society in particular.

Does the Global Society Have a Constitution?

First, there is no doubt that the global society today has an autonomous legal order. A dense network of private and international legal regimes exists: human rights regimes, European law, statutes and jurisdiction of the Council of Europe, the UN Charter, enactments of the UN Security Council and the General Assembly, the General Agreement on Tariff and Trade, the WTO's regulatory systems and dispute settlement bodies, NGO-contract networks of a completely new type, the statutes of international courts of justice, lex mercatoria and private-contract regimes, and so forth.

National and international courts enforce norms globally, and this is most visible in instances of violations of international law and human rights. The cases of Milosevic, Pinochet and Kissinger are only the tip of the iceberg. Usually in these cases there is an intense interplay between national, international and global legislation and jurisdiction. Paradigmatic cases of such newly emerging interaction are the street-kids in Brazil, or the desaparecidos in Argentina.[26] Even new human rights (as the rights of those who have disappeared) originate from the spontaneous self-creation of a weak global public. 'Law-making in the streets' has become a reality. Social protest movements like the madres in Argentina are able to articulate their protest with the support of international associations of legal scholars, NGOs like Amnesty International and Human Rights Watch, and various others such as international newspapers, television, internet

25. Gunther Teubner, 'Das Recht der globalen Zivilgesellschaft', in: Frankfurter Rundschau, no. 253 (2000): 20; Andreas Fischer-Lescano, Globalverfassung: Die Geltungsbegründung der Menschenrechte im postmodernen Ius Gentium (PhD diss., Goethe-University, Frankfurt/M., 2002); and Langer, Grundlagen einer internationalen Wirtschaftsverfassung.

26. Sonia Serra, 'Multinationals of Solidarity: International Civil Society and the Killing of Street Children in Brazil', in Globalization, Communication and Transnational Civil Society, eds. Sandra Bramann and Anabelle Sreberny-Mohammadi (Cresskill, NJ: Hampton, 1996), 219-41 and Fischer-Lescano, Globalverfassung.

communication, and so forth. The result is the mobilisation of local, regional, national and global legislation, which leads to a more or less close network of judicial inquiries, charges and cases in different national and international courts. In the case of the desaparecidos, criminal courts in Spain, Switzerland, France, Germany, Italy, Sweden and a civil court in the United States were involved. International law and global human rights are created—'called into being'—by a weak public of social movements (the Arendtian notion of joint action) and networks of associations (the Deweyan problem-solving communities). These rights are then selectively implemented and enforced by a community of states and national courts, who perform this kind of 'universal jurisdiction'.[27] Protest movements, associations, problem-oriented discussions and binding decisions are loosely coupled in all these cases. Thus, the moral influence of a weak public lies in the communicative medium of universal jurisdiction.

The global legal network becomes more dense every day, and it stems from a growing variety of legal sources. The heterarchy of legal pluralism is producing and reproducing itself 'without a central legislation and without central courts'.[28] There is no hierarchy, no unity, no order of legal steps, no Stufenbau des Rechts (Hans Kelsen), and no chain of legitimacy that reaches back to the real, representative or ascribed will of a people,[29] and yet there is a weak public, its moral influence and the autopoiesis of the legal system.[30]

This legal order is autonomous but, as we can see from the cases mentioned, does not exist without the support of states as it is not totally separated from the states' legal order. It is an autonomous order but not at all self-sufficient. In Parsons' terminology, one could say that it perceives only information produced by its own code, but relies on the support of energy from other social systems. This leads to a paradox: the independence of global law from states (and other social systems) is growing simultaneously with its dependence on states (and other social systems),

27. Fischer-Lescano, Globalverfassung, 263, 346 and Cristina Hoß and Russell A. Miller, 'German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genozide Jurisprudence', in German Yearbook of International Law 44 (2001): 576-611.

28. Niklas Luhmann, Das Recht der Gesellschaft (Frankfurt/M.: Suhrkamp, 1993), 574.

29. On the theory of legal steps, see Adolf Merkl, 'Prolegomena zu einer Theorie des rechtlichen Stufenbaues', in Die Wiener rechtstheoretische Schule, eds. Hans Klecatsky, René Marcic, and Herbert Schambeck (Wien: Europa Verlag, 1968 [1931]); on the 'chain of legitimacy', see Ernst-Wolfgang Böckenförde, 'Demokratie als Verfassungsprinzip', in Staat, Verfassung, Demokratie (Frankfurt/M.: Suhrkamp, 1991), 289-378.

