

# CONTESTED REGIME COLLISIONS

Norm Fragmentation in World Society

Edited by

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## A critical theory of transnational regimes

*Creeping managerialism and the quest for  
a destituent power*

KOLJA MÖLLER

'To radically shift regime behaviour we must think clearly and boldly, for if we have learned anything, it is that regimes do not want to be changed'.<sup>1</sup> In his text 'Conspiracy as Governance', the whistle-blower Julian Assange uses the term regime in an irritatingly generalizing manner. The transnational governance of security apparatuses, the exchange of information and digital surveillance technology – in Assange's view all of this seems to characterize an overwhelming 'conspiracy'. Here, different functional logics become blurred, ranging from the power-driven state system to the profit interests of private Internet companies. They amount to a higher-ranking regime of regimes. This use of the term regime stands obviously in sharp contrast to recent academic discussions. In the latter context, it is supposed to illuminate novel political constellations beyond the nation-state. In particular, the term refers to the diversity of legal regimes or specific policy regimes. They cannot be seen as a new super unit but as a fragmented constellation.<sup>2</sup> In normative regards, the debate also involves the questions of how to deal with this diversity; how regimes can be kept responsive; and what coordinative rules are advisable when it comes to regime-collisions. The obvious lacuna in this strand of discussion consists in an under-theorized normative twist. Either all this boils down to a merely descriptive theory that sheds light on transnational regimes without any critical engagement with the fragmented orders; or a normative impulse enters the stage that advocates responsiveness and coordination. This message, however, runs the risk of legitimizing

<sup>1</sup> Assange, 'Conspiracy as Governance', p. 1.

<sup>2</sup> Cf. Alter and Meunier, 'The Politics of International Regime Complexity'; Koskeniemi, 'The Politics of International Law – 20 Years Later'.

already existing regimes, since the overall idea consists in taming and regulating regime interaction. In that sense, it can lead to a creeping managerialism that tries to create order where disorder reigns. To put it more clearly: Is regime theory a 'party of order' in postmodern guise?<sup>3</sup>

At a minimum, this orderliness leads to a momentous argumentative shortcut. This can be explained when the central remedies to fragmentation are scrutinized. The emphasis on better coordinative rules or intensified dialogue insinuates that an exaggerated process of differentiation causes negative side effects. While the regimes are irrevocable and normatively viable, the process of differentiation must be domesticated. However, this point misses the fact that *regimes themselves* play an active part in the collisions or that they might even cause them in the first place. They offer no neutral third meta-site that would instil world society with deliberation and dialogue.

In contrast, in the following I want to explore whether a critical theory of transnational regimes is conceivable. My main thesis is that we need a perspective sensitive to the role and analysis of power. The landscape of transnational regimes is not only an expression of functional differentiation but also of new hegemonic conditions. This insight opens up scope for critique. Instead of merely restricting the inherent logics of regimes – for example, through conflict of laws rules or power-limiting constitutionalization – I will argue that counter-hegemonic effects only arise when the respective rationalities are exposed to a radical critique and countervailing powers.

First, I scrutinize approaches to transnational regimes in political and legal studies, and reveal the fact that they abstain from a wider critique of their subject. In contrast, the regime analysis as carried out by systems theory emphasized a programme of immanent critique. However, the latter still carries managerialist traces, as I show in a second step. I therefore propose a revision in a third step, which is inspired by theories of hegemony. It is not only able to better illuminate relations of domination, but it also radicalizes the mode of critique significantly: It shifts the constitutional issue to the regimes' outside, namely to the challenge of constitutionalising destituent power(s) on the transnational terrain.

<sup>3</sup> Marx, 'Der 18. Brumaire des Louis Bonaparte (1852)', p. 160.

### Creeping managerialism

Regimes have become an important analytical category.<sup>4</sup> This applies especially to novel patterns of order that emerge beyond the nation-state. They can no longer be addressed by the simple juxtaposition of the nation-state and the international community or state and non-state actors. However, a close examination of the different approaches reveals that so far it widely remains open to what extent the concept of regime can be used for critical purposes or whether it ultimately entails a managerialist bias when it comes to the problem of how to generally deal with new patterns of order.

The discipline of International Relations (IR) has so far given the concept of regime the most prominent treatment. Here, it serves to elucidate issue-specific patterns of interstate cooperation. The seminal definition states that regimes rely on an interplay of 'principles, norms, rules and decision-making procedures around which actor expectations converge in a given subject area'.<sup>5</sup> While well into the 1980s, the orthodox view on the international state system stressed nation-states' quest for power, the rather liberal regime theory proposed a different emphasis. Since states are faced with challenges that can only be solved together, in cooperation, they develop issue-specific institutions on the international level.<sup>6</sup> As a result, such regimes do not enforce the narrow interest of particular states. On the contrary, they have a socializing effect on state behaviour. They reshape expectations by incorporating the states in procedures of justification and monitoring. In this way, they may well change behaviour. Insofar as regime theory entails the hope that multilateralism enters the stage, it exerts a civilizing effect on the international community and safeguards normative goods.<sup>7</sup>

The weakness of this approach is that it remains a state-centric one. Regimes seem to be constituted by the state system, but we can observe patterns of cooperation that cannot be solely derived from interstate relations: Liberal IR theory hitherto largely ignores legal regimes, private regimes or aesthetic regimes of visibility. Julian Assange's initial example of the surveillance regime shows, for instance, that especially state and private actors tend to intersect more and more.

<sup>4</sup> For an overview, cf. Dimitrova, Egermann, Holert, Kastner, and Schaffner, *Regime*.

<sup>5</sup> Krasner, 'Structural Causes and Regime Consequences', p. 185.

<sup>6</sup> Cf. Hasenclever, Mayer, and Rittberger, *Theories of International Regimes*.

<sup>7</sup> Keohane, Macedo, and Moravcsik, 'Democracy-Enhancing Multilateralism'; Slaughter, *A New World Order*.

Against this backdrop, the normative aspect of regime theory becomes rather dim. While general hope existed that transnational regimes in different policy arenas would ultimately safeguard normative goods, such as the rule of law and human rights, the orders beyond the nation-state carry out a 'dark' side as well. At least in the case of the surveillance regime, no issue-oriented multilateralism has evolved that would popularize the rule of law worldwide. The surveillance regime does not seem to tame national executives but rather to enhance the power potential of states and multinational companies.<sup>8</sup>

Compared to IR and the idiosyncratic take on the normative force of state cooperation, the legal debate chooses a different starting point. In this context, the concept of regime is meant to identify specific areas of international and transnational juridification. This applies to international environmental law, diplomatic law or commercial law.<sup>9</sup> There is probably no branch of research in which the concept of regime has found such broad reception as in the debate about the transnationalization of law. The latter can draw on confirmatory trends in case law, and the argument often refers to a judgment of the International Court of Justice (ICJ). It took the view in the debate about the treatment of prisoners (Tehran hostage case) that international diplomatic law needed to be interpreted as a so-called 'self-contained regime'.<sup>10</sup> Echoing this line of thought, the transnationalization of law is characterized by multiple legal regimes in diverse areas: 'Contemporary international law ... resembles a dense web of overlapping and detailed prescriptions in subject areas as diverse as environmental protection, human rights and international trade'.<sup>11</sup> The report of the International Law Commission (ILC) on 'The Fragmentation of International Law' had turned special attention to this circumstance. It identifies the differentiation of regimes and a concomitant fragmentation of international law:

What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialized knowledge as 'investment law' or 'international refugee law', etc. – each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such

<sup>8</sup> See Fischer-Lescano in this volume. <sup>9</sup> Berman, *Global Legal Pluralism*.

