

Critical Theory

of Legal Revolutions

EVOLUTIONARY PERSPECTIVES

Hauke Brunkhorst



Critical Theory
and Contemporary
Society

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Critical Theory of Legal Revolutions

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Evolutionary perspectives

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“Normative texts, particularly constitutions, can be established with insincere intentions. But ultimately this is not done with impunity. They can strike back.” (Friedrich Müller)¹

“The ideas of 1789 have by no means always been on the banner of liberalism and have even been sharply attacked by it.” (Herbert Marcuse)²

“Negativity is the price we pay for our emancipation from the illusion of an unchangeable world.” (Michael Theunissen)³

¹‘Norm- und besonders Verfassungstexte setzt man, mit unaufrichtigem Vorverständnis konzipiert, letztlich nicht ungestraft. Sie können zurückschlagen’. (Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie* VI. Berlin: Duncker & Humblot 1997, p. 56).

²Herbert Marcuse (1934), The struggle against liberalism in the totalitarian view of the state, in: *ibid.*, *Negations: Essays in Critical Theory*. London: MyFlyBooks, 2009, p. 5.

³‘Negativität ist der Preis, den wir für unsere Befreiung vom Schein der Vorgegebenheit zahlen müssen’. (Michael Theunissen, *Sein und Schein. Die kritische Funktion der Hegelschen Logik*. Frankfurt: Suhrkamp 1980, p. 415).

Contents

Acknowledgements viii

General introduction 1

1 The evolutionary significance of revolution 9

2 Class conflict and the co-evolution of cosmopolitan
and national statehood 59

3 Legal revolutions 83

Epilogue 467

Index 469

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General introduction

Since Marx, Spencer and Durkheim, the theory of society has been a theory of social evolution. Therefore, I will first introduce a new framework for a critical theory of the evolution of societies in Chapter 1.

Critical theory is about the paradox of reason within an unreasonable, brutish and random history. Methodologically, critical theory operates as an instrument to find the traces of reason and truth within a reality that as a whole is unreasonable and 'untrue' (Adorno). Because reason exists within this reality at best as a 'Real Possibility' (Hegel), critical theory has an unavoidably utopian dimension. With respect to law, this means that I try to defend the idea that law is freedom, which originates in the transcendental and idealist theory of law of the late eighteenth and early nineteenth century. With the advance of modern society, transcendence becomes more and more immanent, but the dialectic of transcendence and immanence does not vanish completely, as in deconstructive philosophy that accepts a bit too soon that law never can get rid of violence and domination.¹ With the uncoupling of the constitution from the state at the end of the twentieth century, the old utopian and negative theological perspective of a 'peoplehood without monarchy, of a people ruled by divine law, not the arbitrary rule of the state'² in a way becomes actual again, but now as a secular and political project that must be performed from within the horizon of positive law alone.

Following synthetic or (Post-)Neo-Darwinist theories (Mayr, Gould, Eldredge), two different types of evolutionary change are distinguished. While *incremental and cumulative change* leads to an ever better *adaptation* of the social system to its environment, *rapid and revolutionary change* leads to new *constraints* on contingent and purpose-oriented adaptation, and in *social evolution*, these constraints are *normative constraints*.³

¹See the critical adoption of the legal theory of Benjamin, Cohen and Rosenzweig by Daniel Loick, *Kritik der Souveränität*. Frankfurt: Campus, 2012, pp. 238, 242.

²Robert N. Bellah, *Religion in Human Evolution. From the Paleolithic to the Axial Age*. Cambridge, MA: Harvard University Press, 2012, p. 323. The utopian perspective of critical theory, which goes back to the Axial Age, consists in the idea of a world 'of absolute nonviolence, but also of social justice' (p. 587).

³Thanks to Regina Kreide and Rene Gabriels for their critique and discussions on the problematic relation of evolution and revolution that concerns the whole project.

The basic thesis throughout this book is that the organic constraints of natural evolution are replaced in social evolution by normative constraints. These normative constraints in modern societies are, in particular, legal constraints of constitutional law (written or unwritten, material or formal). They are the path-opening direction-givers of evolution. In social evolution, as in organic evolution, the 'role of historical and structural constraints' is that of 'channelling directions of evolutionary change'.⁴ All great revolutions are legal revolutions that create a new level of normative constraints which are implemented through legal and constitutional norms. Insofar as the results of evolution consist in new normative constraints, they are internal to our rational expectations and the intersubjective justification of our actions and plans. We are, therefore, insofar responsible for them as we can argue for or against their validity. Because normative innovations are at the centre of all great legal revolutions, we can and must act *as if* we have made them, *as if* we have fought for or against them, and we can continue to argue and fight for and against them.⁵ However, the moral responsibility of actors – important though this is – is *not* that much of a critical factor for an evolutionary theory that (unlike Luhmann) takes normative learning processes seriously. On the contrary, *the* critical factor is that, once new normative constraints are established within the social and particularly the legal system, social actors *have to cope with them* – whether they want to or not, whether they accept them or not, whether they argue or struggle for or against them. Therefore, normative constraints function within social evolution as a kind of *ratchet effect*.

