Constituent power and constitutionalization in Europe

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In this article, I introduce a modified version of Koskenniemi's distinction between two kinds of constitutional mindsets: Kantian v. managerial. I combine this distinction with evolutionary theory, and in particular with the distinction between evolutionary and revolutionary change (which is also used in constitutional history) and the distinction between selective adaptation and normative constraints of adaptation. I apply this theoretical framework to retrace the constitutional evolution of the European Union. Following Tuori, I distinguish five evolutionary stages: The revolutionary foundation laid in the battlefields of World War II was followed by an evolution of constitutionalism that was a result of the hegemony of the managerial mindset. Nevertheless, the revolutionary foundation was not forgotten, and the growing juridification of Europe produced an increasing need for democratic legitimization. With each stage, the relation between the Kantian and the managerial mindsets is increasingly antagonistic. The opposition becomes untenable once the constitutional evolution of Europe reaches stage five of the social-welfare constitution. The present collapse seems unavoidable. If there still is a way out of "Europe entrapped" (Claus Offe), it remains an open question and one of political praxis alone.

1. Introduction

A couple of years ago, Martti Koskenniemi introduced an important distinction between two different constitutional mindsets: the Kantian and the managerial mindset.[1] I will use Koskenniemi's distinction here for two reasons in particular. First, to make use of a normative concept that bears some relation to Kantian concepts (such as public autonomy, representative government, and morality) but does not co-opt Kant's transcendental self-understanding (e.g., that free action is caused by morality that is free of any relations to the empirical world of moving bodies). What is especially fascinating is Koskenniemi's combination of Kantian concepts with the

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[1] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 Theoretical Inquiries in Law 9 (2006).

empirical and practical mindset of legal professionals and all those affected by the law in one way or another. Second, I use the distinction between the two mindsets to explain the deep ambivalences of post-national and transnational processes of constitutionalization. However, one has to keep in mind that the Kantian mindset needs the managerial mindset to have a real impact. Therefore, both mindsets have their advantages and disadvantages, and they need each other to cope with the ambivalence of modern law.

For Koskenniemi, the dialectical ambivalence of law is crucial. The differentiation between the Kantian and the managerial mindsets is one of many variants in the eternal struggle between Dr Jekyll and Mr Hyde which is fought throughout Koskenneimi's entire body of work, beginning with Kantian *utopia* v. managerial *apologia*.[2] That struggle was followed by those between Kelsen and Schmitt, Lauterpacht and Morgenthau, Dr Jekyll Wolfgang Friedmann, the last hero of the gentle civilizers, and the many Mr Hydes who are the embedded jurists from the US State Department. The latter, as ever, justified the invasion and replacement of a democratically elected government in the Dominican Republic in spring 1965.[3] The struggle was renewed in 2003 when people of the world said "No" to the infringement of international law by the USA and the willing coalition of states and international lawyers.[4] Although I borrow the distinction from Koskenniemi, I will use it in a slightly different way (Section 2). In particular, I will integrate it into a theory of social evolution of law (which in the end does not seem to be completely compatible with Koskenniemi's history of legal discourses). For this purpose, I will use Kaarlo Tuori's developmental schema of European constitutionalism. However, I will not only modify it a bit but I will also try to integrate Tuori's systems-theoretical method into a more normative framework that I take from Habermas and Marxism. It is my basic assumption that modern law does not follow a developmental *telos* of ever more rational, inclusive, and liberal formation, but faces social conflicts *and* struggles between social groups and classes, which are always struggles over material and ideological interests. Therefore, their outcome cannot be explained by functional imperatives or material interests alone, but must be also accounted for using normative claims of justice and egalitarian self-determination, which are at the core of the Kantian mindset and embodied, in particular, in constitutional law. I will use this theoretical framework (which I have developed more extensively in a book on the evolution of modern law[5]) to give a brief account of the functional and normative evolution of European constitutional law that, in a way, is paradigmatic of global legal and constitutional development, and not another European exceptionalism (Section 3). I will finish the article with a short and more political diagnosis of the present crisis (Section 4).

[2] Martti Koskenniemi, From Apologia to Utopia: The Structure of International Legal Argument (1989).

[3] Martti Koskenniemi, The Gentle Civilizer of Nations 413–415, 494–509 (2002).

[4] Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 Leiden J. Int'l L. 229, 245 (2004).

[5] *See* Hauke Brunkhorst, Critical Theory of Legal Revolutions—Evolutionary Perspectives (2014).

2. Contradicting mindsets

A mindset is a network of practical concepts which are internal to, and constitutive of, a form of life, such as a professional community of experts.[6] But it can be associated with any communicative community such as citizenship, a social class, a neighborhood, a religious sect, or a group of soccer fans.

2.1. The Kantian v. the managerial mindset

I will begin with a rough juxtaposition of the meaning of the two mindsets: the Kantian mindset's keywords are autonomy, egalitarian self-determination, representative government, and universal rights. Law should enable government *of* and *by* the people, and that means emancipation from any law to which we have not given our consent.[7] The language of the Kantian mindset is the normative language of a constitutional revolution, the *pouvoir constituant*, and the rhetoric of radical change (such as that of Obama at the beginning of his first campaign). The Kantian mindset is the "legislature" that "produced the French Revolution" (Marx).[8] At the center of the Kantian mindset is the internal relation between law and democracy.

By contrast, the managerial mindset is more about law and economics. Keywords are rule of law, judicial review, possessive individualism, and—in Marx's ironic formulation—"peaceful competitive struggle,"[9] best refereed by a competition commissioner and some judges, such as in the EU. The managerial mindset operates through incremental decision-making, gradual change, muddling through a jungle of hegemonic opinions, managing a complex mix of ideal and material class-interests, and unexpected evolutionary events and coincidences. The managerial mindset's language is the technical language of courts, committees, conferences, and all kinds of agencies which are implementing and stabilizing the pluralized powers of the *pouvoir constitué*. Managerial government is government for *and* against the people. The Kantian and Marxist (as well as American presidential) rhetoric of changing the world is replaced through negotiation, diplomacy, and compromise with new public management and a silent implementation of structural reform (such as Clinton, Schröder, and Blair in their respective second terms). In the world of the managerial mindset, public contestation is just "not helpful" (Angela Merkel), and parliamentary rule must be restricted to "market-conform" "parliamentary participation" (in German, "parlamentarische Mitbestimmung"), to quote again the words of Angela Merkel, the mastermind behind the present European managerial class of politicians, bankers, chief economists, jurists, and embedded journalists, at least until her decision to open the German borders to refugees facing a humanitarian catastrophe.