<sup>10</sup> ICJ, *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)* [1980] ICJ Rep 3.

<sup>11</sup> Simma and Pulkowski, 'Of Planets and the Universe', p. 484.

specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.<sup>12</sup>

This approach has far-reaching consequences as there is no longer just interplay between general international law and special rule-systems; rather, conflictive situations emerge over and over again, where general international law and legal regimes collide. The report distinguishes situations in which different interpretations of international law clash, international law stands in tension with specific legal regimes or even different special legal regimes clash.<sup>13</sup>

A normative response to these conflicts suggests itself: To counter fragmentation, a taming process needs to be established that constrains the respective regime-collisions. Here, the legal vocabulary draws on the notion of constitutionalism: While the constitution had the task to limit the exercise of political authority in the nation-state, a similar process is now to be initiated when it comes to regimes.

In this context, two variants can be identified: The *first* variant perceives legal regimes as quasi-secondary constitutions that emerge as part of the general constitutionalization of international law.<sup>14</sup> They are subordinated to international law or at least brought into a relation to it. Hope rests with meta-rules, which aim at regulating the relationship between regimes and general international law. Metaphorically speaking, this is about the constitutionalization of a network that has its centre still in international public law. Coordination rules are needed which could manage the different sites of conflict.<sup>15</sup> The other, *second* variant regarding the constitutional issue offers an internal perspective. The general trend towards constitutionalization cannot be confined to general international law alone. What can be observed is that legal regimes develop themselves their own internal secondary norms and legal hierarchies. Alec Stone Sweet, for instance, suggests that treaty regimes, like the European Union (EU), European Convention on Human Rights

<sup>12</sup> International Law Commission (ILC), 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, p. 11.

<sup>13</sup> *Ibid.*, p. 30. <sup>14</sup> Kleinlein, *Konstitutionalisierung im Völkerrecht*, pp. 63ff.

<sup>15</sup> See Viellechner in this volume.

(ECHR) and World Trade Organization (WTO), develop a constitutional dimension, since 'they are constituted, like the systems of virtually all nation-states today, by written meta-norms or codified secondary rules'.<sup>16</sup> In this sense, constitutionalism is not bound to states and the international community, but can be identified in different forms:

Simple power-based balance of power arrangements anchored one extreme, the European Union (EU) occupied the opposite extreme, and other regime forms, including the General Agreement on Tariffs and Trade (GATT) and the then-new World Trade Organization (WTO), occupied the middle ground. The continuum captures three dimensions: the extent of hierarchical primacy and entrenchment of the constituting norms; the degree of precision and formality of legal obligation; and the scope of independent, organizational capacity to monitor compliance with, and to enforce, obligations.<sup>17</sup>

In this way, it becomes possible to envisage an internal constitutionalization. It does not amount to a super-constitution 'from above' but operates through self-restraint 'from below'.

With a view to the existing landscape of transnational regimes, these aspirations about juridification tend to be a dubious endeavour. First and foremost, the transnational regimes that were involved in the great crises of world society have rarely shown a low degree of juridification. The best example is the role of the economic regime. For a long time it has been observed that world trade and the banking sector are highly juridified. But contrary to the emphasis on self-restraint, the legal arrangements facilitated crisis tendencies in the world economy and provided a fertile ground for financial accumulation. We can identify a 'new constitutionalism', which enshrines market-liberal programmes with a focus on free trade, investor protection and austerity in higher-ranking norms.<sup>18</sup> This tendency has contributed significantly to the current crisis tendencies.

As different as the approaches in IR and legal debates might be, it is striking to see that a kind of creeping managerialism shines through. The idiosyncrasies of the respective discipline are paraded in order to insert a normative twist: on the one hand, the rationalizing concomitants of administrative statehood at the international level (IR), and on the other hand, the civilizing force of juridification (legal studies).

<sup>16</sup> Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes', p. 631.

<sup>17</sup> Ibid., p. 622.

<sup>18</sup> See Gill and Cutler, *New Constitutionalism and World Order*; Kennedy, 'Law and the Political Economy of the World'.

### Critical systems theory

A more promising perspective stems from critical systems theory approaches.<sup>19</sup> They do not explain the origin of regimes with the internationalization of law or policy alone; instead Niklas Luhmann's thesis about the transition to a world society becomes the starting point. In the 1970s Luhmann had already speculated that functional differentiation does not stop at nation-state borders. He observed a transnationalization of functional social systems. This is associated with a change in leadership. In the transition to a world society, 'a clear prevalence of cognitive, adaptive expectations eager to learn' is striking, 'while normative, morality demanding and prescriptive expectations retreat'.<sup>20</sup> Accordingly, the landscape of transnational regimes is understood as an effect that is caused by an underlying dynamic of functional differentiation. Spelling this out, at least three dimensions of regimes become apparent. First, regimes are not only legal or policy-specific units. The systems-theoretical approach assumes that transnational social spaces emerge: like the world economy, world politics or world science. Special legal matters appear not only as an internal differentiation within the legal system, but also as a surface phenomenon that is nurtured by a more fundamental social evolution. This is why regimes have to be seen as *social regimes* that relate to the entirety of a given social area.<sup>21</sup> To use an expression of the sociologist Saskia Sassen, the communication of different functional systems 'assemble' under the overarching rationality of the respective regime.<sup>22</sup> They provide sites for institutional coagulations (institutions like the World Health Organization (WHO), WTO, United Nations (UN), etc.) and overarching rationalities. These rationalities encompass criteria for assessment, logics, or mind-sets, which always over-determine the internal communication structures. This is the result of a type of secondary encoding: a marker that assigns it to the respective regimes supplements the communicative coding within functional systems. Accordingly, legal communication can play a role within the world economic regime, the environmental regime, the science regime or other regimes; political communication is observable in the international

<sup>19</sup> Fischer-Lescano and Teubner, 'Regime-Collisions'; for the critical systems theory approach, cf. Fischer-Lescano, 'Critical Systems Theory'; Amstutz and Fischer-Lescano, *Kritische Systemtheorie*.

<sup>20</sup> Luhmann, 'Die Weltgesellschaft', p. 68.

<sup>21</sup> Fischer-Lescano and Teubner, 'Regime-Collisions', pp. 1023ff.

<sup>22</sup> Sassen, *Territory, Authority, Rights*.

state system, but also in the scientific system and so forth. The central mechanism, which constitutes the inner coagulations, is structural coupling. This is the case 'if a system presupposes certain features of its environment on an ongoing basis and relies on them structurally'.<sup>23</sup> The co-evolution of different functional systems establishes mutual linkages under the umbrella of a broader regime rationality. It is obvious that the relationship between institution and communication becomes fuzzy. It is, for instance, questionable whether the talk about a world economic regime encompasses all communication in world society related to the economy or simply denotes a nucleus of already existing institutions and agreements. Does the world economic regime only consist of the WTO, the International Monetary Fund (IMF) and the World Bank? Does it extend to the private *lex mercatoria*? Or does it bundle – in strict systems-theoretical terms – all economy-related communication in world society, like, for instance, protests in the form of consumer boycotts? We will have to return to the aspect of fuzziness at a later point.