The overarching thesis of this book is that law that is modern enables both the stabilization of ever new forms of class rule and the continuation of the (legal or illegal) struggle against it, and each time from within the legal-political (or constitutional) system in question. I am particularly interested in this dialectic of enlightenment, which accompanies the evolution of modern law. Revolutionary legal advances are implemented in the course of incremental and gradual evolution *together* with a stabilization and augmentation of domination, exploitation and injustice *through* the same law. However, modern law is not only the result of morally neutralized, gradual evolutionary adaptation of social

⁴Steven Jay Gould, *The Structure of Evolutionary Theory*. Cambridge: Harvard University Press, 2002, p. 26; on the critique of ultra-darwinism, see Stephan S. W. Müller, *Theorien sozialer Evolution. Zur Plausibilität darwinistischer Erklärungen sozialen Wandels*. Bielefeld: transcript, 2010, pp. 203–4; Geoffrey Winthrop-Young, 'On Species of Origin', *Muse* 11 (2003), 305–94, at 336 Marc Amstutz, *Evolutorisches Wirtschaftsrecht*. Baden-Baden: Nomos, 2001, pp. 268–70.

⁵For example, the people of Virginia in the eighteenth century were responsible for the human rights declared in their constitution, and the institution of slavery that was justified on their legal basis. But the people of Virginia were not responsible for the immense growth of administrative state power that was a completely uncontrollable and unintended (even sharply rejected) functional side effect of their successful struggle for human rights and self-government.

systems to their environment (and hence of the cognitive learning of social systems which do not care about their negative externalities), but also the outcome of class struggle and revolutionary change (and hence of normative learning processes of social groups who demand rights for the victims of history, but with ambivalent effects). Once evolutionary constitutionalization leads to forms of systemic adaptation which contradict the normative core of a particular set of revolutionary advances of modern society, a *crisis of legitimization* is hard to avoid, and either must be repressed by coercive power or becomes manifest in social conflicts and public social struggle. Therefore, I will describe this normative core in terms of the *Kantian constitutional mindset*.⁶ My thesis is that the *Kantian mindset* is effective in everybody's daily political and legal praxis as a normative constraint on evolutionary adaptation. If the *Kantian mindset* were to become ineffective in the daily life of citizens and professionals, if finally it were to be forgotten, repressed and deleted, then the institutional praxis of democratic self-determination would collapse and trigger a (potentially revolutionary) crisis of legitimization.⁷ As far as it is institutionally embodied as a *normative constraint* on the adaptive incrementalism of political and legal praxis, the Kantian mindset of universal political autonomy operates as a Hegelian *existing notion* (or *existing concept*) without – and here my project differs from all progressive, liberal, communitarian, conservative or reactionary versions of right-wing Hegelianism (including that of Hegel himself) – *without losing its normative universality, unconditionality, and power*, which is, in particular, the power of the modern legal form to resist its use as a mere instrument of domination. The Kantian mindset exists within the existing law as long as it can strike back against the law's oppressive (and frequently effective) use as class justice. However, my project of a normatively demanding evolutionary theory is as far removed from any transcendental normative theory, and from all social contract theories, as it is from right-wing Hegelianism. Even though I take normative *constraints* that are co-original with the emergence of social evolution into account, as for example the famous Habermasian *forceless force of the better argument*, or Brandom's inferential commitments, I do not think that these kinds of highly generalized constraints entail any normative criteria to prefer (for example) democracy to autocracy, or modern to so-called archaic societies. These general constraints are normatively much less demanding than the original situation of (for example)

⁶This notion, together with the distinction between a *Kantian* and a *managerial mindset*, is taken from Martti Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', *Theoretical Inquiries in Law* 8:9 (2006), 9–36. Having said this, I will decontextualize Koskeniemi's notions and reintegrate them within the evolutionary framework of this book (Ch. I, Sec. III 2).

⁷See Markus Patberg, 'Suprastaatliche Verfassungspolitik und die Methode der rationalen Rekonstruktion', Ms. 2013, p. 13 (forthcoming in: *Zeitschrift für Politische Theorie* 1/2013).

Rawls's contractualist *Theory of Justice* from the 1960s. Members of the Platonic Academy, scholastic philosophers, royal counsellors, advertising consultants, modern lawyers, mafia advisers, students, senior researchers, members of parliament or simply family members are, once they pretend to use an argument, challenged by the same forceless force of the better argument. Reaching rational understanding is presupposed by democracy, but democracy is not presupposed in attempts to reach an understanding. Roughly speaking, one can argue that no earlier than 1789 (or even later as we will see) there exists a normatively and factually highly demanding concept of constitutional law that is the incarnation of the Kantian mindset.

