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Constitutionalism and the Justification of Norms

ABSTRACT

Since the 18th century, there has been discussion regarding whether the basic normative resources of the liberal and democratic state are essentially to be found in the democratic process (somewhere between ideas of deliberative democracy or conceptions of a mere *modus vivendi*) or rather in the processes of the institutionalization of legal principles (basic human rights to freedom, equality and fair legal procedures). This is what Ralf Dreier (1991a) meant when he interpreted democratic legalism and constitutionalism as two different modes of legal thinking. My aim is to present the thesis that the engine and the normative core of (old and new) constitutionalism is found in a phenomenon which I call "Normative Modernity". Legal evolution towards constitutionalist principles involving human rights and the rule of law is driven by a special mode of justifying norms which can, in a certain sense, be understood as a coherent and directed process. In order to make this point, I will combine some legal philosophical arguments with sociological theory.

KEYWORDS

Constitutionalism, justification of norms, legal evolution, Normative Modernity, Normative Individualism

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1. *Modernity and Normativity*

The modern condition is characterized by modern normativity in ethics and especially in law. Modernity is also a normative endeavour referring to a central structural feature of modern societies and the pertinent everyday experience of their members. Social and normative modernization are intertwined. According to Talcott Parsons, the development of universalistic legal order is «the most important single hallmark of modern society» (PARSONS 1964, 353). The evolution of moral and especially of legal norms has been a shaping factor in the evolution of modern Western societies, and there are reasons to expect that it will continue to be a crucial and formative element in the development of a polycentric modernity reflecting the global breakthrough of modern arrangements (SCHMIDT 2014). The engine and core of the *normative* dynamics of Western modernity, however, is to be found in the institutionalization of egalitarian Normative Individualism within the legal system.

2. *The Evolution of Legal Norms*

Modern and pre-modern societies differ in the ways they justify their norms. Modernization is a process of ongoing, self-perpetuating (and accelerating) change, and, in order to understand the normative dimension and the normative dynamics inherent to modern societies, we have to search for a macro-theory of the evolution of norms. Moreover, since normatively substantive messages can only circulate *throughout society* in the language of law (HABERMAS 1992, 56), we need a macro-theory of the evolution of *legal* norms. Or, to be more precise: we are in search of a theory of the evolution of what counts as a normative reason.

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Despite being a non-teleological process, normative modernization seems to follow an intelligible trajectory. Although every social phenomenon, institution and structure is contingent in the sense that alternate paths of development have been and are possible (and often realized), when adopting a long-term perspective and historical viewpoint, we can also discern powerful trends that seem to reflect a directed, rather than erratic course of social change. The development of legal norms and of their forms of justification is the most important example for such an intelligible and directed course of social processes.

In asking whether there is an inherent dynamic or even intrinsic logic in the development of legal norms and legal reasoning, we seem, at first glance, to refer to concepts of the historicity of reason like Hegel's, which is perhaps the most fully developed philosophical theory of history that attempts to discover meaning or direction in history. Hegel regarded history as an intelligible process moving towards a specific condition – the realization of human freedom (HEGEL 1833-36, 74 ff.; 1820). This article will, however, fall short of this axiological question. As lawyers or as social theorists, we cannot conceive social change as the unfolding of an absolute idea. We cannot reasonably apply teleological concepts in this sense any longer, and we have lost our trust in the myths of progress which were so dominant in the 18th and 19th centuries, a long time ago.

Nevertheless, in order to understand the dynamics of (old and new) constitutionalism, we have to ask whether the development of legal norms and legal reasoning can be understood as a coherent, consequent, i.e., directed, process. Or to put it differently: How is it possible that some legal meta-principles successfully claim universal validity and applicability despite their contingent history of origins?

3. *Normative Modernity and Normative Individualism*

The evolution of law is part of a modernization of culture in the Parsonian sense of rationalization, growth of reflexivity, understanding of the malleability and amendability of reality and value generalization (PARSONS 1977). This evolution is characterized by the forming of universalistic norms and of formal, positive, dynamically changeable law.

Modern Western legal systems are especially characterized

a) by post-conventional modes of normative reasoning, i.e., reasoning guided by the coherent application of principles based on legitimate interests;
b) by the institutionalization of Normative Individualism, i.e., the view that, in the last instance, moral norms and values can only be justified by reference to the individuals concerned;
c) and especially by individual rights to certain liberties, to equal treatment, to the rule of law and to certain procedures (FRIEDMAN 1994).