Second, and furthermore, regimes have a legal dimension. In social spheres expectations have to be stabilized. This in turn leads to the trend of juridification. Thereby, law changes its form. It is not necessarily linked to the state's monopoly on the use of force. In transnational regimes non-state legal phenomena gain significance:

The focus in law-making is shifting to private regimes, that is, to agreements among global players, to private market regulation through multinational enterprises, internal rule-making within international organizations, inter-organizational negotiating systems and worldwide standardization processes. The dominant sources of law are now to be found at the peripheries of law, at the boundaries with other sectors of world society that are successfully engaging in regional competition with the existing centres of law-making – national parliaments, global legislative institutions and inter-governmental agreements.<sup>24</sup>

Regimes develop their own decision-making mechanisms, law-making and dispute resolution. These indicated trends can especially be observed in the world economy. In this area, standardized contracts, private arbitration and common law arrangements constitute the engine of a *lex mercatoria* beyond direct state control.<sup>25</sup> This somewhat hyperbolic emphasis on the private sphere may be exaggerated, but it leads us

<sup>23</sup> Luhmann, *Das Recht der Gesellschaft*, p. 441.

<sup>24</sup> Teubner, 'Privatregimes', p. 439 (English version: Teubner, 'Global Private Regimes').

<sup>25</sup> Cf. Cutler, *Private Power and Global Authority*; Renner, 'Death by Complexity'.

to recognize that hybrid structures, where nation-state apparatuses interact with international institutions, multinational companies, non-governmental organizations, lobby groups and social movements play a fundamental role.<sup>26</sup> The hybrid nature of these patterns of order is significant, because an approach based on the private/public distinction misses the subject. Demands for subordinating the regimes to the international political system ignore, for instance, that state apparatuses are heavily involved.

Third, and finally, regimes are also sites at which politics takes place. Yet, while many regimes are far away from copying nation-state politics, they establish relations of power, namely relations of power superiority/power inferiority, even in distance to the political system: Interests collide, decisions are made or appealed, durable relations of superordination and subordination are stabilized. This leads to a broadening of the range of the political: So far, the external relations of regimes were the particular focus of attention, that is, their competitive relationship to other regimes and respective social environments.<sup>27</sup> In this context, both political conflict constellations and discursive strategies were explored that aim at establishing the primacy of certain regimes – such as the world economy or security policy. This approach, however, needs to be complemented by further dimensions. After all, politics does not only occur in the external relations of regimes but also on their inside. There is struggle about the actual purpose of the respective regime: How procedures and decision-making are designed; or which actors are influential and which are not. And moreover, the 'hidden' politics of private regimes, which is rarely discussed in public, also needs to be considered. There certainly is an evolutionary 'politics', which is already about to cement internal power positions.<sup>28</sup> However, this kind of politics is somewhat more volatile than it was in the framework of nation-state constitutionalism. 'Politics' seems here rather to correspond more closely

<sup>26</sup> This brings them in proximity to theories of empire, which Michael Hardt and Antonio Negri also conceive as 'mixed constitutions'; for their reception of systems theory, see Hardt and Negri, *Commonwealth*, pp. 373ff.; cf. also the mélange of state and private regimes in Scholz and Wolf, 'Ordnungswandel durch Umkehrung einer Normenhierarchie'.

<sup>27</sup> Koskenniemi, 'The Politics of International Law – 20 Years Later', pp. 12ff.

<sup>28</sup> The best example for this development is obviously the recent debate about private arbitration, cf. Cutler, 'Legal Pluralism as the "Common Sense" of Transnational Capitalism'.



to what the recent theoretical discussion has termed 'the political'.<sup>29</sup> The latter comes to the fore when issues of dominance and subordination are addressed, or the logic of a regime is questioned. Thus, politics is at least in part decoupled from the state and located within the regimes.

This triple approach has implications for constitutional prospects. Indeed, they cannot simply be reduced to internal legal hierarchies. The decisive criterion is a double reflexivity:

Auto-constitutional regimes are defined by their duplication of reflexivity. Secondary rule-making in law is combined with defining fundamental rationality principles in an autonomous social sphere. Making the distinction between such societal constitutions and simple regimes even clearer: regimes dispose of a union of primary and secondary legal norms, and their *primary rule-making* is structurally coupled with the creation of substantive social norms in a specific societal sector.<sup>30</sup>

It is therefore essential that regimes do not only have a social, political and legal dimension; rather, all three dimensions are structurally coupled and thus establish a regime-specific reflexivity, which in turn is stabilized in the medium of higher-ranking law. It refers not only 'reflexively' to law, in the sense of a higher-ranking law of law-making, but also to power relations within the regime, its rationality and relations with its social environments.

### Rationality maximization

In the next step, the system-theoretical observation takes an explicitly critical turn. Regimes undergo a momentous process that tries to maximize their inherent rationality. The motif of alienation is invoked. Area-specific rationalities become detached from their social environments. They create their respective 'gods',<sup>31</sup> which they equip with all-round problem-solving competence. The global economic regime is built around the expansionist logic of financial accumulation, the state system around the expansion of power claims in security policy and the science system generalizes a type of rationality that disqualifies traditional bodies of knowledge. Regimes coagulate into 'anonymous matrices' that follow a

<sup>29</sup> Cf. Teubner, *Constitutional Fragments*, pp. 114ff.; Christodoulidis, 'On the Politics of Societal Constitutionalism'.

<sup>30</sup> Fischer-Lescano and Teubner, 'Regime-Collisions', p. 1016.

<sup>31</sup> Following Max Weber's polytheism argument, Fischer-Lescano and Teubner, 'Regime-Collisions', p. 1006.

totalizing logic.<sup>32</sup> They stamp their respective inherent rationalities onto world society. This invokes a figure that resonates less with Luhmann's systems theory than Marx's critique of political economy: The productive forces of social evolution collapse into destructive forces. They destroy other societal conditions for communication or prevent them from ever emerging.<sup>33</sup> In this respect, a hegemonic trend exists, an urge towards universalization:

... the point is that regimes such as the "international trade system", the "climate change system" or the "security system" are all engaged in universalization strategies, trying to make their special knowledge and interest appear as the general knowledge and general interest, a common-place consciousness.<sup>34</sup>

Instead of praising regimes as embryonic forms of a civilizing administrative rule, the question arises of how to put a stop to this trend. How can the alienated regimes be constrained? How it is possible to open them up for their social environments?

In that regard, the vocabulary of constitutionalism can be mobilized again. The assumption is that constitutional reflexivity does not necessarily lead to a managerialist praise of order. It can also serve as a gateway to the demands of the social environments. The possibility of a 're-entry' provides decisive leeway.<sup>35</sup> While no super- or meta-constitution of regimes is conceivable, it might be possible to tame the compulsion to maximize through countervailing powers:

... external social forces, which are not only state instruments of power, but also legal rules, and "civil society" countervailing powers from other contexts, media, public discussion, spontaneous protest, intellectuals, social movements, NGOs or trade union power, etc., should apply such massive pressure on the function systems so that internal self-limitations are configured and become truly effective.<sup>36</sup>

In such a hybrid setting, environmental rationalities can enter the stage and undermine the hegemonic urge, so some hope.

<sup>32</sup> Teubner, 'The Anonymous Matrix'.

<sup>33</sup> This can unfold in two steps: 1. Hegemonic regimes colonize their social environments by universalizing their rationality. 2. However, since they in turn live off other systems' functions and their environments, 'death by complexity' can occur (cf. Renner, 'Death by Complexity'), since they cannot ensure their own reproduction.

<sup>34</sup> Koskeniemi, 'Hegemonic Regimes', p. 315.

<sup>35</sup> Cf. Luhmann, 'Observing Re-entries'.

<sup>36</sup> Teubner, 'A Constitutional Moment?', p. 13.