Throughout this book, I rely on Marx's insight that what people think they are doing need not be the same as that which they actually are doing, and I will follow Habermas's fundamental turn from *human* reason (*Menschenvernunft*) to the reason of the forceless force of the better argument, which refers *not* to the human being and her or his consciousness, brain or body, but to the *communicative system*. The forceless force of the better argument locates reason (or rationality) within the system of communication and its evolution. Therefore, world-changing praxis does *not* consist simply in changing human beings, but in *changing society*, and this (Marxist point) means, particularly with respect to communicative rationality, the 'institutionalization of discourses' (for instance, of constitutional, political and social organizations, public spheres, social reform programmes etc.)⁸ Therefore, the social evolution of communicative action cannot be explained by human behaviour, but must be explained by the social evolution of communicative action alone, as Durkheim argued already.⁹

This book is primarily concerned with the *legal evolution* of modern society.¹⁰ There are many other evolutions of modern society, and this is only one of many. I will use only some results of historical research that are significant for my limited purposes, and I am not talking about history but about evolution. The organization of the main Chapter 3 on legal revolutions follows a 10-part structure (see pp. 89–90) that is sociological and evolutionary and not narrative. *First*, unlike history, evolution does not necessarily need a narrative structure. In contrast to history, for evolutionary theory it does not matter who first invented the wing, the eye, the brain, the hand, bureaucracy, religion, democracy, constitutions or human rights. These are all evolutionary universals (or advances) that have proved to be useful for many, if not for all societies and

⁸Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz', in J. Habermas and Niklas Luhmann (eds), *Theorie der Gesellschaft oder Sozialtechnologie*. Frankfurt: Suhrkamp, 1971; Habermas, *Theorie und Praxis*. Frankfurt, 1971, pp. 31–3.

⁹See Hendrik Wortmann, *Zum Desiderat einer Evolutionstheorie des Sozialen. Darwinistische Konzepte in den Sozialwissenschaften*. Konstanz: UVK, 2010, p. 108.

¹⁰I have to thank Chris Thornhill for a long discussion of this point.

therefore have been exported, copied or reinvented again and again in the course of history. From the beginning, evolutionary theory is, therefore, based on a radical decentring of all kinds of (for example) Eurocentrism. This is so because even if the (probably wrong) story that Athens was the cradle of modern freedom were right, or if the claim that Virginia or Rhode Island first invented modern constitutions were true, *the origins* (which do matter for Virginians, Eurocentrics and their respective 'identity', whatever the latter term means) *do not matter for social evolution*. It does not matter who invented modern democracy in the same way as it does not matter which animal species once invented the brain. Moreover, there are huge cultural and other differences between the brain of a cockroach and that of a human being, but it makes no sense to call the human brain better, further developed or more progressive than that of cockroaches, and the same is true for different constitutions of different societies or types of societal and political organization.

Secondly, the theory of social evolution is based on a sharp differentiation between the evolution of primates (including human beings) and social evolution. As far as reason and rationality matter for social evolution, what matters is, to repeat, not *human* but *communicative* rationality. If something like human rationality exists, it exists in the environment of society, which forces human beings to represent and express their egocentric narcissism *through* the eye of the needle of the forceless force of better arguments. They have no alternative to the march through this eye of a needle once they act within the social sphere of a scientific discourse, for instance. If it is true that the use of (sign and gestural) language is widespread among primates (and not exclusively human), then it is not even propositionally differentiated language use that distinguishes the social from the genetically steered organic evolution. The evolution of gestural language differs significantly from genetic display because it enables social learning. But the beginning of the evolution of language is not the beginning of social evolution. The latter can only emerge once *normative communication* is 'invented' within an already existing (verbal or non-verbal) linguistic environment that is structurally coupled to some species that can understand and use normative claims and commitments (at least partially).

Thirdly, we can make social evolution intelligible with Heidegger's model of *Dasein* (being-there).¹¹ *Dasein* for Heidegger is an empty signifier that is always already operating within a meaningful world, and to operate within this world it needs certain skills and competencies (know-how) in relation to other things and *Daseins* that are co-original within the same world. The skills and competencies constitute an open list, and to participate in the game

¹¹I am very grateful for a discussion on this point which I had with Cristina Lafont, Regina Kreide and Axel Mueller on a long car trip through northern Germany.