[6] On this concept of "concept," *see* Robert Brandom, Making It Explicit: Reasoning, Representing & Discursive Commitment (1994).

[7] Alexander Somek, *Europe: From Emancipation to Empowerment*, London School of Economics "Europe in Question" Paper Series No. 60 (2013).

[8] Karl Marx, Critique of Hegel's Philosophy of Right 57 (Annette Jolin & Joseph O'Malley trans., 1977).

[9] Karl Marx. *The Eighteenth Brumaire of Louis Bonaparte* [1852], *available at* https://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm.

If you want paradigms then the European South is full of them today. The Troika-enforced replacement of elected governments by technocrats and bankers such as Mario Monti or Lucas Papademos is a paradigmatic case of the workings of a managerial mindset, while the February 2012 Italian elections, which put an end to the technocratic government in Italy, is a paradigmatic case of the workings of a Kantian mindset. In both cases, the results are catastrophic. Mr Hyde who wants evil can cause good—but without any Mandevillean metaphysical guarantees; while Dr Jekyll who is the bearer of the Kantian good will can cause evil—but not necessarily.

2.2. Different extensions

Both mindsets have different socio-linguistic extensions: whereas the Kantian mindset speaks a universal language, the extension of the managerial language is the exclusive medium of understanding among professional experts and the political and economic class. The specialization of their language allows them to draw a sharp distinction between the internal systemic discourse and the human beings out there within the system's environment. The boundary between the system and the environment is patrolled by simple codes and complicated programs. For human beings "out there," these programs are translated into a hopelessly oversimplified language of kitchen morality of the "Swabian housewife" and her "housekeeping money" (Angela Merkel). Kant himself would have called the members of the managerial class "sorry comforters."[10]

However, for the managerial mindset the converse is true: the Kantian constitutional mindset is to them just another "empty signifier," denoting "illusions of manageability," "solemn declarations," and "revolutionary chants" (*Machbarkeitsillusionen*, *feierliche Erklärungen*, and *Gesänge*)[11]—and rightly so, at least as long as declarations and constitutions are at best legal textbooks, but not yet legal norms.[12] Luhmann's thesis is as follows: As far as legal and constitutional concepts are evolutionary advances with a certain cash-value, they are a fruit of adaptive cognitive learning acquired by the managerial class or independently by social systems once they have completed their self-referential closure (i.e., have become learning, or Turing, machines).

Legal and constitutional advances are good examples. A functionally differentiated, and hence self-referentially closed, legal system produces itself (*autopoiesis*) through

[10] Immanuel Kant, Toward perpetual Peace and Other Writings on Politics, Peace, and History 67–109 (Pauline Kliengeld ed., David L. Colclasure trans., Yale University Press, 2006).

[11] Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft* [Constitution as Evolutionary Achievement] 9 Rechtshistorisches Journal 176 (1990).

[12] On the distinction, *see* Friedrich Müller, "Richterrecht". Elemente einer Verfassungstheorie IV [Case Law. Elements of a Constitutional Theory] 13, 34, 38, 47 *et seq.*, 88 *et seq.* (1986); 8 Friedrich Müller, Demokratie zwischen Staatsrecht und Weltrecht. Nationale, staatlose und globale Formen menschenrechtsgestützter Globalisierung. Elemente einer Verfassungstheorie [Democracy between Constitutional Law and Global Law. National, Stateless and Global Forms of Globalization supported on Human Rights. Elements of a Constitutional Theory] 52–53 (2003); Friedrich Müller & Ralph Christensen, Juristische Methodik II: Europarecht [Legal Methodology II: European Law] 170, 185, 198–199, 363, 437–438 (2003).

a combination of *normative closure* and *cognitive openness*.[13] From the perspective of cognitive or systemic learning, normative expectations and moral points of view are nothing other than learning blockades. They inhibit the improvement and enhancement of adaptive capacities. But they have a positive function for cognitive learning within the legal system, because normative closure of the legal system enables cognitive learning that is highly specialized to improve the adaptation of the legal system to its environment. Structural coupling of law and politics, thus constitutionalization is a further step in the enhancement of the adaptive capacities of both systems. They learn reciprocally to adapt to each other. They learn that every law now can be changed any time by political decisions, but only in a legal procedure which itself is due to legally organized political decisions (on the same or on higher levels, logically but never practically *ad infinitum*). Moreover, structural coupling of solemn declarations, illusions of manageability, revolutionary chants ("Allons enfants de la Patrie …"; "O say, can you see, by the dawn's early light…"), and the "whole immense superstructure"[14] makes ruling through positive law likely and expectable not only for legal experts and political elites but also for the people. In particular because the ascription of legal change to the people and their legislative powers helps gain the time needed to obscure, and thus to disentangle, the paradoxical consequences of the recursive procedures of the structural coupling. So far, constitutions are just evolutionary advances that enable legitimization through procedure (*Legitimation durch Verfahren*).[15] As far as constitutions fulfill the functional requirements of structural coupling, they contribute to the enhancement of the adaptive capacities of modern society. This, however, no longer requires a Kantian mindset; all that needs to be done can be carried out through managerial incrementalism by legal experts, career politicians, and bureaucrats. Praised be the routine (*Lob der Routine*).[16]

2.3. Normative learning

I both agree and disagree with Luhmann's argument. First, I will voice my disagreement. As we know from cognitive psychology[17] as well as from social history[18] and from the sociology of religion, rationalization, and religious evolution,[19] social

[13] Niklas Luhmann, Das Recht der Gesellschaft [The Law of Society] 78–95, 555 (1993).

[14] Karl Marx, *Introduction, in* A Contribution to the Critique of Political Economy (S.W. Ryazanskaya trans., [1859]), *available at* https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/.

[15] Niklas Luhmann, Legitimation durch Verfahren [Legitimation through Procedure] (1983).

[16] Niklas Luhmann, *Lob der Routine (Praise the Routine)*, 55 Verwaltungsarchiv: Zeitschrift für Verwaltungslehre, Verwaltungsrecht und Verwaltungspolitik 1 (1964).

[17] *See only* Jean Piaget, The Moral Judgment of the Child (Marjorie Gabain trans., 1968); 2 Lawrence Kohlberg, Essays on Moral Development (1984).

[18] *See* Barrington Moore, Injustice. The Social Bases of Obedience and Revolt (1978).