For this constellation, which combines a systems-theoretical approach with a postmodern reconstruction of power-limiting constitutionalism, a price has to be paid, however. It comes in the form of restricted spaces for critique and politicization. All the constitutional prospects are meant to correct functional self-reference in an immanent mode, but offer hardly any space for fundamental questioning – hence, for a critique that does not only ask whether the law of the respective regime is just or whether its political constitution does justice to the general interest,<sup>37</sup> but that also asks whether a particular regime, its law or policies are necessary at all. This restriction in articulating critical concerns is mainly due to a normative reading of functional differentiation. It is assumed that critique and politicization can also trigger a totalizing dynamic, not less destructive than the regimes' universalizing urge.<sup>38</sup> Accordingly, the cycles of counter-power have a relatively a clear and restricted task: They should block colonizing effects on the social environments and thereby allow functional differentiation to play out its normative potential, namely the advent of diverse autonomous social sectors. However, what seems unattractive and even dangerous is to question regimes fundamentally or even to revoke them. With regard to the economic constitution, for example, the abandoning of the economic growth is rejected as potentially de-differentiating. Criticism should only attack 'self-destructive growth-excesses', since 'a functioning monetised economy is reliant on a certain compulsion to grow'.<sup>39</sup> What becomes discernible here is that the hybrid constitutionalization is not meant to revoke the respective regime. It cannot revoke it because this would undermine the evolutionary course of functional differentiation as a sort of 'fall of mankind' (evolutionary argument). And it may not evoke it because this falls prey to de-differentiation (normative argument). Consequently, critique always follows an *a posteriori* logic. The political is, as Luhmann had once polemicized with regard to protest movements, reminiscent of 'vaulting on someone else's horses'.<sup>40</sup> It draws parasitically on system differentiation.

In this respect, critical systems theory provides a link to social theory and opens up room for critique. Nevertheless, the central position of

<sup>37</sup> This point refers to the contingency formula of the respective functional system; with regard to the political system, cf. Luhmann, *Die Politik der Gesellschaft*, pp. 118ff.; with regard to the law, cf. Gonçalves, *Il Rifugio delle Aspettative*.

<sup>38</sup> For the role of social movements, cf. Luhmann, *Protest*, pp. 176ff.

<sup>39</sup> Teubner, *Constitutional Fragments*, p. 99. <sup>40</sup> Luhmann, *Protest*, p. 188.

functional differentiation allows the 'party of order' to creep in: Functional differentiation appears suddenly not only as an observable reality, but rather as a normative ideal of 'civil societal liberty'.<sup>41</sup> Thus, differentiation is in the end equipped with normative potential. It rejects a totalizing critique, which not only aims at the paradoxes in the application of the respective codes but also at their foundational paradox.<sup>42</sup> This leads to restrictions: System-theoretical regime analysis focuses on hegemonic regimes but has yet to acquire the tools to understand differentiation itself as a part of hegemonic conditions. The scope of critique remains centred on power-limiting constitutionalization. In the next step, I suggest a revision, which is inspired by theories of hegemony. This should make it easier to discern the regime collisions and insert the potential for a radical critique into the theoretical horizon.

### Hegemony

It was already alluded to above that transnational regimes tend to carry out a hegemonic dimension. However, the concept of hegemony is too multifaceted to locate it only at the phenomenal level.<sup>43</sup> For this reason, a reconceptualization is required that introduces the concept of hegemony in the theory of transnational regimes.<sup>44</sup>

In the post-Marxist take on the concept of hegemony, as it was developed by Chantal Mouffe and Ernesto Laclau, we find a promising approach in order to reconceptualize the analysis of transnational regimes. Of course, Laclau and Mouffe are no systems theorists; in their first joint publication, they heavily criticize a Marxist functionalism that tries to derive social contradictions directly from the rationality of the economic system.<sup>45</sup> They read Marxist categories, such as hegemony,

<sup>41</sup> Teubner, 'Privatregimes', pp. 448ff. <sup>42</sup> Cf. Horst, 'Politiken der Entparadoxierung'.

<sup>43</sup> In the 1920s, the Italian communist Antonio Gramsci stressed with his concept of 'hegemony' the point that the bourgeoisie generates its rule in modern society with the help of a complex interplay of coercive and integrative mechanisms. In particular, it seemed to be able to generalize its worldview through intellectual and cultural leadership. By creating a wide civil societal terrain, which opens the cultural space for the generalization of different world views, coercive rule is supplemented by relations of leadership, cf. Gramsci, *Gefängnishefte – Kritische Gesamtausgabe*, Heft 13, § 37, p. 1610.

<sup>44</sup> For a similar approach, cf. Stäheli, *Sinnzusammenbrüche*.

<sup>45</sup> Laclau and Mouffe, *Hegemony and Socialist Strategy*. The anti-essentialism does not yet recognize sufficiently that it leads back into the economy. After Laclau and Mouffe insist that respective societal formations refer back to discursive articulations, which coagulate into a permanent 'sedimented objectivity' (Laclau, *New Reflections on the Revolution of*

class, or contradiction before the backdrop of contemporary post-structuralism and de-constructivism. This constitutes a fundamentally different approach. They do not locate the concept of hegemony at the level of class struggle. They shift it to the level of discourse.<sup>46</sup> Laclau and Mouffe draw on post-structuralist assumptions about the indeterminacy of the social. Yet, they add another step in their argument that more clearly emphasizes the aspect of meaning construction and unity. Their considerations transcend the point that the social is characterized by a differential mode of meaning-creation. The playing field of discourse only opens up because a 'construction of nodal points which partly fix meaning' takes place.<sup>47</sup> The historically unchangeable priority of particular spheres that determine the social directly (economy, state, law, culture, etc.) vanishes in this perspective. But nevertheless, it is possible to analyse nodal points that shape the respective social formation. This reading of the concept of hegemony re-introduces a distinction that for systems theory actually belonged to the old-European *problématique* of stratified societies. It situates the 'part/whole' distinction in the discursive process. Parts (discursive units) claim to represent the whole but fail to generate unity. The relation of part and whole should not be understood as if a whole pre-existed that would only need to be reassembled; it must be seen as a performative act. Since parts claim to represent the whole, they exert an 'ecological dominance', which can, however, never become 'total'. The logic of hegemony produces an imaginary fullness, which remains out of reach. The whole remains unavailable.<sup>48</sup>

If this perspective is applied to regimes, the previously identified gaps can be addressed. The universalizing trend is given a systematic place. The outlined expansionist urge is thus not a purely negative externality. It is not a degenerated turbo self-reference, which eclipses and corrupts 'actual' functional differentiation. The expansionist urge is simply

*Our Time*, p. 35), it immediately suggests itself to elucidate how a systemic character and a permanent interaction between the economy, law and the state emerge. So far, the post-Marxist discussion often tends to uncover so-called 'essentialism' instead of using the specific theoretical reservoir, e.g., in view of a post-Marxist theory of capitalism, a theory of law, the state, etc.

<sup>46</sup> Laclau and Mouffe, *Hegemony and Socialist Strategy*, pp. 93ff.; for a research programme and some applications, see Howarth, Norval and Stavrakakis, *Discourse Theory and Political Analysis*.

<sup>47</sup> Laclau and Mouffe, *Hegemony and Socialist Strategy*, p. 113.