of *Dasein*, only a couple of these skills and competencies, which are *not determined in advance, are needed*. The competencies finally performed also can be partial, restricted or flawed. Two points are fundamental: The first is that *Dasein* can, *but need not*, be human. Anthropocentrism is decentred with this very first hermeneutic-pragmatic philosophical argument that coincides completely with the advanced theory of social evolution. Instead of closing the world and reserving it for authentic individuals and even authentic nations or racial groups (as Heidegger did it in *Sein und Zeit* with his disastrous distinction between authenticity and inauthenticity), one can and must keep the world of *Dasein* wide open for the *Dasein* not only of *all* humans but also of (all) other species (or even things) which somehow or other are included in normative communication – as, for example, dogs and other animals have been for thousands of years, or, more recently, as great apes have been, for several generations already, in communities formed between them and research personnel. We now must also include self-evolving systems such as computers, regardless of whether or not they will, at one point, interact with us, as in Stanley Kubrick's movie '2001', suddenly creating feelings of sympathy and pain. My second point is this: Once they affect normative communications by contributions that are interpreted normatively as disappointing normative expectations (bad dogs, obstinate donkeys, terribly autonomous computers), the negativity pool of social evolution is also filled with their communicative negations and deviances.¹² There are not only human beings, but also a lot of *other* potential *Daseins* in the environment, whose actions could be understood communicatively *as* negative operations and therefore have to be included in the respective social system of normative communication.

Fourthly, methodologically my theory of social evolution is based on a specific version of *dialectical negativism*. To start with, I will try to combine the philosophical critique of dualism and the reification of universals (from Dewey, Heidegger and Quine to Tugendhat) with the Hegelian and Marxist critique of societal reification (from Lukács to Habermas). This idea is developed throughout the book but, in particular, in the first Chapter and in the part on modernism in the last section of the last Chapter.

Negative criticism, *fifthly*, nicely accords with advanced theories of social evolution. Hegel already discovered negativity as the driving force of social evolution, and sociology (from Marx and Durkheim to Habermas and Luhmann) step by step has deconstructed the Hegelian teleology of reason, but kept the idea of negativity, and finally reinterpreted the Hegelian *power of the negative* as an endless, permanent and uncontrollable auto-production of (linguistic, gestural and other) *communicative negations*. To fill the variety pool of evolution with the critical mass of negative communication that was

¹²I have to thank Charles Larmore for a discussion of this point.

needed for the take-off of *social* evolution and its differentiation from biology and organic evolution, a specific form of communication had to be 'invented' by evolution, and that was the invention of reciprocally binding norms, and the permanent communicative contestation of normative claims and obligations. What Marx called class struggle always has been, and continues to be, about normative claims which exclude each other reciprocally, so that sometimes right stands against right in an antinomic way, as Marx wrote in *Capital*. If we understand class struggle primarily as a struggle between material and ideal interests over normative claims and violations that are articulated by the societal 'sense of injustice' (Barrington Moore), then Marx and Engels were profoundly right when they wrote in the *Communist Manifesto* that all history is the history of class struggle. However, *pace* Marx, class struggles are not just the midwife of the unleashing of all productive forces of society, but also the power engine of normative and moral learning processes which sometimes lead to the revolutionary institutionalization of a new constitutional order. Moreover, not only does the functional differentiation of the economy have the negative externality of accidental and deeply unfair social differentiation, class struggle and other capital-oriented conflicts, but other functionally differentiated systems such as law, politics and, nowadays, education also have similar negative externalities which cause different and much more complex formations of social differentiation, class struggle and material and ideal class interests than Marx had assumed.¹³

Finally, for the evolutionary reconstruction of the punctuational bursts of modern society that were great legal revolutions, my main thesis is that of the co-evolution of cosmopolitan and national statehood. Throughout the evolution of modern law and politics, cosmopolitan state formation (in a broad, Kelsian sense of 'state') has preceded and enabled particular and national state formation.

¹³Wilkinson, Richard and Pickett, Kate, *The Spirit Level. Why Greater Equality Makes Societies Stronger*. New York: Bloomsbury, 2010; see Judt, Tony, *Ill Fares the Land*. New York: Penguin, 2010.

1

The evolutionary significance of revolution

Introduction

Everything is evolution. Revolutions and collective normative learning processes are also evolutionary processes. Evolution never stops. But while evolution is, in a rough distinction, a process beyond plan and control, revolutions and (revolutionary and non-revolutionary) normative learning processes are specific kinds of evolutionary developments which not only proceed automatically as blind natural occurrences (*naturwüchsig*), but also express and perform our plans, intentions and ideas. Revolution is itself an evolutionary advance, in particular of the evolution of modern societies, even if it may have some forerunners that are premodern.