[19] *See only* Jürgen Habermas, Zur Rekonstruktion des Historischen Materialismus [On the Reconstruction of Historical Materialism] (1976); 2 Jürgen Habermas, Nachmetaphysisches Denken [Post-metaphysical Thinking] 7–53 (2012); Wolfgang Schluchter, Die Entwicklung des okzidentalen Rationalismus [The development of Occidental Rationalism] (1979); Klaus Eder, *Collective Learning Processes and Social Evolution: Towards a Theory of Class Conflict in Modern Society*, Tidskrift för Rätssociologi 23 (1983); Klaus Eder, *Learning and the Evolution of Social Systems—An Epigenetic Perspective, in* Evolutionary Theory in Social Science 101 (Michael Schmid & Franz M. Wuketits eds., 1987); Robert Bellah, Religion in Human Evolution—From the Paleolithic to the Axial Age (2011); Brunkhorst, *supra* note 5.

evolution (i.e. socialized development of human beings) is not only characterized by cognitive learning that enhances adaptive capacities, but also by normative learning which is not adaptive but which channels and constrains systemic adaptation (since adaptation is blind to negative externalities it produces in its environment of natural and social systems and in the social life-world). In particular, the normative closure of the legal system through constitutional law is not just functionally adjusted to adaptive cognitive and systemic learning, but is an embodiment of normative learning processes which have a lasting internal relation to the minds, actions, and bodies of all individual addresses of legal norms. Therefore constitutions not only structurally couple law and politics but also express the—internally differentiated—unity of these systems within the general public sphere. What appears to be a learning blockade from the perspective of adaptive cognitive learning is itself a result of evolutionary learning that consists in an increase and categorical progress of moral insight, measured in categories such as social inclusion, moral universality, political egalitarianism, reciprocal understanding, justice as fairness, and societal individualization (e.g., Durkheimian modern cult of the individual). The results of normative learning are embodied within the whole system of positive law, and in particular in constitutional rights and principles such as public and private autonomy, democracy, checks and balances, due process, social equality, human and civil rights, thus the whole list of solemn declarations and revolutionary chants: "The International unites the human race." ("Die Internationale erkämpft das Menschenrecht"). These are holistic statements and empty signifiers which everybody understands in legal terms as well as in terms that belong both to specialized discourses *and* colloquial language, or, in Habermas's terminology, in the language of system and life-world. Revolutionary declarations such as the declarations of 1776, 1789, or 1948, are sometimes very meaningful to professional jurists (at least to Supreme Court justices) but they are even more meaningful to philosophers and to the people, especially when it comes to social conflicts that are structural. Why? Because they express a better, at least presumably better justified (or better interpreted), idea of freedom that seems to be more universal, more inclusive, more individualized and decentered than any former idea of freedom. Hegel has called the historical sequence of these ideas and justifying discourses progress in the consciousness (or understanding) of freedom.[20]

Constitutions are therefore not only evolutionary but also revolutionary advances, and revolutionary advances such as human rights and democracy are the result of a kind of evolutionary change that is not steered by adaption improved through natural and social selection. To be sure, these advances exist only because they are adaptable. Nothing that is not adaptable exists. To be adapted, modern constitutions must fulfill functional requirements of structural coupling. But they are neither designed as improvements of adaptation nor can they be explained as improvements of adaptation. In the latter context, they emerge far too rapidly, like punctuational bursts in

[20] 12 Georg W. F. Hegel, Werke 32 (1970).

the evolution of living systems (biological evolution).[21] Instead of improving adaptation, revolutionary advances normatively constrain morally neutralized adaptive mechanisms of society. As normative constraints they limit adaptation in a similar way as animals' building plans (*Baupläne*) limit the adaptation of living organisms to their environment. The "role of historical and structural constraints" consists in "channeling directions of evolutionary change."[22] And we extend this to the biologist Steven Jay Gould's observation by saying that this is true also of the role of normative constraints in social evolution. Normative constraints disclose new evolutionary paths. As a result of successful normative learning, constitutional normative constraints of systemic adaptation contain the emancipatory potential of a respective society.[23] Under the never ending selective pressure of the three selective mechanisms of modern society—(a) systemic (in particular economic) imperatives; (b) dominating and dominated (material and ideal) class interests; and (c) hegemonic and counterhegemonic mindsets—the emancipatory potential that is embodied in constitutional text books and legal practices "can be halted and inhibited. But it cannot be eliminated."[24] Because they are normative, the constraints of blind evolutionary adaptation can be violated, neglected, and derogated over and over. The violation of a legal norm is a proof of its existence. But as long as these norms "are not forgotten" (Kant) they can "strike back" (Friedrich Müller).[25]

This capacity to strike back has distinguished revolutionary documents since the 1075 *Dictatus Papae* from mere words, slogans, and chants.[26] It is the emancipatory progress of revolutionary advances that made Kant's "enthusiasm" and "moral rapture" in the face of the French Revolution endure, even at the very height of the Jacobean terror. In becoming normative constraints channeling evolutionary directions, the revolutionary advances of the Kantian mindset are no longer empty signifiers but what Hegel termed existing notions.[27]

2.4. Contradicting managerial mindsets

Thus far, I am more or less in agreement with Koskenniemi. But time has come to express my disagreement with Koskenniemi and my partial agreement with Luhmann and the managerial mindset. The Kantian enthusiasm for the flash of the revolution that makes "men and things seem set in sparkling diamonds" and "ecstasy . . . the

[21] *See* Stephen Jay Gould, *Darwinian Fundamentalism*, 44(1) N.Y. Rev. Books (1997); Stephen Jay Gould & Richard C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme* (1979), *available at* http://www.inf.fu-berlin.de/lehre/SS05/efs/materials/Spandrels.pdf; Stephen Jay Gould, The Structure of Evolutionary Theory (2002) [hereinafter Structure].

[22] Gould, Structure, *supra* note 21.

[23] *See* Brunkhorst, *supra* note 5.

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

[25] Immanuel Kant, 11 Werke: Streit der Fakultäten [Dispute Between the Faculties] 361 (1977) (my translation of the German expression "vergessen sich nicht").

[26] Harold Berman, Law and Revolution. The Formation of the Western Legal Tradition (1983).