30. Gunther Teubner, 'Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts', in Globalisierung und Demokratie (Frankfurt/M.: Suhrkamp, 2000), 240-73 and Global Law Without a State (Aldershot: Dartmouth, 1997); Luhmann, Das Recht der Gesellschaft; and Fischer-Lescano, Globalverfassung.

and vice versa. The state does not need to be brought back in. It has never been 'out'. Rather, it has to adapt to a widely changed role and to perform a much more specialised function, restricted more or less to the organisation of administrative power and social welfare.[31] Yet, today states' independence, especially in these areas, is only growing together with their dependence on global legislation and jurisdiction. Here we are confronted with the phenomenon of a joint and equal growth of dependence and independence as already analysed on a more elementary and paradigmatic level by Dewey and G.H. Mead in their accounts of the relation between individual freedom and systems of social interaction.[32] In Dewey's words:

> [t]hat social 'evolution' has been either from collectivism to individualism or the reverse is sheer superstition. It has consisted in a continuous re-distribution of social integrations on the one hand and of capacities and energies of individuals on the other. Individuals find themselves cramped and depressed by absorption of their potentialities in some mode of association which has been institutionalised and become dominant. They may think they are clamouring for a purely personal liberty, but what they are doing is to bring into being a greater liberty to share in other associations, so that more of their individual potentialities will be released and their personal experience enriched.[33]

If we abstract from the particular relationship between the individual and the societal community which Dewey is giving here, then we can generalise the relation between the legal orders of states and transnational organizations. Both legal orders, the global and the national, are interwoven, interpenetrating, overlapping. The state is still one among other important sources of transnational legislation and jurisdiction. For

31. Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., Bringing the State Back In (Cambridge: Cambridge University Press, 1985) and Hauke Brunkhorst, 'Verfassung ohne Staat: Das Schicksal der Demokratie in der europäischen Rechtsgenossenschaft', Leviathan 30, no. 4 (2002): 1-14.

32. Dewey, The Public and Its Problems and Demokratie und Erziehung; George Herbert Mead, Mind, Self and Society from the Perspective of a Social Behavioralist (Chicago: Chicago University Press, 1934). This is also the basic idea of Emile Durkheim's functionalistic approach in The Social Division of Labor in Society (New York: The Free Press, 1984). See also Jürgen Habermas, Theorie des kommunikativen Handelns, Vol. 2 (Frankfurt/M.: Suhrkamp, 1981).

33. The dialectically determined growth between dependency and independency of individuals in relation to society and vice versa is only blocked when one social system becomes dominant: '[l]ife has been impoverished', Dewey writes, 'not by the predominance of "society" in general over individuality, but by a domination of one form of association, the family, clan, church, economic institutions, over other actual and possible forms'; Dewey, The Public and Its Problems, 356. A similar idea is expressed in Michael Walzer, Spheres of Justice: A Defence of Pluralism and Equality (Oxford: Blackwell, 1995).

example, both supremacy as well as the direct effect of European law entirely depend on the implementation by national courts.[34] This explains why it is now so important for the EU only to allow for the accession of those countries whose legal system is capable of guaranteeing the smooth application of European law. The state further keeps the main power to enforce law in all cases of serious violations of global law, be it human rights or lex mercatoria. Over time, states have become a community of interpreters of global law, who adjust different legal cultures in association with an international professional class of legal advisers and international lawyers.[35] Hence the state remains one of the most important driving forces of the process of globalisation, but the global order of economy, politics and law brought to power by states has evolved towards a set of autonomous social orders interpenetrating one another.

Today—and this is my second point referring in particular to the constitutional order of world politics—the autonomous global legal order as a whole is ruled by a high legal level of hard-law human rights.[36] The core of human rights and international law (concerning life, slavery, torture, aggression, terrorism, peoples' self-determination) has become jus cogens binding states, organisations, peoples and single human beings, even if they have never signed any international treaty (jus erga omnes).[37] The whole system of human rights today in fact works in a constitutionalised way. Let me give two brief examples.