Like most theories of society, the critical theory of Karl Marx is an evolutionary theory. Yet even if Marx in his historical research clearly distinguished the historical analysis of *class struggles* from the functional logic of the *capitalist system*, he did not make much of this distinction systematically. In systematic concerns, his representation of the history of class struggles ultimately assimilates the *normative developmental logic* of the 'history of class struggles' to the *functional adaptation* of the economic system to its environment. The reason is that Marx did not distinguish systematically between *work* and *interaction*.¹ Therefore, Marx cannot explain the take-off of social evolution (I). Even if Marx in his historical essays understood the great European revolutions as *legal revolutions*, he retained a schema of basis

¹Habermas, 'Arbeit und Interaktion', in Habermas (ed.), *Technik und Wissenschaft als Ideologie*. Frankfurt: Suhrkamp, 1967; Habermas, *Erkenntnis und Interesse*. Frankfurt: Suhrkamp, 1967. On developmental logic recently, see Müller, *Theorien sozialer Evolution*, pp. 185, 191; Rainer Walz, 'Theorien sozialer Evolution und Geschichte', in Becker (ed.), *Geschichte und Systemtheorie*. Frankfurt: Campus, 2004, pp. 29–75, at 39–42.

and superstructure that *reduced* the basis to the economic system. It is not the schema that is the problem. All theories of society distinguish between basis and superstructure. For instance, Durkheim distinguishes the *system of social division of labour* from the *collective consciousness* of society; Parsons distinguishes the *energy of a system* (basis) from its ability to codify, organize and collect *information* (superstructure); Habermas distinguishes *system* (basis) and *lifeworld* (super-structure), and furthermore, the *material* (basis) from the *symbolic* lifeworld (superstructure) and Luhmann distinguishes the *societal structure* from the *semantics* of society. The problem with Marx is not the schema 'basis vs. superstructure', but his conceptual decision to give the economic system a kind of causal priority over all the other social systems, spheres of value and the whole superstructure. Therefore, he cannot develop a sufficient understanding of the *normative peculiarity of revolution* and the role of *law* as a 'pacemaker' of evolution that *constrains* blind evolutionary adaptation *normatively* (II).² The most important of these normative legal constraints are constitutions. Constitutions are *evolutionary universals*. As *universals* they have a functional and a practical side. They are *functional advances* as well as *practical mindsets* (III).³ Constitutionalism presupposes a functionally differentiated legal system, and hence modern society. The last section gives a brief discussion of the internal relations between functional differentiation, crisis and social struggle in the evolution of modern society (IV).

I The power of the negative: The take-off of social evolution

Fifteen years before Darwin's book *On the Origin of Species* (1859) was published, the epistemological implications of evolutionary theory were already made explicit in an unpublished manuscript by Marx and Engels that appeared much later under the title *The German Ideology*. From the middle of the eighteenth century onwards, evolutionary theory developed together with, and for a long time not really differently from, emerging modern historical scholarship and the (idealist) philosophy of history. Marx and Engels, at the end of the pre-Darwin period of evolutionary theory, summarized the results of the first hundred years of evolutionary theory in one short sentence: 'We know

²Habermas, *Zur Rekonstruktion des historischen Materialismus*. Frankfurt: Suhrkamp, 1978.

³For the former, see Luhmann, 'Verfassung als evolutionäre Errungenschaft', *Rechtshistorisches Journal* 9 (1990); for the latter: Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, pp. 176–220.

only a single science, the science of history.⁴ The short statement that there is only one field of study, namely the study of history, has the epistemological implication that evolution overall is an empirical fact with a transcendental meaning. The meaning of 'transcendental' is 'x being *constitutive* for y' (or x *limits* the knowledge of y, and by limiting it *enables* the knowledge we have of y). Because everything is evolution, evolution is a quasi-transcendental fact that is *constitutive* for the reflexive knowledge of evolution that is itself part of evolution.

(1) Work, interaction and the growth of communicative negativity

There is only one evolution. But there are *first* different levels in the emergence of evolution: 'One can look at history from two sides and divide it into the history of nature and the history of men.' The two sides are 'inseparable', are 'dependent on each other', but have different evolutionary histories.⁵ The evolution of evolution has led to the distinction between *natural* and *social evolution*. Therefore, Engels later called his and Marx's theory *historical materialism*.⁶ In social evolution, so Parsons argues from a state of scientific knowledge a hundred years later, '(the) "gene" has been replaced by the "symbol."' ⁷ Yet this argument, in a nutshell, was already presupposed by Marx and Engels, the disciples of Hegel.⁸ Human beings are *learning* to invent and use their means of production *through social interaction*:

Men . . . themselves begin to distinguish themselves from animals as soon as they begin to *produce* their means of subsistence. . . . The way in which men produce their means of subsistence . . . must not be considered simply as being the production of the physical existence of the individuals. Rather it is . . . a definite form of expressing their life. . . . As individuals

⁴Marx and Friedrich Engels, *Die Deutsche Ideologie*, MEW 3. Berlin: Dietz, 1990, p. 18, English translation quoted from: <http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm>, 31 March 2012.