[27] 2 Georg W. F. Hegel, Wissenschaft der Logik [Science of Logic] 424 (1975); *see also* Georg W. F. Hegel, *Lectures on the History of Philosophy* (E.S. Haldane and Frances H. Simson trans., [1894]), *available at* http://www.marxists.org/reference/archive/hegel/works/hp/hparistotle.htm.

order of the day," is regularly followed by "a long Katzenjammer [hangover]." What remains is a "sober reality," managed by "its own true interpreters and spokesmen": "the Sayès, Cousins, Royer-Collards, Benjamin Constants, and Guizots"[28]—managed in the aftermath of the French Revolution in the same way as in Europe since the 1950s has been managed with the "Method Monet".[29] In a long period of managerial incrementalism and gradual adaptation, society has learned (after Napoleon's final defeat as well as after the Treaty of Rome) "to assimilate the results of its storm-and-stress period soberly." It needed heroism and costumes, the "conjuring up of the dead of world history" to perform the normative learning process of revolutionary social classes.[30] But the path disclosing the force of normative constraints also enabled new cognitive learning processes which corrected the revolutionary dreams. However, gradual adaptation, incremental adjustment, muddling through, and clever management—in a word Mr Hyde—are needed to stabilize Dr Jekyll's lofty plan for a just society.[31] In a deal with the devil Dr Jekyll had to pay stability with justice and democratic self-determination. Human emancipation was reduced first to political emancipation (Marx),[32] then to the ironic emancipation of the political system of power from its societal embedment (Thornhill).[33] Parliamentary rule became a *facade democracy* (Habermas),[34] and constitutional claims became *kitsch* and *cliché* (Koskenniemi).[35]

Nevertheless, the managerial mindset cannot be reduced to the evil genius of Mr Hyde, as in Rouben Mamoulian's 1941 movie or in Koskenniemi's history of international law. The managerial mindset not only stabilizes the Kantian constitutional mindset at the price of justice, it also realizes and concretizes, at least partially, Kantian constitutional justice and fairness. Mr Hyde's his personality is split again into a Mr Hyde and a Dr Jekyll-kind of manager. Mr Hyde cannot just get rid of revolutionary established normative constraints of the Kantian constitutional mindset; he has to do his job with them whether he wants to or not: they are becoming effective as his own existing contradiction ("daseiender Widerspruch").[36]

[28] Marx, *supra* note 9.

[29] Jacques Delors, *Entwicklungsperspektiven der europäischen Gemeinschaft* [Development Prospects of the European Community], B1 Aus Politik und Zeitgeschichte 3, 5 (1993), *quoted in* Kolja Möller, Die *Europäische Sozialunion—Ideen, Hindernisse, Fragmente* [The European Social Union—Ideas, Obstacles, Fragments], *in* Interdisziplinäre Europastudien 291, 291–308 (Ulrike Liebert & Janna Wolff eds., 2015).

[30] Marx, *supra* note 9.

[31] 2 Jürgen Habermas, Theorie des kommunikativen Handelns [Theory of Communicative Action] 228 (1981); *see also* Armin Nassehi, Der soziologische Diskurs der Moderne [The Sociological Discourse of Modernity] 126–127 (2006).

[32] Karl Marx, *Zur Judenfrage* [On the Jewish Question], *in* 1 Marx–Engels: Studienausgabe [Marx–Engels. Study-Edition] 31 (Iring Fetscher ed., 1966).

[33] *See* Chris Thornhill, A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective (2011).

[34] Peter Bofinger, Jürgen Habermas, & Julian Nida-Rümelin, *Kurswechsel für Europa. Einspruch gegen die Fassadendemokratie* [A Change of Course in European Policy. An Appeal against Façade Democracy], Frankfurter allgemeine Zeitung, Aug. 3, 2012, *available at* http://www.faz.net/aktuell/feuilleton/debatten/europas-zukunft/kurswechsel-fuer-europa-einspruch-gegen-die-fassadendemokratie-11842820.html.

[35] Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 Eur. J. Int'l L. 113, 122 (2005).

[36] 2 Hegel, Wissenschaft der Logik, *supra* note 27, at 59.

This existing contradiction urges Dr Jekyll not only to come to terms with the Kantian normative constraints from the perspective of cognitive learning. As we have seen, from this perspective (which is just one end of the contradiction), normative constraints appear to be only learning blockades. However, normative constraints also urge Mr Hyde to participate in a normative learning process (which is the other end of the contradiction). Normative learning—and here I disagree again with Luhmann—does not end with a hangover after the revolutionary job has been done. Just as cognitive learning, normative learning has "to assimilate the results of its storm-and-stress period soberly."[37] Once they become effective normative constraints (hence normative constitutional law in Loewenstein's sense), revolutionary advances enable not only cognitive learning of the legal system, but also incremental and gradual normative learning of human individuals and social groups who are subject to public law and involved in the democratic process of public law formation. The *pouvoir constituant*, which is at the core of the Kantian constitutional mindset, is present in all legal performances, hence, it is "permanent."[38] The internalized contradiction between Mr Hyde and Dr Jekyll urges Mr Hyde to participate in the ongoing process of negative communication with his opponent, triggering a rapid growth of "variation . . . by communication that refutes or rejects communicative propositions. . . . The refutation contradicts the expectation of acceptance. It contradicts the tacit consent that everything continues, 'as always.' All variation therefore is contradiction as disagreement, hence, not in the logical meaning of contradiction but in the originally dialogical meaning."[39] However, the dialogical negations and contradictions are not only contributions to the rapid growth of variation that triggers evolutionary selection, they are at the same time no-positions of the alter-ego who answers to the ego's claim of truth or normative rightness which is internal to the ego's speech-act, and the answer triggers a critical discourse of normative learning.[40]

We must now move beyond Koskenniemi's Wittgensteinian use of Dr Jekyll's and Mr Hyde's opposing worldviews which only can be changed by an arbitrary *Gestalt switch* (what appears to be a picture of a rabbit which, with a slight shift in perspective turns out to be a duck, or vice versa). Unlike Koskenniemi's history of discursive raptures, the evolutionary combination of normative and adaptive learning, first, allows for a dialogical reconstruction of the existing contradiction between the

[37] Marx, *supra* note 9.

[38] *See* Ernst-Wolfgang Böckenförde, Die verfassungsgebende Gewalt des Volkes—Ein Grenzbegriff des Verfassungsrechts [The Constituent Power of the People—The Conceptual Limit of Constitutional Law] (1986).

[39] Niklas Luhmann, Die Gesellschaft der Gesellschaft [Theory of Society] 461 (1998), my translation of the German original: "Variation kommt . . . durch eine Kommunikationsinhalte ablehnende Kommunikation zustande. . . . Die Ablehnung *widerspricht* der Annahmeerwartung oder auch einfach einer unterstellten Kontinuität des 'so wie immer'. Alle Variation tritt mithin als Widerspruch auf—nicht im logischen, aber im ursprünglicheren dialogischen Sinn." *See* Hannes Wimmer, Evolution der Politik. Von der Stammesgesellschaft zur modernen Demokratie [Evolution of Politics. From Tribal Society to Modern Democracy] 115 (1996).