<sup>48</sup> Laclau develops this argument in a kind of parallel move to the psychoanalytic theory of Jacques Lacan, which also assumes a constitutive lack as driving force of subject formation, cf. Laclau, *On Populist Reason*, pp. 115ff.

evidence for a logic of hegemony that is always already at work in social relations. In this way, the transition to the world society can be read as a *constellation of fragmented hegemony*. It is not only the site at which regimes differentiate but also where new relations of domination and subordination occur. This has three key consequences.

The *first consequence* is that fragmentation is not only an effect of functional differentiation. Rather, it must be understood as part of contested social change. What we call globalization today was decisively shaped by the crisis of the welfare state and the collapse of real-existing socialism.<sup>49</sup> In this vein, post-Marxist studies outline how the combination of state-regulated market conditions, mass democracies and male breadwinner models drifted into crisis from the 1970s and 1980s onwards and paved the way for a market-liberal turn.<sup>50</sup> This very historical trend has triggered the recent surge of globalization, not functional differentiation alone.

The *second consequence* concerns the relationship of regimes between each other. It is not equality or creative plurality that determines the relation of transnational regimes to their social environments, but hegemonic relations, which can be described as *relations of ecological dominance* in the parlance of systems theory.<sup>51</sup> The fact remains that world society is not only characterized by diversity or new complexity, but also by persistent asymmetries. They are the result of processes of hegemony formation, which are of course always met by counter-forces and blockades.

This suggests a correction. Regimes do not develop their bias *a posteriori*. From the very beginning, they are involved in hegemonic struggles. Consequently, not all regimes are the same. Particular regimes succeed in establishing themselves as a 'nodal point', but others fail to do so. While every regime shows a totalizing aspect, not all of them are equally able to maximize self-rationality. Hence, one has to distinguish among hegemonic, non-hegemonic and even counter-hegemonic regimes. This implies a number of methodological challenges when confronted with the question of how such hegemonic relations can be identified.<sup>52</sup> If we

<sup>49</sup> Cox, *Production, Power, and World Order*, pp. 274ff.

<sup>50</sup> Jessop, *The Future of the Capitalist State*, pp. 56ff.

<sup>51</sup> Cf. the concept of 'ecological dominance' in Jessop, *State Power*, 26ff; for similar attempts to conceptualize functional differentiation as capitalist society, see Bachur, *Kapitalismus und funktionale Differenzierung*; Schimank, 'Die Moderne'.

<sup>52</sup> See the works of the so-called 'Essex School of Discourse Analysis': cf. Howarth, Norval and Stavrakakis, *Discourse Theory and Political Analysis*.

draw on the various contributions to the regime debate there is much evidence that the current world economic regime and security regime play such a dominant role, yet not the world health regime or the rights of indigenous peoples.<sup>53</sup> This has far-reaching ramifications for the question from what point hegemonic trends can be criticized or restricted.

The *third consequence* is an expanded perspective on the internal regime-constitution. It is not only that the 'world economy' or 'states' generalize their logics; rather, the relationship between part and whole takes effect, after all the logic of hegemony is also effective within regimes. The best example of this is surely the world economic regime. Recent developments indicate not only a general trend towards economization but also the dominance of specific economic *policies*, oriented towards free trade and the protection of property rights. They are even given the status of higher-ranking constitutional norms in treaties and case law, and are therefore no longer questioned.<sup>54</sup> As part they eclipse the whole of regime-specific rationality. The already mentioned fuzziness – that regimes can be seen as overarching communication structures and as specific ensembles of institutions and treaties – just reveals the fact that specific programmes and projects (and not the 'economy' or the 'security' generally) carry out a hegemonic dimension.

This revision shifts the perspective considerably. Regime collisions or interactions have to be examined for how far they reflect the relationship between hegemony and counter-hegemony. And the internal state of regimes, that is, 'economy', 'environment', 'security', is not simply given but itself the subject of social conflict. Differentiation is consequently not an invisible hand and first mover, it is itself the result of conflicts over hegemony.

#### Destituent power: from societal to plebeian constitutionalism

This leads to a changed conception of transnational constitutionalism. While the systems-theoretical diagnosis had introduced its normative twist at the point where a constitution-typical reflexivity enables social environments to be taken into account, here a more sceptical approach

<sup>53</sup> Cf. Kennedy, 'Law and the Political Economy of the World'; Schneiderman, *Constitutionalizing Economic Globalization*; Brunkhorst, *Critical Theory of Legal Revolutions*; Streeck, *Gekaufte Zeit*.

<sup>54</sup> Gill and Cutler, *New Constitutionalism and World Order*.

comes to the fore. The point is that the evolutionary emergence of regimes has consequences for the form of constitutionalism. At least in hegemonic regimes, a strong tendency exists to back up the substantial focus on a correct policy with higher-ranking law. Specific projects and substantial ideas of a 'good order' eclipse as part the whole of the regime.<sup>55</sup> They are tied down in the medium of constitutionalism. The distinction between codes and programmes becomes blurred. The current world economic regime, for instance, is biased towards free trade and investment protection. The security regime is not about 'security' in general terms but is mainly concerned with monitoring and combating terrorism. This superposition of codes and programmes has serious consequences. It restricts the ability of a regime to respond to external pressure. Systems theory assumed that the particular programmes are the site where openings vis-à-vis the social environments take place.<sup>56</sup> But if the new form of constitutionalism reduces the scope for social conflicts and collisions to be processed adequately or to become visible at all, it seals off social sectors from potential alternatives and immunizes them against environmental demands. Transnational constitutionalism is thus no guarantor of openness and transcendence, but of closure. Substantive programmes restrict juridico-political reflexivity, that is, the regime's self-referentiality. It cuts them off from inquiry. Thus, fundamental questions – about the purpose of economic activity or the purpose of the security policies – are relegated to the outside of transnational constitutionalism.<sup>57</sup>

That does, however, not mean that reflexivity would not matter. On the contrary, transnational regimes make use of reflexivity quite often and stage openings for the respective environments. In the run-up to the financial crisis, for example, the drafting of the Basel II guidelines in the area of banking regulation was opened up for comments from civil society.<sup>58</sup> In its Blairite market-liberal heyday, the European Union followed the principles of a comprehensive citizen dialogue and tested

<sup>55</sup> The parallel to the early modern 'Policey' is obvious, see Somek, 'Administration without Sovereignty', p. 273.

<sup>56</sup> In systems theoretical parlance: 'Based on the changeability of the code, the program level can be understood at the site at which alternative solutions are tested and different articulations of the code offered. Programs serve as a supplement of the code by specifying its application' (Stäheli, *Sinnzusammenbrüche*, p. 283). For this opening function of programme, cf. also Opitz, *An der Grenze des Rechts*, pp. 50ff.

<sup>57</sup> For similar observations, cf. Chimni, 'Between Co-option and Resistance'.

<sup>58</sup> Barr and Miller, 'Global Administrative Law'.

this approach in various policy areas.<sup>59</sup> Participation opportunities for civil societal actors have emerged in the WTO.<sup>60</sup> Last but not least, the academic debate has tried to address these processes with the concept of governance steering and stakeholder participation. However, these mechanisms exert no limiting but rather legitimacy-generating functions. They incorporate social environments. They breed their own subject of legitimation, their own 'people' – a trend which the young Karl Marx already saw at work in Hegel's attempt of constitutionalizing the societal estates: 'Here the people [Das Volk] is already dressed out, exactly as required in this particular organism, so as to have no determinate character'.<sup>61</sup> In this regard, Julian Assange's point about the hegemonic character of regimes is quite helpful; unhelpful, however, is his implicit assumption that an overwhelming power enforces its interests only 'from above'. In contrast, constitutionalizing processes in regimes are already about cultivating their version of social environments; they are committed to the protection of human rights or to develop methods of balancing, which nevertheless strengthens their respective 'bias' in the end.<sup>62</sup> Based on the hope of restricting effects on regimes through opening them up for their social environments, transnational societal constitutionalism loses its persuasiveness.<sup>63</sup> In other words: some of its desiderata have already been established without achieving the desired limiting effects. In the light of such sceptical observations, the question of critique arises. If constitutionalism coagulates increasingly into a post-democratic form of rule, how and on what basis can critical concerns then be formulated at all?