⁵Marx and Engels, *Deutsche Ideologie*, p. 18 (<http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm>).

⁶Engels, "'Einleitung zur englischen Ausgabe (1892) der, Entwicklung des Sozialismus von der Utopie zur Wissenschaft'", in Marx and Engels (eds), *Werke* 22. Berlin: Dietz, 1990, pp. 287–315, at 292.

⁷Talcott Parsons, 'Evolutionary Universals in Society', *American Sociological Review* 29:1–6, 1964, pp. 339–57, at 341; see Habermas, *Theorie des kommunikativen Handelns II*. Frankfurt: Suhrkamp, 1981, p. 287.

⁸See Dieter Henrich, 'Karl Marx als Schüler Hegels', in Henrich (ed.), *Hegel im Kontext*. Frankfurt: Suhrkamp, 1971, pp. 187–208.

express their life, so they are. What they are, therefore, coincides with their production, both with *what* they produce and with *how* they produce. . . . This production . . . presupposes the *intercourse* [*Verkehr*] of individuals with one another.⁹

Social evolution begins with the socially learned cooperative use of instruments: 'The production of life . . . as a social relationship' consists in 'the co-operation of several individuals, no matter under what conditions, in what manner and to what end'.¹⁰ Co-original with the social production of life is the *production of communicative variation* (consisting in the *symbolic* distinction between old and new needs) that finally leads to the take-off of social evolution. Marx and Engels call this take-off the *first historical act*. The 'satisfaction of the first need . . . leads to new needs; and this production of new needs is the first historical act'.¹¹

Henceforth, for Marx, the driving mechanism of social evolution is the symbolically mediated growth of productive forces. But Marx also considers another driving mechanism, namely, *class struggle*. He understands class conflicts as conflicts between social groups that are caused by the social structure of society. At the beginning of the *Communist Manifesto*, he and Engels assert: 'The history of all hitherto existing society is the history of class struggles.'¹² Similar ideas on the evolutionary role of conflict were developed later by American pragmatists such as John Dewey.¹³ As all historical essays and studies of Marx and Engels show, class contest is about material as well as about ideal interests.¹⁴ But when he switches from the history of class struggles to the theory of society, Marx connects class struggle and the growth of productive forces in a way that *eliminates class struggle as an independent evolutionary mechanism of change*. Instead, he reduces the

⁹Marx and Engels, *Deutsche Ideologie*, p. 21 (<http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm>).

¹⁰*Ibid.*, pp. 29–30 (<http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm#a3>).

¹¹*Ibid.*, p. 29 (<http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm#a3>).

¹²Marx and Engels, *Manifest der kommunistischen Partei*. Stuttgart: Reclam, 1997, p. 19 (quoted from: <http://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm#007>). On the difference between two driving mechanisms in Marx, see Klaus Eder, 'Collective Learning Processes and Social Evolution: Towards a Theory of Class Conflict in Modern Society', (1983) *Tidskrift för Rättsociologi*, S. 23–36. Already, Kant recognized the progressive side of conflict in history (*ungesellige Geselligkeit*), see Kant, 'Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht', in Kant (ed.), *Werke XI*. Frankfurt: Suhrkamp, 1977, pp. 31–50, at 37–9.

¹³See Robert B. Westbrook, *John Dewey and American Democracy*. Ithaca: Cornell University Press, 1991, pp. 80–1.

¹⁴See Brunkhorst, *Kommentar zu: Karl Marx, Der 18. Brumaire des Louis Bonaparte*. Frankfurt: Suhrkamp, 2007, quoted from the MEGA-Edition Berlin: Dietz, 1985; Volkan Çıdam, *Geschichtserzählung im Kapital*. Baden-Baden: Nomos, 2012.

role of class struggle to that of a 'midwife' (Marx) of the unfettering of all productive forces. In the orthodox reading, the growth of productive forces (which leads to new symbolic expressions of ever new needs) is, therefore, the source of *variation*, and class conflict is the mechanism of *selection* that is *re-stabilized* by the relations of production. Therefore, Marx must explain the *take-off* of social evolution by the capacity to *work*. Work and technology, instrumental and strategic actions are learnt through social interaction. However, the learning of instrumental and strategic know-how is not specific to social evolution. Not only human beings, but also computers, great apes or students of law and economics can be involved successfully in communicative interactions of learning instrumental and strategic know-how. They all are able to learn socially. The actors of strategically restricted communication (like the homo economicus in game theory) learn cooperation with others for the single purpose of getting more *for themselves* at the end of the day. This is not due to the egoistic or greedy motivation of the actor, but to the strategically restricted system of communication. Marx already observed this in his basic distinction between the real-abstract *personification of economic categories* (which is related in strategic interaction with other existing categories) and the concrete *person* (and his or her altruistic or egoistic motivations). But, furthermore, learning 'instrumental actions from others socially' must be distinguished from *learning to follow reciprocally binding norms* and the evolution of systems of such norms.¹⁵ Strategically restricted communication can never lead to the take-off of social evolution because the variety pool of negative communication does not grow quickly enough to reach the critical mass needed. Even the reciprocal use of symbols and reflexive symbols that replace other symbols ($a=b$) is not sufficient for the take-off of social evolution. Neither purposive rationality, that is, the ability to make practical inferences, nor the use of a universal *language of binary codes* that allows for identical transformations of meaning between different signs (propositionally differentiated language) can explain the take-off of social evolution. Such a language can exist as a medium of learning socially from others in groups of humans and other primates, of economists and computers, without causing social evolution. We cannot exclude that the strategically restricted use of language will once lead to a *new form of evolution* that is emancipated from genetic predetermination *and* from the realm of norms and truth claims (which