Within the Western states and on the European and international level, especially the human rights discourse has been institutionalized and deeply embedded as an objective legal regime and the central element of constitutionalism. With the principles of human dignity, liberty, equality, the rule of law and democracy, all legal systems affirming democracy and the *Rechtsstaat* have «incorporated [...] as principles of positive law, the basic principles of modern natural law and the law of reason and thereby the basic principles of modern legal and state morality» (ALEXY 2001, 71; cf. DREIER 1991b, 105 ff.). This has been a meta-trend since the last quarter of the 18th century.

This modern discourse on state and rights does have a contingent history of origins. Historically, it goes back to the age of European civil wars in the 17th century. Politically, the human rights discourse was initially used as a vehicle to undermine the rule of the aristocracy by the ascending

bourgeoisie. Theoretically, it presupposes the transition from concepts of law built around the notion of obligation to concepts based on the notion of subjective rights ascribed to persons in relations of reciprocal recognition. Starting with Thomas Hobbes (who is still criticized for this by the champions of premodern political philosophy, cf. STRAUSS 1953, 181 ff.), these foundations were not laid until the 17th and 18th centuries.

The advent of these concepts then created a normative developmental momentum which can be reconstructed as the vectored unfolding of a double idea. The implicit, but pivotal notion of modern normative discourse since 1650 is that every person has an individual «right to equality of concern and respect» (DWORKIN 1984, 298 ff.). The first derivation from this principle of equal freedom for all is that there is a right not to be legally discriminated against. This can be called the *substantial* moment of Normative Individualism.

This substantial idea arose together with its *procedural* dimension. Justification of the leading principles of state and law is no longer based on concepts of objective, mostly theological, reason. It is rather founded on what Hobbes called everybody's «own judgement and reason» (HOBBES 1651, 64). Its leading theoretical concept is social contract, and its main idea is that the functions of legal norms in general and especially every limitation of individual freedom have to be justified to the bearer of the right, justified in language he or she is supposed to be able to understand and justified by referring to reasons he or she, at least in principle, is able to consent to. You need *reasons* to justify the denial of equal liberty to persons or groups, and, under conditions of Normative Modernity, these reasons can no longer be provided by tradition (or religion).

The central idea of Normative Modernity is that citizens have a «right to justification» (FORST 2011). The rule of law and individual human rights – the core concepts of the constitutionalist momentum – are the precipitate left behind «once the normative substance of a traditional ethos embedded in religious and metaphysical traditions has been forced through the filter of post-traditional justification» (HABERMAS 1992, 99). Human rights are what is left because, under conditions of Normative Modernity, nobody can reasonably reject them – "reasonably" meaning referring to reciprocal and universal arguments. In this sense, Jürgen Habermas had good reasons to claim that the very «form of modern law is an embodiment of post-conventional structures of consciousness»[1]. This is the main reason behind the idea of universalizability of rights and the conceptual and pragmatic continuity from constitutionalism to cosmopolitanism (ANSUÁTEGUI 2016).

Given an individual right to equality of concern and respect, legal discrimination demands justification, and, under conditions of Normative Modernity, increasingly fewer reasons for discrimination can be provided. This idea started historic dynamics which have led to a coherent, consequent and directed process we cannot but analyze as the unfolding of a principle. As far as it actually can unfold, the right to equal concern and respect turns against *all* forms of defiance of it. Its logic is egalitarian and inclusive, aiming at the inclusion of all persons into its realm. The history of the idea of human rights, which was originally limited to white, male, free, heterosexual and economically independent citizens, is a history of its extension (MENKE, POLLMANN 2007, 99 ff.)[2]. What we see and promote is the progress of a self-correcting learning process (HABERMAS 2005, 8) which is far from being completed.

Egalitarian Normative Individualism is the *normative* reason for why modern society can tolerate a great deal of gradual inequality, a tolerance which is compatible both with its structural mode of organization and its ideational foundations, but cannot accommodate persistent categorical inequalities,

[1] So «kann die Form des modernen Rechts als eine Verkörperung postkonventioneller Bewusstseinsstrukturen begriffen werden»: HABERMAS 1976, 266.