The first example is the case of lex mercatoria. The WTO treaties have set up the WTO courts in Geneva, which consist of the Dispute Settlement Body together with its Appellate Body. According to article 3 paragraph 2 of the Dispute Settlement Understanding, the treaties bind these legal bodies to the 'conventional rules of interpreting the Law of the Peoples'.[38]

34. Karen Alter, 'The European Court's Political Power', West European Politics 19, no. 3 (1996): 458-87 and '"Who Are the Masters of the Treaty?": European Governments and the European Court of Justice', International Organization 52, no. 1 (1998): 121-47; and Joseph H. H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', Comparative Political Studies 26, no. 4 (1994): 510-33.

35. Christoph Möllers, 'Globalisierte Jurisprudenz', Archiv für Rechts- und Sozialphilosophie, Beiheft 79 (2001): 41-60.

36. In this respect the UN-centred political approach of Fassbender's 'The United Nations Charter as Constitution' and the court-centred functionalist approach of Teubner's 'Des Königs viele Leiber' and Fischer-Lescano's Globalverfassung coincide. For an earlier construction of an 'international civil society' based on rights, see Jean Cohen, 'Rights, Citizenship, and the Modern Form of the Social: Dilemmas of Arendtian Republicanism', Constellations 3 (1996): 164-89.

37. Juliane Kokott, 'Der Schutz der Menschenrechte im Völkerrecht', in Recht auf Menschenrechte, eds. Hauke Brunkhorst, Wolfgang R. Köhler and Matthias Lutz-Bachmann (Frankfurt/M.: Suhrkamp 1999), 177-79, 182-83 and Andreas Fischer-Lescano, 'Globalisierung der Menschenrechte', Blätter für deutsche und internationale Politik, no. 10 (2002): 1236-44.

38. See also Klaus Günther and Shalina Randeria, Recht, Kultur und Gesellschaft im Prozess der Globalisierung (Bad Homburg: Reimann-Stiftung, 2001).

This is not an empty declaration, as it has direct impact on the judges of that international organisation. The reference to the Law of the Peoples here is not law in the books but law in practice, and the application of the 'conventional rules of interpretation' brings non-economic principles to the fore, which often lie in strong tension with the very neo-liberal economic programme of the WTO itself. If confronted with 'hard cases', the judges—especially those in the Appellate Body—have to refer to the 'conventional rules', as they need a level of general legal principles to make their jurisprudence coherent and consistent.[39] To fulfil the basic function of a legal system—which is to reproduce security of expectation—international courts, bodies of dispute settlement, as well as legislative bodies have all to refer to a system of constitutional basic rights. This in the past has become very important in a number of cases which prevented small states from being dominated by the economic power of big states. Nevertheless, global private and public law regimes like those mentioned here remain hegemonic law that is corrupted by particular interests through and through.[40] As there is no sufficient egalitarian procedures for the formation and representation of a global volonté générale, which would provide 'direct access . . . for all the interests concerned', global law regimes still lack the 'stamp of legitimacy'.[41]

My other example is UN legislation. The resolutions of the Security Council and the General Assembly, judgements of the international courts in The Hague and elsewhere, and not to forget the interpretations and comments of a broad variety of communities of legal scholars, are part of a legislative procedure that transforms and implements the general rules of the UN Charter and the human rights treaties into concrete legal norms, binding advice, order, and so forth. The legislation of the General Assembly and Security Council works in analogy to the legislation of a parliamentary body that implements, interprets and applies the rules of a constitution. The Security Council today is the most important source of what one in constitutional terms would call the enactment of 'secondary law'.[42] Between the Charter and the secondary law of the resolutions is a clear hierarchy of norms, even if the constitution of the UN is sometimes broken by its most important constitutional organ—just imagine the case should the Council legalise pre-emptive war. Furthermore, domestic law and governmental activities have to be in accordance with the UN Charter, as Article 103

39. Ronald Dworkin, Taking Rights Seriously (Cambridge, MA: Harvard University Press, 1977).

40. Hauke Brunkhorst, Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft (Frankfurt/M.: Suhrkamp, 2002), 171-84; trans. Solidarity: From Civic Friendship Towards the Global Legal Community (Cambridge, MA: MIT Press, forthcoming).

41. Peter T. Muchlinski, '"Global Bukowina" Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community', in Global Law Without a State, 99-100.