[40] On the constitutive role of the *negating answer*, *see* Ernst Tugendhat, Traditional and Analytical Philosophy. Lectures on the Philosophy of Language 190 (P.A. Gorner trans., 1982).

two evolutionary world-perspectives which, second, are internally related through a whole and holistic network of normatively binding inferential operations.[41] The difference between the revolutionary Kantian and a reformist managerial perspective has now become less unbridgeable, and it no longer excludes Kantian reformism from the performance of managerial incrementalism; on the contrary, Kantian reformism proves to be one of managerial incrementalism's possible developmental tracks that opposes and contradicts the reduction of democratic self-determination to mere economic adjustment to the imperatives of the markets.[42]

3. Evolutionary perspective

In this section, I will try to combine the Kantian mindset of the Finnish jurist Martti Koskenniemi with the managerial mindset of another Finnish jurist, Kaarlo Tuori. Tuori has suggested a highly plausible schema of a general and incremental development of a plurality of European constitutions.[43] Both mindsets are extreme, and rightly so. But the extremes can be integrated in a complementary and dialectical manner. Koskenniemi constructs a non-dialectical, unbridgeable, and, as I suppose, too fundamentalist opposition between the two mindsets. Getting from one to the other requires the Gestalt switch from one closed linguistic universe to another one. Complementarily, Tuori neglects and represses the action of the Kantian mindset within the managerial praxis and, in particular, he ignores that the Kantian constitutional mindset was at the root of the European unification process.

The European Union once was founded on the battlefields of World War II.[44] The battles were not fought with the single aim to found Europe anew as a political union, in contrast to the American War of Independence nearly two hundred years earlier which was fought in view of a new kind of political union of the former colonies. However, this was one of the war's aims, and a new foundation of Europe and the European system of states and international relations was unavoidable at the end of World War II anyway. It is not an overstatement to argue that the Kantian constitutional mindset of peoples and social classes who emancipated themselves from fascist rule over Europe, had an important role. Battles were fought in the name of comprehensive democratic and social self-determination. Liberating violence was transformed into the constituent power of a new foundation and at least some kind of unification of Europe.[45] A new foundation was unavoidable because a classical peace

[41] On the logic of inferential commitments, *see* Paul Lorenzen, Normative Logic and Ethics (1969); Wilhelm Kamlah & Paul Lorenzen, Logische Propädeutik [Logical Propaedeutics] (1967); Robert Brandom, Making It Explicit: Reasoning, Representing and Discursive Commitment (1994).

[42] *See* Cristina Lafont, *The Cunning of Law: Remarks on Hauke Brunkhorst's* Critical Theory of Legal Revolutions, 23 Soc. & Legal Stud. 565 (2014).

[43] Kaarlo Tuori, *The Many Constitutions of Europe*, *in* The Many Constitutions of Europe 3 (Kaarlo Tuori & Suvi Sankari eds., 2010).

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

[45] *See* Somek, *supra* note 7. Even the former president of the European Commission, Portuguese Barroso owes his job to a late effect of the emancipation of Europe from fascism.

treaty was no longer possible after the atrocities committed by the former Axis Powers in Europe and Asia.

Even from a legal standpoint, European unification did not begin with the Treaties of Paris and Rome in 1951 and 1957, nor did it begin with the managerial "Monet Method," but with the *new* constitutions that all the founding members (France, Belgium, Italy, Luxemburg, the Netherlands, and West Germany) had given themselves between 1944 and 1948.[46] All the 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.[47] All constitutions of the founding members were new or, in important aspects, revised and more democratic than ever before, and had eliminated the remains (or structures newly invented after 1918) of corporatist political representation of society.[48] The German *Grundgesetz* even constituted a completely new state.[49] All constitutions of the founding members expressed a strong emphasis on human rights and had opened themselves (explicitly or implicitly) to international law.[50] They were committed to the egalitarian project of mass democracy and social welfare. Even conservative parties' programs advocated ideas of democratic socialism. Already in 1941, Spinelli, Rossi, and Colorn, all three communists or socialist resistance fighters (in the Ventotene Manifesto[51]) outlined the project of a European federal social welfare state that preceded the later foundation of the

[46] Thornhill, *supra* note 33, at 327–371; John Erik Fossum & Augustín José Menéndez, The Constitution's Gift. A Constitutional Theory for a democratic European Union 11–16 (2011); on the two basic ideas of a constitution, power-founding vs. power-limiting, *see* Hauke Brunkhorst, Solidarity. From Civic Friendship to the Global Legal Community 67 *et seq.* (Jeffrey Flynn trans. 2005); Christoph Möllers, *The Politics of Law and the Law of Politics*, *in* Developing a Constitution for Europe 129–139 (Erik O. Eriksen, John Erik Fossum, & Agustín José Menendéz eds., 2004).

[47] Jürgen Osterhammel & Niels P. Petersson, Geschichte der Globalisierung [History of Globalization] 85 (2007); Eric Hobsbawm, Das Zeitalter der Extreme. Weltgeschichte des 20. Jahrhunderts [The Age of Extremes. A World History of the Twentieth Century] 185–187 (1994). This does not mean that strong continuities did not remain in all countries, in particular, in Germany, the Nazi continuity among the élites was still strong but it was kept hidden and suppressed, as strikingly described by Hermann Lübbe as "kommunikatives Beschweigen brauner Biographieanteile" (communicative refusal to mention the Nazi background), *see* Hermann Lübbe, Der Nationalsozialismus im politischen Bewusstsein der Gegenwart [National Socialism in Present-day Consciousness] Deutschlands Weg in die Diktatur [Germany's Path during the Dictatorship] 343–344 (Martin Broszat et al. eds., 1983).

[48] *See* Dietrich Jesch, Gesetz und Verwaltung. Eine Problemstudie zum Wandel des Gesetzmässigkeitsprinzips [Law and Administration. A Case Study on Change in Legal Principles] (1961); Thornhill, *supra* note 33, at 327–371.

[49] *See* Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 Am. J. Int'l L. 518 (1945). Monet was a founding father of the EU after World War II, and his method was functional integration through elite action.

[50] *See*, on the German case, which was not exceptional: Rainer Wahl, Verfassungsstaat, Europäisierung, Internationalisierung [Constitutional State, Europeanization, Internationalization] (2003); Udo Di Fabio, Das Recht offener Staaten. Grundlinien einer Staats- und Rechtstheorie [The Law of Free States. Baselines of a State Theory and of a Legal Theory] (1998).