[2] «The translation of the first human right into positive law gave rise to a legal duty to realize exacting moral requirements, and that has become engraved into the collective memory of humanity», HABERMAS 2010, 476.

for these have been rendered historically obsolete and are fundamentally at odds with this society's self-understanding (SCHMIDT 2012). Egalitarian Normative Individualism has become part of what Charles Taylor and others have analysed as the modern "social imaginary" (TAYLOR 2004).

Again: the political and social circumstances which back up or impede legal equality are and have always been contingent. The real history of legal equality is a piecemeal and zigzag process with advances and setbacks (and there have been dramatic setbacks in the 20th century). Nevertheless, the driving normative principle for legal equality is consistent and uniform, generating reasons for criticism of every single form of legal discrimination by standards which – theoretically – had already been fully developed before the year 1800. This is why the development of Normative Modernity is only intelligible as a directed process.

4. *The Nature of Normativity*

What makes this kind of directed development possible is the nature of normativity. Modern Normativity and the language of prescription and justification exist in the mode of giving and demanding reasons (BRANDOM 1994). Reasons have a life of their own. They are not facts, not even *faits sociaux* in the Durkheimian sense. You cannot see, observe or measure them. Treating reasons as facts means missing their point (HABERMAS 2003).

This has methodological implications for legal theory. Facts and norms, facticity and validity are two different registers that must be attended to methodologically in order to approach modernity. Normative reasons, having no justification-transcendent point of reference, *cannot* be observed, but they can be reconstructed by means of practical and legal philosophy (and, at the same time, they are stated in our participants' perspective, where we necessarily bring forward normative arguments about how the law ought to be; cf. ALEXY 2013, 103). The evolution of modern law as a central feature of modern societies is propelled by an *inherent* dynamic of normative reasons.

5. *Secularization*

Many elements of Normative Modernity – the concepts of person, of responsibility, of agency, of justice, of generalizability and universalizability of norms – have been developed within a specific European and even Christian context. It is, however, important to see that the most important feature of European "modern" moral and legal thinking since 1650 may be that it has systematically emancipated itself from its own tradition and become thoroughly secularized (SIEP et al. 2011; LILLA 2008). Not only the evolution of the modern state (BÖCKENFÖRDE 1976), but also the evolution of modern legal systems and legal thinking is a process of radical secularization. The central concepts of law have been transformed and refounded to serve the function of coordinating the actions of persons who treat each other strictly as equals (GUTMANN 2011). This transformation comprises our expectations towards what legal justification means and which resources can be applied here, and it is the very reason why some legal meta-principles like the idea of the universalizability of human rights can successfully claim universal validity. Although the West was the first world region to have experienced the individualization of society's normative order, there is nothing uniquely Western about this process. Instead, it is a *universal* product of normative modernization (FRIEDMAN 2002, 37).

Historically, Normative Modernity is a vanguard within the process of rationalization of worldviews and systems of meaning which enables itself to act under conditions of the «fact of pluralism» (RAWLS 2005, xvii), i.e., cultural and religious diversity, and to be the normative foundation of a

poly-centric, global modernity as well. Therefore, constitutionalism today is characterized by a political conception of liberalism providing a free-standing framework for a right whose content or justification does not depend on metaphysical, epistemological or religious doctrines that cannot be presumed to be shared among citizens (cf. RAWLS 2005; NUSSBAUM 2011). It is characterized by what John Rawls calls the liberal principle of legitimacy: «Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason» (RAWLS 2005, 137). In this sense, constitutionalism depends on the secularization of law. Regardless of its content, the very *form* of a religious justification of norms – i.e., the claims that laws and morals which are not based on religious transcendence are deficient and that what is morally and legally legitimate depends on religious criteria – blocks the development and application of the law's autonomous, "constitutionalist" normativity.

6. *Global Modern Normativity*

It is an open question whether, given the fragmentation of global law, the constitutionalist momentum which was largely successful on the level of the nation state can be reconstructed on the inter- and transnational level. We face discussions on whether fundamental norms in the international legal order can and do fulfil constitutional functions (PETERS 2006; MACDONALD, JOHNSTON 2005) and debates about different forms of *global governance* or *international public authority* and their democratic legitimacy (SLAUGHTER 2004; VAN BOGDANDY et al. 2010; COHEN 2012).