42. Fassbender, 'The United Nations Charter as Constitution', 574.

declares: '[i]n the event of conflict . . . [the] obligations under the present Charter shall prevail'.[43]

The Charter is signed by states like a treaty, but it declares its validity in the name of the peoples of the United Nations, and therefore begins like a copy of the constitution of the United States of America: 'We, the peoples of the United Nations [. . .] '. This sets a clear hierarchy: first come the peoples and only then the states, who sign the document in the name of we, the peoples. Similarly to the French and American constitutions of the 18th century, the peoples constitute the United Nations, and not the states, who nonetheless still keep the power over its legal bodies. In contrast to international treaties Article 2 paragraph 1 of the Charter then declares not the equal sovereignty but the 'sovereign equality' of its members which 'gives the idea of equality precedence over that of sovereignty'.[44] Therefore the sovereignty of states 'as a concept' excludes 'legal superiority of any one state over another. . . . All that states can ask is to be treated equally in and before the law'.[45]

Yet, there remain some very significant differences between the UN Charter and the basic ideas of the constitutions of democratic nation-states. First, the principle of equal sovereignty is violated within the Charter itself. Instead of the equal-sovereignty principle of 'one state, one vote' amendments to the Charter crucially depend on the consent of the five permanent members of the Security Council. Second, following the broadly accepted interpretation of the Charter, there are in principle a variety of equal subjects of international law and of the international community encompassing sovereign states: states with limited international legal personality, intergovernmental organisations, peoples and minorities, belligerent parties, and even individual human beings.[46] However, the state- and government-centred, highly selective, non-egalitarian and hegemonic mechanisms of decision making only bind the representative bodies morally to take into account all interests concerned. Though the Charter binds all members equally, only state governments have participatory rights, legislative and executive competences. Third, despite the fact that there are some checks and balances and some division of powers in the UN, the Security Council enjoys the most important powers of UN legislative, executive and even judicial bodies. The international community, constitutionalised by the Charter, has only 'rather limited constitutional means' to 'correct a wrong interpretive decision' made by the Council.[47] This makes it difficult to imagine the emergence of any strong democratic public intrinsic to the UN system. Fourth, the General Assembly and the Security Council can create binding decisions if and only if there

43. See ibid., 577-78.
44. Ibid., 582.
45. Ibid.
46. Ibid., 597.
47. Ibid., 598.

is no veto from one of the five permanent members of the Council, which means that the structure of hegemonic law is lawfully implemented in the whole system of the UN. Five of the member states are lawfully allowed to threaten all others with the use of nuclear weapons, and this is, as Marti Koskenniemi has called it, a 'perverse' situation[48]—yet, it is the only one that makes the system work. Note that it is just this basic veto condition that turns the international community into a hierarchical society, which could potentially lead to what Rawls called a 'well-ordered' one, with a background of basic rights.

Now, does the global society have a constitution? Yes, on the one hand; no, on the other. The argument in favour of a global constitutional regime is covered by my second point: from the point of view of the legal transformation from soft to hard human rights law and towards a normatively effective system of international law, the global society has a constitution without a state.

Yet, compared to democratic nation-states this constitution lacks the legal body of egalitarian and democratic organisational norms. Therefore the freedom secured by global human rights today realises only half of the promise of freedom once declared by the constitutional revolutions of the 18th century. However, what is legally secured by the existing global constitution is private autonomy: freedom as reciprocally generalisable 'independence from another man's compulsive arbitrary will, as far as it is compatible with a general law of freedom'—this is Immanuel Kant's one and only human right which he took straight from Article 2 of the French Declaration of 26 August 1789.[49]

However, what our global constitution (and by the same token the European Treaties' constitution) lacks is public autonomy: the rights and organisational body of norms that allow or enable addressees of law to transform themselves into its authors by procedures of self-legislation. Our global order has a kind of inherent output-legitimation through the positive effect it has for the people or peoples of the world, however what it lacks is input-legitimation by and through these peoples. But freedom without self-legislation is no freedom at all, in the end. Legal subjectivity secured by human rights today is only the evolutionary 'effect of law'—as Joseph H. H. Weiler has put it with respect to European law—because it does not represent the deliberative and general will of its subjects, it is not rooted in their own free and equal decisions. The private freedom that is

48. Martti Koskenniemi, 'Die Polizei im Tempel: Ordnung, Recht und die Vereinten Nationen: Eine dialektische Betrachtung', in Einmischung erwünscht?, ed. Hauke Brunkhorst (Frankfurt/M.: Fischer, 1998), 63-87.