This sceptical view is able to highlight the emancipatory challenge, however. The task of pushing back hegemonic regimes can only succeed, if their innermost core, namely the reduction of transnational constitutionalism to specific programmes, is tackled. This raises the issue of effective countervailing powers able to cause such an opening. The desideratum would not be a mere re-entry of social environments, but

<sup>59</sup> European Commission, 'European Governance – A White Paper' COM(2001) p. 428; for the application in the field of employment policy, cf. Möller, 'Gouvernementales Wahrheitsregime oder dezentrales Netzwerk-Regieren?'.  
<sup>60</sup> Lang, *World Trade after Neoliberalism*, pp. 88ff.

<sup>61</sup> Marx, 'Kritik des Hegelschen Staatsrechts', p. 273.

<sup>62</sup> Cf. Chimni, 'International Institutions Today'; Maus, 'Verfassung oder Vertrag'; Holmes, 'The Rhetoric of Legal Fragmentation and Its Discontents'; For an attempt to uncover the possibility of internal opposition in international law, cf. Ley, *Opposition im Völkerrecht*.  
<sup>63</sup> Teubner, *Constitutional Fragments*.

a *destituent power* that neither aims at a managerialist meta-order nor remains in a mere 'construction of respect',<sup>64</sup> but displaces hegemonic projects of their higher-ranking status, opens them up for revision or withdraws them completely.

### *The young Marx*

This perspective does not stand apart from the constitutional mind-set. But instead of drawing on the power-limiting tradition, it takes the *power-constituting* tradition as its starting point.<sup>65</sup> On the one hand, it may seem ill suited to be applied to fragmented regimes given the absence of a global *demos*. On the other hand, the figure of *pouvoir* *constituant* implies an element of a radical critique that one cannot simply equate with the population of the political state. The idea that only the people generate the constitution and rules itself within its framework includes not just a positive, law-generating dimension. It also possesses an expressly negative dimension, a latent threat of revoking juridico-political forms in society.<sup>66</sup>

At least, this is the way in which the young Marx understood constituent power in his *Critique of Hegel's Philosophy of Right*.<sup>67</sup> Here Marx sought to defend the constitutional theory of the French Revolution against Hegel's managerialist model of a constitution, in which each estate (each regime?) confined to the right dosage should contribute to a succeeding state as a whole.<sup>68</sup> Marx's praise of the revolutionary democratic principle comes in many formulas. The democratic constitution is depicted as 'the resolved riddle of all constitutions', the 'essence

<sup>64</sup> This is Marx's take on Hegel's corporate constitution, see Marx, 'Kritik des Hegelschen Staatsrechts', p. 288.

<sup>65</sup> Cf. the distinction between 'big C' and 'small c' constitutionalism with regard to world society in Kumm, 'The Cosmopolitan Turn in Constitutionalism'; for the paradox relation of constituting and constituted power, cf. Loughlin and Walker, *The Paradox of Constitutionalism*.

<sup>66</sup> Consequently, Beaud identifies also a 'deconstitutionalizing' moment in constituting power, Beaud, *La Puissance de l'Etat*, pp. 224ff.

<sup>67</sup> Marx, 'Kritik des Hegelschen Staatsrechts', pp. 441ff. Admittedly, Hegel's legal philosophy cannot be reduced to a mere defence of a conservative constitutional model, cf. Honneth, *Freedom's Right*; for an approach that makes use of the young Marx with regard to international law, cf. also Koskeniemi, 'What Should International Lawyers Learn from Karl Marx?'.  
<sup>68</sup> Hegel, *Grundlinien der Philosophie des Rechts*, pp. 441ff.

of every political constitution' and even the 'truth of the monarchy'.<sup>69</sup> The revolutionary idea of the democratic constitution appears to be a qualitatively completely different principle, a 'completely opposed concept of sovereignty'.<sup>70</sup> With the figure of *pouvoir constituant*, the constitution contains a sort of tribunal that installs a constant pressure on those who rule. This is the decisive turn: Constituent power always entails a destituent scenario, which subjects all legal and political forms to the permanent threat of revocation.<sup>71</sup>

For Marx, this is the 'truth of democracy'. Legal and political forms emerge out of societal conditions. They are 'made' by people and can therefore be changed. It is not the enthusiasm for the political state that renders Marx a proponent of the French Revolution; Marx rather hopes for a transgression of democracy's boundaries. Since the *pouvoir constituant* raises the question of the extent to which people can be understood as authors of their own *legal conditions*, a dynamic process may occur. The inquiry needs to be extended to the totality of social relations, particularly with regard to the question of whether people can see themselves as authors of their own *living conditions*. In this way, Marx turns his reconstruction of the democratic constitution in the end against the state. In the *Critique of Hegel's Philosophy of Right* and in his essay 'On the Jewish Question' the project of a 'true democracy'<sup>72</sup> is discernable, in which the alienated forms of rule return into society and 'man has recognized and organized his "own powers" as social powers, and, consequently, no longer separates social power from himself in the shape of *political power*'.<sup>73</sup>

The post-democratic nature of regime constitutions has to be positioned at this very point; since they are reshaped by concrete ideas of

order, they remain without a destituent moment. The challenge is therefore to renew the threat of revocation. The constitutional question increasingly shifts to the outside of hegemonic regimes. Can transnational social movements, counter-hegemonic regimes (such as in the field of social human rights), or political organizations exert such destituent power? The simple interplay of regimes and social environments is not sufficient. After all, it remains open which social environments really possess destituent potential.

### *Potentia and potestas*

Consequently, if we understand the challenge not only as responsiveness but also as a question of transnational countervailing powers, yet another connection to constitutionalism emerges. If destituent power understood in this way occurs as a temporary placeholder for constituent power, it becomes much more than a mere active civil society. It aims directly at the substantive core of regimes and needs to maintain its ground in the constitutional struggles of the transnational. It is therefore not only inexhaustible *potentia* but also *potestas*; not only free-floating communication but also effective countervailing force. To appear as a permanent countervailing force, the destituent power will have to undergo a constitutionalizing process. Although it resists full-scale juridification, it still needs its own form.<sup>74</sup> Only in this way can it become visible and find a way of dealing with its internal contradictions. This is the reason why it will turn to legal formalism in order to organize itself and not to collapse into a mere gesture of total politicization or into an anarchic exodus that immunizes itself against critique and reflexivity.

Even the primal scene of social countervailing power, namely the struggle between the patricians and plebeians in the Roman Republic suggests this. When the Roman *plebs* seceded to the holy mountain *mons sacer* and turned itself into an antagonist, it did not only engage in a revolt but also stabilized itself in the medium of its own legal (*leges sacratae*) and political forms (tribunate). The plebeian secessions, which according to tradition occurred in 494 BC, 450 BC, and 287 BC, were not only a means of a revolt, but they were also a self-organizing process, which found its expression in a plebeian constitution. The *plebs* forms a

<sup>69</sup> Marx, 'Kritik des Hegelschen Staatsrechts', pp. 230ff. <sup>70</sup> Ibid., p. 230

<sup>71</sup> Especially functionalist inspired analyses of constituent power miss this point (cf. Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power'). They can certainly show that liberal and republican constitutionalism are intertwined, and both prepare the ground for the centralization of political power. The notion of constituent power, however, cannot be reduced to a mere instrument of rule. Once it has found entrance into constitutional law and once the revolution has become an historical event, this can serve as reference point for those ruled, in case they intend to repeal the existing juridico-political forms. At least an available threat scenario for this repeal exists.