There are several reasons to expect that the principles of Normative Modernity, which serve as the engine and the normative core of constitutionalism, will be formative elements in the development of a poly-centric modernity which reflects the global breakthrough of modern arrangements in an age of global modernity.

6.1. *Common Structural Features of Law in Modern Market-Driven Economies*

What seems to be empirically valid with Max Weber's hypothesis of law's evolution towards formal rationality (WEBER 1980, 504) is that *all* modern market-driven economies generally do need a high degree of legal security, i.e., predictability of legal decisions, well-defined property rights and legal procedures, professionalization and (political) independence (autonomization) of the judiciary – in one word: the rule of law. The same is true for other major social systems besides economy. Whereas politico-economic modernization processes can – at least for quite some time – do without full-scale Western style multi-party *democratic* systems, they increasingly and much earlier do need the rule of law. The more complex the economic and other social systems grow, the less their development can do without legal modernization. Legal modernization, however, always means functional differentiation, i.e., autonomization and autopoiesis of the legal systems, in growing degrees (LUHMANN 2004, 76 ff.). Legal systems strive towards autonomy at the level of their operational rules. There may and will remain areas of direct and indirect political control of legal case decisions in some nation states, but legal modernization will always tend to isolate these areas, as complex legal systems always tend towards consistency and normative coherence in the long run (LUHMANN 2004, 60 and 219 ff.). Moreover, modern legal systems are expansionist; they keep widening their reach through transgression of their sectoral boundaries (juridification). Modern legal systems are dense and ubiquitous; they tend to cover a wider and wider span of social space. Thus even partial autonomization of the legal system, as a moment of co-evolution with the

politico-economic development, will create a strong momentum towards overall legal rationality. In this sense, the process of *modernization* once more triggers the project of modernity.

6.2. *The Momentum Towards a «Modern Legal Culture» on a Global Scale*

As already noted, Lawrence Friedman (1994) has analysed certain traits which, taken together, characterize modern legal systems. The following traits are among the ones which he holds to be reflexes of what he calls modern legal culture:

i) that a core element of legitimacy of modern law is instrumental; it is a means to achieve economic and social ends
ii) that modern law forms universalistic and positive norms which are characterized by post-conventional modes of normative reasoning and subject to continuous dynamic (and accelerating) change
iii) and that, as its non-instrumental side, it stresses subjective rights and is strongly individualistic, forming a global «human rights culture» (FRIEDMAN 2011) in the end.

Vice versa, the ongoing process of convergence among modern legal systems is expected to have the effect of further disseminating this kind of modern legal culture, centered around the notion of individual rights, self-determination and responsibility for one's own life course. Thus, of course, the notion of modern legal culture reflects all four central assets of modern culture in general: activism, rationalism, universalism and individualism.

6.3. *World Polity*

As demonstrated by John Meyer's neo-institutionalist approach, a rationalized institutional and cultural order consisting of universally applicable models of "rational agency" which tend to construct, motivate and legitimize the actors carrying them has been manifest since at least the middle of the nineteenth century (MEYER 2009). Promoted by cultural and political elites, transnational organizations, NGOs, social movements and state bureaucracies alike, conceptions of progress, sovereignty, rights and the like now structure the actions of states and individuals. World cultural frames, although often initially dysfunctional for the societies concerned, have been enacted widely and, no longer solely being the preserve of the West, have become institutionalized across the globe. The enactment of global models creates considerable institutional similarity among differently situated states and entities, thus arousing strong expectations regarding global integration.

Main features of Normative Modernity – post-conventional normative reasoning, Normative Individualism and individual rights, universal norms, (contested notions) of justice and collective welfare, the instrumental elements in the legitimacy of modern law, rights-consciousness, etc. – are deeply embedded in these models and processes. Thus, world culture exerts further pressure toward normative isomorphism, powerfully shaping modern societies' sense of rightness and directionality, of what can and cannot be legitimized in light of its normative principles, and of where it should be headed to realize these.

6.4. *Reciprocal Amplifications and Stabilizations between the Normative Evolution and Social Modernity*

Finally, and most important: There are reciprocal amplifications and stabilizations between the normative evolution of legal norms and what macro-sociology describes as social modernity. Normative Modernity itself is part of the process of functional differentiation underlying global modernization.