¹⁵Michael Tomasello, *Origins of Human Communication*. Cambridge: MIT, 2008, 213, see also 181ff; Tomasello, *Why We Cooperate*. Cambridge: MIT-Press, 2009, p. 23, 25f, 33f. See I. C. Gilby, 'Meat sharing among the Gombe chimpanzees', *Animal Behavior* 71:4 (2009), 953–63 (no proof for reciprocal exchange) http://www.duke.edu/~ig25/gilby_2006.pdf; Gilby et al., 'Ecological and social influences on the hunting behaviour of wild chimpanzees', *Animal Behavior* 72:1 (2009), 169–80, http://www.duke.edu/~ig25/gilby_et_al_2006.pdf.

was Nietzsche's evolutionary dream). But communicative language use that does not allow communicative agreement on (the truth of) reciprocally binding norms cannot lead to the take-off of *social* evolution. Therefore, what is needed is a system of communication that is based on inferentially binding distinctions between different kinds of binary codes of validity (such as true/false, right/wrong, consistent/inconsistent and so on).¹⁶ Together with the replacement of *genetic* by *communicative variation*, and the banishment of the former to the natural environment of society, *natural selection* is replaced by *social selection* which is split into the three main mechanisms of (1) *functional imperatives*, (2) *social differentiation* (material and ideal class interests of the ruling, but also of the ruled classes) and (3) *hegemonic opinions*, but also counter-hegemonic opinions (e.g. dissenters).¹⁷

Only after the evolutionary invention of reciprocally binding *norms* does the potential for disputes between reciprocally committed actors (whether humans alone, or humans together with dogs, apes, pigs, spiders or computers) grow towards the immeasurable. To get enough variety together, it needs a certain amount of critique and negation of norms, and of disputes about their validity. Actors, therefore, must be a kind of *being in the world* that is able to produce negations at any time. These negations *need not be intended as a critique of validity* (and therefore can be produced accidentally, and by grown-up humans as well as by children, insane persons, dogs, computers, economists, apes and other animals or learning machines), but they must *count as a critique of validity claims* (and therefore, a sufficient amount of communicative contributions by human beings is necessary). It is precisely – as Hegel argued – ‘the seriousness, the suffering, the patience, and the labour of the negative’ that makes social evolution

¹⁶Habermas, *Theorie des kommunikativen Handelns I und II*. Frankfurt: Suhrkamp, 1981; Robert Brandom, *Making It Explicit: Reasoning, Representing & Discursive Commitment*. Cambridge, MA: Harvard University Press, 1994.

¹⁷German lawyers call the hegemonic opinion ‘herrschende Meinung’ or use the acronym ‘hM’. Uwe Wesel gives a sound short description of the formation of ‘hM’, or the hegemonic legal opinion that nicely accords with evolutionary theory: 1. *Communicative variation*: A new legal problem comes up 2. *Social selection*: Lower courts make decisions 3. *Systemic re-stabilization*: Judgements are published, jurists write essays, books, legal comments and textbooks, interpreting the judgements; finally, a higher court makes its decision at the last instance. Hegemonic opinion has been formed. Wesel, *Juristische Weltkunde. Eine Einführung in das Recht*. Frankfurt a.M.: Suhrkamp, 1984, pp. 189–90, quoted from: Sonja Buckel and Oberndorfer, Lukas, Die lange Inkubationszeit des Wettbewerbs der Rechtsordnungen – Eine Genealogie der Rechtsfälle Viking/Laval/Rüffert/Luxemburg aus der Perspektive einer materialistischen Europarechtstheorie, in Fischer-Lescano, Andreas, Rödl, Florian and Schmid, Christoph (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*. Baden-Baden: Nomos, 2009, pp. 277–96, at 279 (my translation). ‘Puzzle solving’ is borrowed from Kuhn's concept of normal science (Thomas S. Kuhn, *The Structure of Scientific Revolutions*. Chicago: Chicago University Press, 1970).