<sup>72</sup> Marx, 'Kritik des Hegelschen Staatsrechts', p. 232.

<sup>73</sup> Marx, 'Zur Judenfrage', p. 370. Abensour unpacks the young Marx's 'democracy against the state' in detail (cf. Abensour, *Democracy Against the State*), but ignores the fact that Marx in fact distinguishes between constitution and state and does not reject the constitution one-sidedly in the name of genuine democracy.

<sup>74</sup> In contrast, cf. Giorgio Agamben's view of an exit from politics and law in Agamben, 'What is a Destituent Power?' and Antonio Negri's endeavor to reduce constituent power to *potentia*: Negri, *Insurgencies*.

parallel order. It protects the plebeian institutions against attacks and constitutes the *plebs* as 'counter-sovereign vis-à-vis the established order'.<sup>75</sup> The plebeians swear on their constitution as *leges sacratae*, as sacred and in this sense higher-ranking law. The latter are a basis for ensuring that it is possible to gradually achieve concessions and introduce the tribunes of the plebs as a constitutional institution of the Roman Republic.<sup>76</sup> This applies to the world society alike: Only a transnational *plebeian constitutionalism* is able to set a destituent power in motion.<sup>77</sup> This would also be an alternative to the interplay of overwhelming conspiracy and individualized counter-conspiracy, which Julian Assange emphasizes. Scandalous revelations about the power of the powerful or the encryption of e-mails with the safest application are important issues, but the challenge is more fundamental: How can destituent constituencies establish a sustainable counterweight to hegemonic regimes?

### References

- Abensour, M., *Democracy against the State: Marx and the Machiavellian Moment* (Cambridge and Malden: Polity Press, 2011).
- Agamben, G., 'What Is a Destituent Power?', *Environment and Planning D: Society and Space*, 32 (2014), pp. 65–74.
- Alter, K. J., and S. Meunier, 'The Politics of International Regime Complexity', *Perspectives on Politics*, 7 (2009), pp. 13–24.
- Amstutz, M., and A. Fischer-Lescano (eds.), *Kritische Systemtheorie: Zur Evolution einer normativen Theorie* (Bielefeld: Transcript, 2013).
- Assange, J., 'Conspiracy as Governance' (2006), <http://web.archive.org/web/20070129125831/http://iq.org/conspiracies.pdf>.
- Bachur, J. P., *Kapitalismus und funktionale Differenzierung* (Baden-Baden: Nomos, 2013).
- Barr, M. S., and G. P. Miller, 'Global Administrative Law: The View from Basel', *European Journal of International Law*, 17 (2006), pp. 15–46.
- Beaud, O., *La Puissance de l'Etat* (Paris: Presses Universitaires de France, 1994).
- Berman, P. S., *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press, 2012).

<sup>75</sup> Koschorke, Lüdemann, Frank and De Mazza, *Der fiktive Staat*, p. 27.

<sup>76</sup> See also Lorey, *Figuren des Immunen*, pp. 281ff. However, Lorey recoils in her reading of the *leges sacratae* from using the concept of constitution and mainly points to constituent *potentia* as being at work (p. 59); for a similar perspective, cf. Breugh, *The Plebeian Experience*.

<sup>77</sup> For the analogy with struggles for political order in the Roman Republic, see Möller, *Formwandel der Verfassung*.

- Breugh, M., *The Plebeian Experience: A Discontinuous History of Political Freedom* (New York: Columbia University Press, 2013).
- Brunkhorst, H., *Critical Theory of Legal Revolutions* (London and New York: Bloomsbury Academic, 2014).
- Chimni, B. S., 'Between Co-option and Resistance: Two Faces of Global Administrative Law', *NYU Journal of International Law and Politics*, 37 (2004), pp. 799–827.
- 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law*, 15 (2004), pp. 1–37.
- Christodoulidis, E., 'On the Politics of Societal Constitutionalism', *Indiana Journal of Global Legal Studies*, 20 (2013), pp. 629–63.
- Cox, R. W., *Production, Power, and World Order: Social Forces in the Making of History* (New York: Columbia University Press, 1987).
- Cutler, C., *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003).
- 'Legal Pluralism as the "Common Sense" of Transnational Capitalism', *Oñati Socio-Legal Series*, 3 (2013), pp. 719–40.
- Dimitrova, P., E. Egermann, T. Holert, J. Kastner and J. Schaffner, *Regime: Wie Dominanz organisiert und Ausdruck formalisiert wird* (Münster: edition assemblage, 2012).
- Fischer-Lescano, A., 'Critical Systems Theory', *Philosophy & Social Criticism*, 38 (2012), pp. 3–23.
- Fischer-Lescano, A., and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, 25 (2004), pp. 999–1046.
- Gill, S., and C. A. Cutler, *New Constitutionalism and World Order* (Cambridge University Press, 2014).
- Gonçalves, G. L., *Il Rifugio delle Aspettative. Saggio sulla Certezza del Diritto* (Lecce and Rovato: Pensa Multimedia, 2013).
- Gramsci, A., *Gefängnishefte – Kritische Gesamtausgabe* (Hamburg: Argument, 1991).
- Hardt, M., and A. Negri, *Commonwealth* (Cambridge, MA: Harvard University Press, 2009).
- Hasenclever, A., P. Mayer and V. Rittberger, *Theories of International Regimes* (Cambridge University Press, 1997).
- Hegel, G. W. F., *Grundlinien der Philosophie des Rechts, Werke Band 7* (Frankfurt am Main: Suhrkamp, 1986 [orig. 1821]).
- Holmes, P., 'The Rhetoric of Legal Fragmentation and Its Discontents. Evolutionary Dilemmas in the Constitutional Semantics of Global Law', *Utrecht Law Review*, 7 (2011), pp. 113–40.
- Honneth, A., *Freedom's Right: The Social Foundations of Democratic Life* (Cambridge, MA: Polity Press, 2014).