Above all, there is a deep relationship between Normative Individualism (a prescriptive concept) and what Parsons called modern societies' *institutionalized individualism* (a descriptive concept: PARSONS 1967, 29). Postconventionalism is an important element of a reflexive self, which is required as well as produced by processes of the «modernization of the person» (SCHMIDT 2014, 37 ff.). At the same time, "self-expression" values which support allegiance to human rights are on the rise globally and are particularly pronounced among populations and social groups that inhabit postindustrial economic spaces (INGLEHART, WELZEL 2005). Under conditions of global modernity, a rapid diffusion of these self-expression values is to be expected, thus creating post-conventional modes of thought and reflexive selves as a mass phenomenon and as the basis of a further dissemination of Modern Normativity.

What is perhaps the most important aspect: Normative Modernity, i.e., individual rights and principles of the rule of law, is both a pre-condition and a consequence of functional differentiation. Luhmann points out three points:

a) In a functionally differentiated society, law is becoming structurally autonomous (at least partially) at the level of its operational rules and is being enabled to follow its own sub-rationality, guided by principles of Modern Normativity and its core idea, the concept of subjective rights, which «is probably the most important achievement of the evolution of law in modern times» (LUHMANN 2004, 76 ff. and 269).
b) A functionally differentiated society has no use for categorical inequalities that sort people according to pre-conceived status differentials. The nature of role-asymmetries generalized by a reference to the outside (e.g. race or gender) and thus generating structural disadvantages which pervade very different functioning systems transversally, is offensive to our modern understanding. As Luhmann (2004, 487) rightly claims, this is «more related to structure than to individual cases», thus making categorical discrimination, in general, dysfunctional (SCHMIDT 2012).
c) Functional differentiation puts a premium on individualistic values (freedom, equality, autonomy, etc.) which are reflected in Modern Normativity. Moreover, complex, functionally differentiated societies need individual actors who take part in different systemic communications simultaneously. The only way to organise this is to provide the individuals with legally protected options for agency, i.e., individual rights. Then, at least in general, individual rights enable systemic functioning and protect individual agency and autonomy at the same time (LUHMANN 1965; VERSCHRAEGEN 2002). We have reason to assume that complex modern societies can only be coordinated by means of subjective rights which, at the same moment, protect the individual's claim to freedom and dignity vis-à-vis state and social powers.

To sum up: There are some powerful macro-sociological trends working in favor of the constitutionalist momentum.

7. *A Theory of Social Learning*

A theoretically adequate approach to the phenomenon of the evolution of legal norms as an integral part of the evolution of modern societies could be a theory of social learning.

Societies learn and remember by materializing structures of rationality in social institutions (HABERMAS 1976, 260). That is what we have done and what we are doing in the processes of constitutionalizing human rights and principles of the *Rechtsstaat*. Legal institutions are a mechanism for saving and storing what we have learned in our legal evolution.

In the end, HABERMAS' (1991) early idea of a parallel between phylogenetic and ontogenetic processes which are linked in their common development from traditionalism to postraditionalism has a point. Just as the adolescent learns to distinguish soberly «between socially accepted norms and valid norms, between de facto recognition of norms and norms that are worthy of recognition» (HABERMAS 1990, 126), the modes of legal justification change historically. The disenchantment with religious worldviews «leads to a reorganization of legal validity, in that it simultaneously transposes the basic concepts of morality and law to a postconventional level» (HABERMAS 1992, 71). The principles of constitutionalism are still gaining momentum because, under conditions of Normative Modernity, nobody can reasonably reject them with reciprocal and universal arguments.

Bibliography

ALEXY R. 2001. *The Argument from Injustice: A Reply to Legal Positivism*, Oxford, Clarendon Press, 2001.

ALEXY R. 2013. *Some Reflections on the Ideal Dimension of Law and on the Legal Philosophy of John Finnis*, in «The American Journal of Jurisprudence», 58, 2, 2013, 97 ff.

ANSUÁTEGUI F.J. 2016. *La propensione cosmopolita del costituzionalismo*, in «Diritto & questioni pubbliche», 16, 1, 2016, 11 ff.

VON BOGDANDY A., WOLFRUM R., VON BERNSTORFF J., DAAN P., GOLDMANN M. (eds.) 2010. *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, Heidelberg, Springer, 2010.