[51] Altiero Spinelli, Ernesto Rossi, & Eugenio Colorni, *Manifest von Ventotene* [The Ventotene Manifest] (Aug. 1941), *available at* http://www.europarl.europa.eu/brussels/website/media/Basis/Geschichte/bis1950/Pdf/Manifest_Ventotene.pdf; *see also* Möller, *supra* note 29; Altiero Spinelli: From Ventotene to the European Constitution, ARENA Report 1/2007 (Agostín José Menéndez ed., 2007).

national welfare states.[52] Finally, and most crucially to the foundation of the European Union, all founding members of the European Communities bound themselves by the constituent powers of their peoples to the project of European Unification. Only Luxemburg had no explicit commitment to Europe in its constitution, but its constitutional court decided that it was implicit. Fossum and Menéndez appropriately speak of a synthetic constitutional moment of Europe.[53]

In consequence, it can be concluded that, from the very 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, albeit still national, constitutional powers. At the same time and with the same founding act, those peoples, acting as a plurality, constituted a single European citizenship. Therefore, from the very beginning, the European Treaties were not just intergovernmental, but legal documents with a constitutional quality. However, what followed was—to use the polemical language of Hegel's *Eighteenth Brumaire*—the long Katzenjammer of gradual incrementalism and the Method Monet. The story is structured by a sequence of evolutionary stages.

3.1 Stage one: Economic constitution

The Kantian mindset of emancipation from fascism was repressed by the rhetoric of peace, reconciliation, and anti-communism. The first stage of the constitutional evolution was triggered by the invention of the European economic constitution which consisted in the structural coupling of law and economics. Already in the early 1930s, German Ordoliberals "hijacked" the idea of economic constitution from the political left, from Hugo Sinzheimer and Franz Neumann.[54] In 1957, treaty negotiations by

[52] *See* Möller, *supra* note 29. Lutz Leisering has developed a similiar thesis, namely that international welfarism *preceded* the development of the modern welfare state: *see* Lutz Leisering. *Gibt es einen Weltwohlfahrtsstaat?* [Is There a World Welfare-State?], *in* Weltstaat und Weltstaatlichkeit [World State and World Statehood] 185 (Mathias Albert & Rudolf Stichweh eds., 2007). *See also* Ulrike Davy, *The Rise of the "Global Social." Origins and Transformations of Social Rights under UN Human Rights Law*, 3 Int'l J. Soc. Quality 41 (2013). Historically, and only for a short period, the idea of a constitution was bound to the state alone. As some new studies show, at least since the twelfth century, there has always existed in Europe a co-evolution of cosmopolitan and national (or particular) statehood: *see only* Thornhill, *supra* note 33, at; Hauke Brunkhorst, "The Co-evolution of Cosmopolitan and National Statehood—Preliminary Theoretical Considerations on the Historical Evolution of Constitutionalism, 47 Cooperation & Conflict 176 (2012); Brunkhorst, *supra* note 5.

[53] Fossum & Menéndez, *supra* note 46, at 80 *et seq.*, 175: The only instance of a constitution of a founding member that made no declaration about Europe, the Constitution of Luxemburg, is of itself a revealing case. In this case, the Luxemburg *Conseil d'État* decided in 1952 that the Constitution implicitly committed the representatives of the people to join the European Coal and Steel Community, and to strive for further European unification. It is argued that, even if the constitution of Luxemburg did not contain anything vaguely resembling a proto-European clause, the *Conseil d'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 also should, renounce certain sovereign powers if the public good so required. See the Report on the 1952 judgment of the *Conseil d'État*.

[54] Tuori, *supra* note 43, at 16. The hijacking was organized by Franz Böhm, Wettbewerb und Monopolrecht [Competition and Monopoly Law] (2010).

German Ordoliberals—then strongly backed by the conservative American government—took the opportunity to realize their old dream of a mere technical constitution without government or legislator.[55] The economic constitution was centered on competition law, and watched by the Court. Looking back, the beheading of the legislative power that had once produced the French Revolution, was exactly the overlapping consensus between German–Austrian Ordoliberals from the Freiburg school and the later Neoliberals from the Chicago school, between Friedrich Hayek and Milton Friedman. In the words of Ernst-Joachim Mestmäcker: "Die wichtigsten Aufgaben obliegen nicht der Legislative oder der Regierung, sondern der Rechtsprechung." (The most important tasks should be the responsibility, not of the legislative or the executive, but of the judiciary.)

Retrospectively, and from an observer's point of view, the program of economic constitutionalization appears to be a two-step immunization of free market capitalism against democratic control: First, Ordoliberals took over Europe; then Neoliberals took over the rest of the world. First, the transnational constitution of Europe, then the transnational constitution of the World Trade Organization (WTO), should be detached from national political constitutions, which had to stay home alone, relieved of the great economic decisions of the world. To put it bluntly, the basic constitutional idea that unites Ordo- and Neoliberalism is the idea of changing law from functioning as society's immune system into law that functions as the immune system of transnational capitalism, triggering an autoimmune disease by stigmatizing the rest of the societal body and especially its legislative organs as the public enemy.[56] The immune system of the many stakeholders and their clients should become an immune system of the few shareholders.[57] Hans Kelsen was the first who made this legal and constitutional implication of Ordo- and Neoliberalism evident in his 1954 critique of Hayek,[58] and it is here that Kelsen's critique of Hayek coincides with Luhmann's fear of loss of freedom through de-differentiation and Habermas's fear of loss of freedom through colonization of the life-world. In 1957, Mr Hyde had won his first round against Dr Jekyll. However, until the 1980s, the national social welfare regimes were strong enough to cope with the slowly emerging liberalization machinery of "peaceful competitive struggle" (Marx). A quick knockout of Mr Hyde seemed impossible. But since the mid-1970s, things had begun to change. The European constitution became more and more the transnational constitution that it is today, and the hegemony of the economic constitution became stronger and stronger, culminating in the introduction of the euro, a currency without legislator or government.

[55] *See* Wolfgang Streeck, *Zum Verhältnis von sozialer Gerechtigkeit und Marktgerechtigkeit* [The Relationship between Social Justice and Market Justice] (Unpublished lecture, Verona, Sept. 20, 2012).

[56] I thank Willis Guerra Filho for this reference (in a contribution to the discussion that took place at *Problemas Jurídicos e Constitucionais da Sociedade Mundial*, Conference, Brasilia, Sept. 18, 2013).

[57] *See* Colin Crouch, The Strange Non-Death of Neoliberalism (2011).