49. 'Freiheit (Unabhängigkeit von eines anderen nötigender Willkür), sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen, kraft seiner Menschheit, zustehende Recht'; Immanuel Kant, Metaphysik der Sitten, Vol. 8 (Frankfurt/M.: Suhrkamp 1977), 345, my translation.

enabled by the legal order suffers from the lack of political freedom that determines the legal order.

Following Hegel, to have rights is 'not nothing', and it stands as a precondition for the realisation of private and communicative freedom, the extension of the existing body of rights and its legal interpretation, the use of existing pre-democratic and pre-representative forms of participation, the access to the legal system, and so forth. 'But you 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'.[50] To enjoy direct effect is close to the boundary that separates a weak from a strong public. You can go to court to enforce binding decisions, but you cannot democratically create and maintain the legal norms that bind the judges—and only this would turn the subject of law into a full citizen.

These considerations lead me now to the counter-statement on global constitutionalism, which is my third point: from the point of view of the democratic constitutional revolutions of the 18th century, the global society has no constitution at all.[51]

Strong Public in the Making—An Optimistic (Deweyan) Conclusion

The lack of a functional equivalent to parliamentary representation and legislation on the global level eventually causes all faults of the global legal order, such as the lack of clear distinctions between private and public jurisdiction, law and morality, and the colonisation of law by political power and economic capital. The openness of human rights to arbitrary moral interpretations is deeply problematic but unavoidable, as the only social basis of a weak public is its moral influence based on moral interpretations. This is evident not only in spectacular cases such as humanitarian interventions by military force. In all cases concerning human rights, the appeal to normative standards can be used as an ideological weapon and pseudo-justification in support of particular interests—be it the interests of multinational firms, be it the interests of NGOs or those of states.

Yet, at the end of this tour d'horizon there is some hope, and this brings me to my fourth and final point: the current weak global public is a weak public with hard-law basic rights. Such a public can be interpreted optimistically as 'a strong public in the making', especially if we imagine

50. Joseph H. H. Weiler, 'To Be a European Citizen: Eros and Civilisation', Journal of European Public Policy 4, no. 4 (1997): 503.

51. On the global (and even European) level there is no functional equivalent to the structural coupling of discussion and decision through democratic and egalitarian organisational law that exists on the level of the nation-state.

it as a growing and extending community in a Deweyan sense. Its necessary condition is the existence of a working system of hard-law human rights embedded in a well-ordered global society. Its sufficient condition is a public sphere enabled technologically by electronic media in interplay with associations and individuals that make communicative use of these. If we have a weak public with NGOs, a global legal professional class, and an emerging human rights culture, then the openness of human rights to diverse moral interpretation is from a legal perspective more or less disastrous. However, from a democratic, weak public's political point of view this can be seen as a huge advancement: it is the first step on the long way towards a strong global public.[52]

If NGOs and other global public agencies speak the language of human rights, they speak a language which is still morally grounded, but already legally binding.[53] This language, as a moral language, can enable the mobilisation of public interest and communicative pressure, and it is, as a legal language, a language the political class and its administrative body of legal advisors, diplomats, etc. can understand and take into account for decision making. As long as no sufficient legal procedures of democratic representation bind discussions to decisions—and this might never be the case on the global level—the language of human rights will replace global democracy—and human rights have to be 'called into being' by 'lawmaking in the streets', a task which can be performed even by a weak but growing and extending public. Exactly here lies the relevance of Dewey's notion of a 'public' for IR.

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52. This is what Richard Rorty has in mind when he refers to a growing human rights culture by 'extending the reference of us', 'wet liberals', 'as far as we can' presupposing 'us at our best'. This means that with an open discursive and hermeneutic mind we can learn from others who are not yet 'us'. See Richard Rorty, 'Solidarity or Objectivity?', in Post-Analytical Philosophy, eds. John Rajchman and Cornel West (New York: Columbia University Press, 1985), 3-19, 'Putnam and the Relativist Menace', Journal of Philosophy 90, no. 9 (1993): 452, 'Human Rights, Rationality and Sentimentality', in On Human Rights: The Oxford Amnesty Lectures 1993, eds. Stephen Shute and Susan Hurley (New York: Basic Books, 1993), 112-34.

53. Peer Zumbansen, 'Spiegelungen von Staat und Gesellschaft: Governanceerfahrungen in der Globalisierungsdebatte', Archiv für Rechts- und Sozialphilosophie, Beiheft 79 (2001): 13-40.