BÖCKENFÖRDE E.W. 1976. *Die Entstehung des Staates als Vorgang der Säkularisation*, in ID., *Staat, Gesellschaft, Freiheit*, Frankfurt a.M., Suhrkamp, 1976, 42 ff.

BRANDOM R.B. 1994. *Making It Explicit: Reasoning, Representing, and Discursive Commitment*, Cambridge (Mass.), Harvard University Press, 1994.

COHEN J.L. 2012. *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism,* Cambridge, Cambridge University Press, 2012.

DREIER R. 1991a. *Konstitutionalismus und Legalismus*, in «Archiv für Rechts- und Sozialphilosophie», Beiheft 40, 1991, 85 ff.

DREIER R. 1991b. *Der Begriff des Rechts*, in ID., *Recht – Staat – Vernunft. Studien zur Rechtstheorie 2*, Frankfurt a.M., Suhrkamp, 1991, 95 ff.

FORST R. 2011. *The Basic Right to Justification: Toward a Constructivist Conception of Human Rights*, in ID., *The Right to Justification: Elements of a Constructivist Theory of Justice*, New York, Columbia University Press, 2011, 213 ff.

FRIEDMAN L.M. 1994. *Is There a Modern Legal Culture*?, in «Ratio Juris», 7, 2, 1994, 117 ff.

FRIEDMAN L.M. 2002. *One World: Notes on the Emerging Legal Order*, in LIKOSKY M. (ed.), *Transnational Legal Processes*, Cambridge, Cambridge University Press, 2002, 23 ff.

FRIEDMAN L.M. 2011. *The Human Rights Culture. A Study in History and Context*, New Orleans, Quid Pro LLC, 2011.

GUTMANN T. 2011. *Säkularisierung und Normenbegründung*, in JANSEN N., OESTMANN P. (eds.), *Gewohnheit, Gebot, Gesetz. Normativität in Geschichte und Gegenwart*, Tübingen, Mohr Siebeck, 2011, 221 ff.

GUTMANN T. 2012. *Normenbegründung als Lernprozess? Zur Tradition der Grund- und Menschenrechte*, in GUTMANN T., SIEP L., JAKL B., STÄDTLER M. (eds.), *Von der religiösen zur säkularen Begründung staatlicher Normen. Zum Verhältnis von Religion und Politik in der Philosophie der Neuzeit und in rechtssystematischen Fragen der Gegenwart*, Tübingen, Mohr Siebeck, 2012, 295 ff.

GUTMANN T. 2013a. *Religion und Normative Moderne*, in WILLEMS U., POLLACK D., GUTMANN T., BASU H., SPOHN U. (eds.), *Moderne und Religion. Kontroversen um Modernität und Säkularisierung*, Bielefeld, Transcript, 2013, 447 ff.

GUTMANN T. 2013b. *Zur Institutionalisierung der Normativen Moderne*, in AARNIO A., HOEREN T., PAULSON S.L., SCHULTE M., WYDUCKEL D. (eds.), *Positivität, Normativität und Institutionalität des Rechts. Festschrift für Werner Krawietz zum 80. Geburtstag*, Berlin, Duncker & Humblot, 2013, 471 ff.

GUTMANN T. 2015. *Rechtswissenschaft*, in JAEGER F., KNÖBL W., SCHNEIDER U. (eds.), *Handbuch der Moderneforschung. Interdisziplinäre und internationale Perspektiven*, Stuttgart, Weimar, Metzler'sche Verlagsbuchhandlung, 2015, 216 ff.

HABERMAS J. 1976. *Überlegungen zum evolutionären Stellenwert des modernen Rechts*, in ID., *Zur Rekonstruktion des Historischen Materialismus*, Frankfurt a.M., Suhrkamp, 1976, 260 ff.

HABERMAS J. 1990. *Moral Consciousness and Communicative Action*, Cambridge (Mass.), MIT, 1990.

HABERMAS J. 1991. *Gerechtigkeit und Solidarität. Zur Diskussion über „Stufe 6"*, in ID., *Erläuterungen zur Diskursethik,* Frankfurt a.M., Suhrkamp, 1991, 49 ff.

HABERMAS J. 1992. *Between Facts and Norms*, Cambridge (Mass.), MIT, 1996 (or. ed. *Faktizität und Geltung*, Frankfurt a.M., Suhrkamp, 1992, Eng. trans. by W. Rehg).