[58] Hans Kelsen, *Demokratie und Sozialismus* [Democracy and Socialism], *in* Demokratie und Sozialismus. Ausgewählte Aufsätze [Democracy and Socialism. Selected Papers] 170 (Norbert Leser eds., 1967); for an old but still brilliant analysis and representation of Kelsen's position, *see* Peter Römer, *Die reine Rechtslehre Hans Kelsens als Ideologie und Ideologiekritik* [Hans Kelsen's Pure Legal Doctrine as Ideology and a Critique of Ideology], 12 Politische Vierteljahresschrift 579 (1971).

3.2. Stage two: Rule of law constitution

The Ordoliberal takeover was not without contestation that was due to the same process of constitutional trans-nationalization. Mr Hyde had to cope with a copy of Dr Jekyll within himself. Their relation resembled more an antagonistic reciprocity of interactive perspectives and taking the role of the other (as explained by Georg Herbert Mead) than a Wittgensteinian Gestalt switch. The establishment of a rule-of-law constitution (or rights-constitution) at the second stage of European constitutionalization challenged the reduction of constitutionalization to technique and technocracy.[59] The growth of European norms and corresponding legal conflicts was an urgent call for European and national courts to construct, apply, and implement European rights and the direct effect of European law, together with the corresponding European citizenship. At the end of this process, European and national law became a single, deeply interpenetrated legal order.[60] In systems-theoretical terms, the rule-of-law constitution can be defined as a reflexive structural coupling of law and law, or, perhaps better and more precisely, as a structural coupling of law and rights.[61]

The Kantian point actually is that subjective rights can no longer be normatively neutralized by law that is technical, such as competition law. To implement European subjective rights for mere economic purposes of private autonomy one must—at least counterfactually and anticipatory—construct a full-fledged European citizenship. There is no private autonomy without public autonomy. The opposite view was the great illusion of classical liberalism.[62] In a famous essay on "Eros and Civilization" of European citizenship, Joseph Weiler once argued that "you could create rights and afford judicial remedies to slaves" because of "the ability to go to court to enjoy a right bestowed on you by the pleasure of others"—by which Weiler means that an international agreement between states or governments, such as in his opinion the European Union "does not emancipate you, does not make you a citizen."[63] From a normative point of view, I suppose, Weiler is wrong, even if there are a lot of empirical cases of rights bearers who are denied full citizenship. He is wrong because once I go to a *public* court, I must—whether I (or the ruling classes and power elites) want it or not—participate in the judicial "concretization" (Kelsen) of the respective legal norms, and that means that I must participate in a procedure of creating and changing law that has the legislative side that legal texts are transformed into legal norms which in many cases are new, and the transformation from text to norm is publicly arguable in *any*

[59] Tuori speaks of a *juridical constitution*: *see* Tuori, *supra* note 43, at 3, 18.

[60] Tanja Hitzel-Cassagnes, Entgrenzung des Verfassungsbegriffs. Eine institutionentheoretische Rekonstruktion [The Dissolution of the Boundaries of the Concept of the Constitution. An Institutional-theoretical Reconstruction] (2012); Karen Alter, *The European Court's Political Power*, 19(3) W. Eur. Pol. 458 (1996); Karen Alter, *Who are the "Masters of the Treaty"? European Governments and the European Court of Justice*, 52 Int'l Org. 121 (1998).

[61] Tuori, *supra* note 43, at 18.

[62] *See* Ingeborg Maus, Zur Aufklärung der Demokratietheorie [The Enlightenment of the Theory of Democracy] (1992); Jürgen Habermas, Faktizität und Geltung [Between Facts and Norms] (1997).

[63] Joseph H.H. Weiler, *To be a European Citizen—Eros and Civilisation*, 4 J. Eur. Pub. Pol'y 495, 503 (1997).

case subjected to a judicial judgment.[64] At every level of the (Merkl-Kelsian) normative hierarchy of steps (*Stufenbau des Rechts*), concretization is in need of direct democratic legitimization—as far as it creates a new norm or modifies an old one. Christoph Möllers rightly speaks of individual legitimization through legal actions, which is part and parcel of the whole process of democratic legitimization. Thus, the existing notion of European rights contradicts (as an "existing contradiction") the status of slavery once the slave makes use of these rights (if he or she has any rights, such as Dred Scott had in Missouri in the late 1840s).

Thus, the European Court of Justice in *Van Gend en Loos* has rightly interpreted the Treaties as an "agreement between the peoples of Europe that binds their governments and not simply as agreement between the governments that binds the peoples."[65] The construction of European citizenship by the Court must thus be derived from the synthetic constituent power of the peoples of Europe, and the Kantian mindset is back in. Once European rights and citizenship are created, no longer can a single nation quit membership on its own, out of its sovereign will. Not only all other nations, but also the European citizens must have a say in such a case. If Denmark quits the Union, I (as a German and European citizen) lose my European rights in Denmark, now even including active citizenship rights such as voting for the Danish contingent of the EU-Parliament (if I live in Denmark). Therefore today the Treaty of Lisbon allows withdrawal of a nation only through European procedural rules. Habermas has rightly called this a civilization of state power by overcoming state sovereignty and individualizing popular sovereignty.[66] At stake is not only the existing justice of a nation-state at stake when it comes to transferring sovereign rights from a nation-state to the European Union, but also the pre-existing justice of the European Union when it comes to returning the powers of the Union to the nation-state.

So, it seems that the second round goes to Dr Jekyll. The growing audience of European lawyers applauds. The two decisions of the Court from 1963 (*Van Gent en Loos*) and 1964 (*Costa v. ENEL*) emphatically have been described by jurists as "the declaration of independence of Community law."[67] The applause may be premature, because as long as there was no full-fledged political European constitution, active citizenship remained virtual and arbitrary. Individual, or better, private legitimization without public legitimization remains structurally incomplete on the level of the

[64] *See* Jochen von Bernstorff, *Kelsen und das Völkerrecht: Rekonstruktion einer völkerrechtlichen Berufsethik* [Kelsen and International Law: Reconstruction of an International Professional Ethics], *in Rechts-Staat* [Constitutional State] 167 (Hauke Brunkhorst & Rüdiger Voigt eds., 2008); Müller, "Richterrecht," *supra* note 12, at 13, 34, 38, 47 et seq., 88 et seq.; Müller, Demokratie zwischen Staatsrecht und Weltrecht, *supra* note 12, at 52–53.