- Horst, J., 'Politiken der Entparadoxierung. Versuch einer Bestimmung des Politischen in der funktional ausdifferenzierten Weltgesellschaft' in M. Amstutz and A. Fischer-Lescano (eds.), *Kritische Systemtheorie. Zur Evolution einer normativen Theorie* (Bielefeld: Transcript, 2013), pp. 193–217.
- Howarth, D. R., A. J. Norval and Y. Stavrakakis, *Discourse Theory and Political Analysis: Identities, Hegemonies and Social Change* (Manchester University Press, 2000).
- Jessop, B., *The Future of the Capitalist State* (Cambridge and Malden: Polity Press, 2002).
- State Power* (Cambridge and Malden: Polity Press, 2007).
- Kennedy, D., 'Law and the Political Economy of the World', *Leiden Journal of International Law*, 26 (2013), pp. 7–48.
- Keohane, R. O., S. Macedo and A. Moravcsik, 'Democracy-Enhancing Multilateralism', *International Organization*, 63 (2009), pp. 1–31.
- Kleinlein, T., *Konstitutionalisierung im Völkerrecht. Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Heidelberg and others: Springer, 2012).
- Koschorke, A., S. Lüdemann, T. Frank and E. M. De Mazza, *Der fiktive Staat: Konstruktionen des politischen Körpers in der Geschichte Europas* (Frankfurt am Main: Fischer, 2007).
- Koskeniemi, M., 'What Should International Lawyers Learn from Karl Marx?', *Leiden Journal of International Law*, 17 (2004), pp. 229–46.
- 'The Politics of International Law – 20 Years Later', *European Journal of International Law*, 20 (2009), pp. 7–19.
- 'Hegemonic Regimes' in M. A. Young (eds.), *Regime Interaction in International Law* (Cambridge University Press, 2012), pp. 305–24.
- Krasner, S. D., 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', *International Organization*, 36 (1982), pp. 185–205.
- Kumm, M., 'The Cosmopolitan Turn in Constitutionalism. An Integrated Conception of Public Law', *Indiana Journal of Global Legal Studies*, 20 (2013), pp. 605–28.
- Laclau, E., *New Reflections on the Revolution of Our Time* (London and New York: Verso, 1990).
- On Populist Reason* (London and New York: Verso, 2005).
- Laclau, E., and C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London and New York: Verso, 2001 [orig. 1985]).
- Lang, A., *World Trade after Neoliberalism: Reimagining the Global Economic Order* (Oxford University Press, 2011).
- Ley, I., *Opposition im Völkerrecht. Ein Beitrag zur Legitimation internationaler Rechtserzeugung* (Heidelberg and others: Springer, 2015).
- Lorey, I., *Figuren des Immunen: Elemente einer politischen Theorie* (Zurich: Diaphanes, 2011).
- Loughlin, M., and N. Walker, *The Paradox of Constitutionalism* (Oxford University Press, 2007).
- Luhmann, N., *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993).
- 'Observing Re-entries', *Graduate Faculty Philosophy Journal*, 16 (1993), pp. 485–98.
- Protest. Systemtheorie und soziale Bewegungen* (Frankfurt am Main: Suhrkamp, 1996).
- Die Politik der Gesellschaft* (Frankfurt am Main: Suhrkamp, 2002).
- 'Die Weltgesellschaft' in N. Luhmann (ed.), *Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft* (Wiesbaden: VS-Verlag, 2005 [orig. 1971]), pp. 63–88.
- Marx, K., 'Der 18. Brumaire des Louis Bonaparte' in F. Engels and K. Marx (eds.), *Marx-Engels-Werke Band 8* (Berlin, Dietz-Verlag, 1972 [orig. 1852]), pp. 111–207.
- 'Kritik des Hegelschen Staatsrechts' in F. Engels and K. Marx (eds.), *Marx-Engels-Werke Band 1* (Berlin, Dietz-Verlag, 1972 [orig. 1843]), pp. 203–333.
- 'Zur Judenfrage' in F. Engels and K. Marx (eds.), *Marx-Engels-Werke Band 1* (Berlin, Dietz-Verlag, 1972 [orig. 1843]), pp. 347–77.
- Maus, I., 'Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik' in B. Herborth and P. Niesen (eds.), *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik* (Frankfurt am Main: Suhrkamp, 2007), pp. 383–405.
- Möller, K., 'Gouvernementales Wahrheitsregime oder dezentrales Netzwerk-Regieren?', *Leviathan*, 37 (2009), 575–601.
- Formwandel der Verfassung. Die postdemokratische Verfasstheit des Transnationalen* (Bielefeld: transcript, 2015).
- Negri, A., *Insurgencies: Constituent Power and the Modern State* (Minneapolis: University of Minnesota Press, 1999).
- Opitz, S., *An der Grenze des Rechts. Inklusion/Exklusion im Zeichen der Sicherheit* (Weilerswist: Velbrück, 2012).
- Renner, M., 'Death by Complexity – The Crisis of Law in World Society' in P. F. Kjaer, A. Febbrajo and G. Teubner (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011), pp. 93–112.
- Sassen, S., *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2006).
- Schimank, U., 'Die Moderne: Eine funktional differenzierte kapitalistische Gesellschaft', *Berliner Journal für Soziologie*, 19 (2009), pp. 327–51.
- Schneiderman, D., *Constitutionalizing Economic Globalization. Investment Rules and Democracy's Promise* (Cambridge University Press, 2008).



- Scholz, S., and K.-D. Wolf, 'Ordnungswandel durch Umkehrung einer Normenhierarchie. Der Schutz geistigen Eigentums und das Recht auf Gesundheit', *HSFK-Report*, 5 (2014).
- Simma, B., and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', *European Journal of International Law*, 17 (2006), pp. 483–529.
- Slaughter, A.-M., *A New World Order* (Princeton University Press, 2004).
- Somek, A., 'Administration without Sovereignty' in M. Loughlin and P. Dobner (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), pp. 267–78.
- Stäheli, U., *Sinnzusammenbrüche. Eine dekonstruktive Lektüre von Niklas Luhmanns Systemtheorie* (Weilerswist: Velbrück, 2000).
- Streeck, W., *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus* (Berlin: Suhrkamp, 2013).
- Sweet, A. S., 'Constitutionalism, Legal Pluralism, and International Regimes', *Indiana Journal of Global Legal Studies*, 16 (2009), pp. 621–45.
- Teubner, G., 'Privatregimes: Neo-Spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft' in D. Simon and M. Weiss (eds.), *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis* (Baden-Baden: Nomos, 2000), pp. 437–53.
- 'Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society?' in K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (Aldershot: Ashgate, 2004), pp. 71–87.
- 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors', *The Modern Law Review*, 69 (2006), pp. 327–46.
- 'A Constitutional Moment? The Logics of "Hitting the Bottom"' in P. F. Kjaer, G. Teubner and A. Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011), pp. 9–51.
- Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012).
- Thornhill, C., 'Contemporary Constitutionalism and the Dialectic of Constituent Power', *Global Constitutionalism*, 1 (2012), pp. 369–404.

## Materialism of form

### *On the self-reflection of law\**

CHRISTOPH MENKE, TRANS. JAVIER BURDMAN

I begin with a simple statement: with law, there is only form. That is to say, with law there is no other as opposed to or outside its form – if or given that to say “there is” [*es gibt*], which implies the “thereness” [*Gegebenheit*] of something, in law as in anything else, is in itself a form. All that there is in law is there only through and, therefore, within its form.

To begin with this simple statement, however, necessarily implies to go beyond it. It is the beginning of thinking law, not its end – and therefore not the truth about law and its form. The truth about the legal form is that it carries a contradiction within itself, which manifests itself in certain collisions. The truth of the legal form is that it contains the other of law within itself – or that the law is the other of itself. By taking a traditional term for the other of form, “matter,” I call this the *materialism of law*. This materialism is dialectical, as it does not conceive of matter as the other as opposed to form, but rather as the other of form within the form.

I proceed in three steps. The first step explains the thesis of the gap of law. The second step describes the figure of the self-reflection of modern law. The third step outlines how the self-reflection of modern law both grounds and suspends the form of (“subjective”) rights. The goal of the considerations on the materialism of law is a critique of bourgeois law.

### The gap of law

The determination of the legal form can proceed from two general insights formulated by Niklas Luhmann. The first insight is that law (as a form) is marked by two distinctions (i). The second insight is that these two distinctions are connected in the law (as a system) through its self-referentiality (ii).

\* The text is the abbreviated version of an argument which I have developed further in a book entitled *Kritik der Rechte* (Berlin: Suhrkamp Verlag, 2015), esp. part II.