HABERMAS J. 2003. *Rightness versus Truth: On the Sense of Normative Validity in Moral Judgments and Norms*, in ID., *Truth and Justification*, Cambridge (Mass.), MIT, 2003, 237 ff.

HABERMAS J. 2005. *Equal Treatment of Cultures and the Limits of Postmodern Liberalism*, in «Journal of Political Philosophy», 13, 1, 2005, 1 ff.

HABERMAS J. 2010. *The Concept of Human Dignity and The Realistic Utopia of Human Rights*, in «Metaphilosophy», 41, 4, 2010, 464 ff.

HEGEL G.W.F. 1820. *Elements of the Philosophy of Right*, Cambridge, Cambridge University Press, 1991.

HEGEL G.W.F. 1833-36. *Vorlesungen über die Philosophie der Geschichte*, in *Werke*, Band 12, Frankfurt a.M., Suhrkamp, 1986.

HOBBES T. 1651. *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*, London, Crooke, 1651.

INGLEHART R., WELZEL C. 2005. *Modernization, Cultural Change and Democracy: The Human Development Sequence*, New York, Cambridge University Press, 2005.

LILLA M. 2008. *The Stillborn God. Religion, Politics, and the Modern West*, New York, Vintage, 2008.

LUHMANN N. 1965. *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie*, Berlin, Duncker & Humblot, 1965.

LUHMANN N. 2004. *Law as a Social System*, Oxford, Oxford University Press, 2004.

MACDONALD R.ST.J., JOHNSTON D.M. (eds.) 2005. *Towards World Constitutionalism. Issues in the Legal Ordering of the World*, Leiden, Nijhoff, 2005.

MENKE C., POLLMANN A. 2007. *Philosophie der Menschenrechte. Zur Einführung*, Hamburg, Junius, 2007.

MEYER J.W. 2009. *World Society. The Writings of John W. Meyer*, in KRUCKEN G., DRORI G.S. (eds.), Oxford, Oxford University Press, 2009.

NUSSBAUM M. 2011. *Rawls's Political Liberalism. A Reassessment,* in «Ratio Juris», 24, 2011, 1 ff.

PARSONS T.W. 1964. *Evolutionary Universals in Society*, in «American Sociological Review», 29, 3, 1964, 339 ff.

PARSONS T.W. 1967. *Durkheim's Contribution to the Theory of Integration of Social Systems*, in ID., *Sociological Theory and Modern Society*, New York, Free Press, 1967, 3 ff.

PARSONS T.W. 1977. *The Evolution of Society*, Englewood Cliffs (NJ), Prentice Hall, 1977.

PETERS A. 2006. *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, in «Leiden Journal of International Law», 19, 3, 2006, 579 ff.

RAWLS J. 2005. *Political Liberalism. Expanded Edition*, New York, Columbia University Press, 2005.

SCHMIDT V.H. 2012. *Comparing Inequalities. On a Difference that Makes a Difference*, in SOEN D., SHECHORY M., BEN-DAVID S. (eds.), *Minority Groups: Coercion, Discrimination, Exclusion, Deviance and the Quest for Equality*, New York, Nova Science, 2012, 3 ff.

SCHMIDT V.H. 2014. *Global Modernity. A Conceptual Sketch*, Houndmills, Basingstoke, Palgrave Macmillan, 2014.

SIEP L., GUTMANN T., JAKL B., STÄDTLER M. (eds.) 2011. *Von der religiösen zur säkularen Begründung staatlicher Normen. Zum Verhältnis von Religion und Politik in der Philosophie der Neuzeit und in rechtssystematischen Fragen der Gegenwart*, Tübingen, Mohr Siebeck, 2011.

SLAUGHTER A.M. 2004. *A New World Order*, Princeton, Princeton University Press, 2004.

STRAUSS L. 1953. *Natural Right and History*, Chicago, University of Chicago Press, 1953.

TAYLOR C. 2004. *Modern Social Imaginaries*, Durham/London, Duke University Press, 2004.

VERSCHRAEGEN G. 2002. *Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory*, in «Journal of Law and Society», 29, 2, 2002, 258 ff.

WEBER M. 1980. *Wirtschaft und Gesellschaft: Grundriss der Verstehenden Soziologie*, Tübingen, Mohr Siebeck, 1980.