[65] Damian Chalmers, Gareth Davies, & Giorgio Monti, European Union Law (2d ed. 2010); *see* Claudio Franzius, *Recht und Politik in der transnationalen Konstellation* [Law and Politics in the Transnational Constellation] 87 *et seq.* (2014); Claudio Franzius, *Besprechung von Habermas,* Die Verfassung Europas [Review of Habermas, *The European Constitution*], 2 Der Staat 317, 318 (2013); Claudio Franzius & Ulrich K. Preuß, *Die Zukunft der europäischen Demokratie* [The Future of the European Democracy] 16 *et seq.* (2012). *See* Case 26/62 Van Gent en Loos, ECJ, ECLI:EU:C:1963:1.

[66] Jürgen Habermas, Zur Verfassung Europas—Ein Essay [For a European Constitution—An Essay] 57 (2011).

[67] Tuori, *supra* note 43, at 3, 17. *See* Case 6/64 Costa v. ENEL, ECJ, ECLI:EU:C:1964:66.

rule-of-law constitution. Round two between Dr Jekyll and Mr Hyde is a draw, and the hegemony of the economic constitution prevails.

3.3 Stage three: Political constitution

But then comes the third round with an impressive progress of European parliamentarization.[68] At the third stage of constitutionalization, the political constitution structurally couples law and politics, and the beginnings of a European social-welfare and security constitution—fourth and fifth stages—now come into view.[69] Once again, Dr Jekyll is seriously contesting the hegemony of the economic constitution and its liberalization machinery. The Czech Constitutional Court in its judgment on the Lisbon-Treaty states that the European Union today forms a complete and gapless system of democratic legitimization, and rightly so.[70] The Kantian mindset of comprehensive democracy now is legally articulated in many single articles and legal norms of primary and secondary European law, such as the famous article 6 of the Maastricht Treaty, or articles 9–12 of the Lisbon Treaty. Von Bogdandy has rightly argued that the latter articles not only contain the democratic substance of the Lisbon Treaty but also a cosmopolitan project. However, I would not argue that they are "developing the democratic credentials not just of the EU, but of public authority beyond the state in general," hence showing "what lessons can be learnt for international organizations."[71] If one moves away from a participating international lawyer's perspective, which is not completely free of Eurocentrism, and adopts an evolutionary perspective, we can argue that articles 9–12 are realizations of an *evolutionary universal* or an *evolutionary advance* that probably has been realized elsewhere, and not only in Europe, and already long ago, for example in the constitutional order that was established after the Papal Revolution of the eleventh century. Be that as it may, it seems as if the third round goes to Dr Jekyll.

[68] *See* Phillip Dann, *Looking Through the Federal Lens: The Semi-Parliamentary Democracy of the EU*, Jean-Monnet Working Paper 5 (2012), *available at* www.jeanmonnetprogram.org/archive/papers/02/020501.rtf; Jürgen Bast, *Europäische Gesetzgebung—Fünf Stationen in der Verfassungsentwicklung der EU* [European Legislation—Five Stages in the Constitutional Development of the European Union], *in* Strukturfragen der Europäischen Union [Structural Issues of the European Union] 173 (Claudio Franzius, Franz C. Meyer. & Jürgen Neyer eds., 2010).

[69] *See* Tuori, *supra* note 43; Sonja Buckel, "Welcome to Europe"—Die Grenzen des europäischen Migrationsrechts. Juridische Auseinander um das "Staatsprojekt Europa" ["Welcome to Europe"—The Limits of European Migration Law. Juridical Examination of the "European State Project"] (2013).

[70] Isabelle Ley, *Brünn betreibt die Parlamentarisierung des Primärrechts. Anmerkungen zum zweiten Urteil des tschechischen Verfassungsgerichtshofs zum Vertrag von Lissabon vom 03.11.2009* [Brno Performs the Parliamentization of Primary Law. Comments on the Second Decision of the Czech Constitutional Court on the Treaty of Lisbon of Nov. 3, 2009], 65 Juristen-Zeitung 170 (2010).

[71] Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations*, 23 Eur. J. Int'l L. 315, 315, 317, 321–325, 333 (2012). *See already* (with respect of the Maastricht-Amsterdam Treaty and in particular the Constitutional Treaty that failed in 2005 but which, to a large extent, was identical to the Lisbon Treaty), Christian Callies, *Das Demokratieprinzip im Europäischen Staaten- und Verfassungsverbund* [The Democratic Principle in the European States and the Constitution Compound], *in* Internationale Gemeinschaft und Menschenrechte 399, 402–404 (Jürgen Bröhmer et al. eds., 2005).

4. Winner takes all

Unfortunately, just at the moment when the hard issues of unequal distribution of wealth, unequal living conditions, and unequal opportunities come to the fore, Mr Hyde's bodyguards—the European Council, the German hegemon, and the hastily established Troika—reach for their guns. The economic state of siege has been declared. Technical knockout: Mr Hyde is the winner, and the winner takes all. What has happened? The economic constitution (stage one) had been for a long time the beginning of a democratically open process of transformation from a national, democratic class struggle[72] to a peaceful competitive struggle among nations for advantages such as low taxes, low wages, and flexible jobs.[73] The prevalent program of competitiveness was one of many alternative programs, however, that changed after the unique introduction of a common currency without legislator and government. Democratically organized, national class struggle (based on strong unions and strong parliaments) was replaced with the international struggle between nations (based on weak and disempowered unions, and weak and disempowered parliaments). The race to the bottom became unavoidable, and a conflict between northern and the southern states of the Union began. The austerity regime with constitutionalized debt breaks became the hard core of the constitution of Europe.[74] Now there are no longer alternatives to the austerity regime left on the democratic agenda. The European situation today might best be expressed by a sketch of Monty Python: "If you have guests, you can make games. All guests are divided in two teams, A and B. And A are the winners. . . . Well you can make it more complicated if you want to."[75] The problem of democracy today is how to make it more complicated again. Therefore, a renewal and transnationalization of democratic class struggle: a new turn from national to social differences is needed.

[72] Walter Korpi, The Democratic Class Struggle (1983).

[73] Claus Offe, *Europe Entrapped—Does the EU Have the Political Capacity to Overcome its Current Crisis?*, 19 Eur. L.J. 595 (2013).

[74] *See* Wolfgang Streek & Daniel Mertens, *Politik im Defizit. Austerität als fiskalpolitisches Regime* [Politics in Deficit. Austerity as a Fiscal Policy Regime], Max-Plank Institute for the Study of Societies Discussion Paper 10.5 (2010).

[75] A scene from "Do not Adjust your Set", BBC 1967–69, precursor to "Monty Python's Flying Circus."