possible.¹⁸ Even the most aggressive communities of apes, the chimpanzees, have a much better human rights record than their human relatives who are obsessed with justice.¹⁹ Insofar, Nietzsche was right to blame a moral attitude for all human disasters. But he was wrong to address a moral attitude as the revocable *degeneration* of social evolution, because the conflict over normative validity is *constitutive* of social evolution (but not necessarily of the existence of human beings).²⁰ He was right to note an internal link between morality and resentment, but he was wrong to criticize morality as resentment. Such criticism is empty and undetermined because moral resentment is co-original with social evolution. There is no social evolution without the reactive moral attitude of resentment. Making moral resentment explicit means to contradict and negate normative injury or indifference.²¹ It is only because we cannot avoid binding ourselves reciprocally to normative expectations once we participate in an everyday conversation that the evolutionary pool of variation is rapidly filled with enough deviant copies of symbolic acts: that is, *communicative dissent*. Every sentence can be negated: 'Every word a man utters provokes the opposite opinion.'²² Only the exponential increase of *communicative negativity* (i.e. the increase of no-statements) *enables the take-off of social evolution*.²³ It is dissent that explains the take-off of social evolution:

Variation is triggered . . . by communication that refutes or rejects communicative propositions. . . . The refutation contradicts the expectation of acceptance. It contradicts the tacit consent that everything continues "as always." All variation therefore is contradiction as disagreement, that

¹⁸Georg Wilhelm Friedrich Hegel, *Phänomenologie des Geistes*. Hamburg: Meiner, 1955, p. 24 (English: <http://www.marxists.org/reference/archive/hegel/works/ph/phprefac.htm> (01 April 2012).

¹⁹Lutz Wingert, 'Die elementaren Strukturen menschlicher Sozialität', *Deutsche Zeitschrift für Philosophie* 1 (2011), 158–63, at 162.

²⁰See Friedrich Nietzsche, 'Zur Genealogie der Moral', in Nietzsche (ed.), *Sämtliche Werke Bd. 5*. Munich: DTV, 1980, 245–412; critical: Apel, *Diskurs und Verantwortung*. Frankfurt: Suhrkamp, 1988, pp. 388–92, 434–6; Apel, *Auseinandersetzungen in Erprobung des transzendentalpragmatischen Ansatzes*. Frankfurt: Suhrkamp, 1998, pp. 237–9, note 28.

²¹For this argument in a different discourse (i.e. on objectivism and not on evolution), see Peter F. Strawson, 'Freedom and Resentment', quoted from: <http://www.ucl.ac.uk/~uctyho/dfwstrawson1.htm> (12 May 2013); see Anne Reichold, Normativity and Negativity. Comment on Brunkhorst, paper IUC-Dubrovnik 2013.

²²Johann Wolfgang von Goethe, *Elective Affinities*, p. 224, (<http://www.ia600208.us.archive.org/8/items/electiveaffiniti00goetuoft/electiveaffiniti00goetuoft.pdf>), see Luhmann, *Die Gesellschaft der Gesellschaft*. Frankfurt: Suhrkamp, 1977, p. 226. For legal evolution, see Christoph Henke, *Über die Evolution des Rechts*. Tübingen: Mohr Siebeck, pp. 45–9, 56–8 (legal variation is every legal communication that is deviant or new in some aspect).

²³On the communicative role of no-statements in response to speech act offers, see Ernst Tugendhat, *Einführung in die sprachanalytische Philosophie*. Frankfurt: Suhrkamp, 1976, pp. 76–7, 219–20, 237, 243–4; Habermas, *Theorie des kommunikativen Handelns I*.

is, not in the logical sense of contradiction, but in the original dialogical sense.²⁴

However, because the dialogical negations and contradictions are not just divergent replications but (more or less) *reasonable* replications which are mediated by the forceless force of the better argument, dialogical contradictions are not only contributions to the rapid growth of *variation* that triggers evolutionary *selection* – they are *at the same time* no-positions of Alter-Ego who *answers* to Ego's claim of truth or normative rightness that is internal to his or her speech-act, and the answer triggers a *critical discourse of normative learning*.

Even if Marx was right with his observation that the growth of new needs produced by socially learned instrumental and strategic action is at the beginning of social evolution, it is not production and work that ultimately explain the increase of communicative variation. On the contrary, it is only the increase of *dissent over normative expectations concerning cooperative work* that can explain 'the production of new needs' which indeed 'is the first historical act'.²⁵ Therefore, the explanation of evolutionary change through the improvement of adaptive capacities by way of the growth of productive forces (or, with Luhmann, the growth of systemic complexity) must be *decoupled* from evolutionary change through class struggle that culminates in *normative conflicts*, finally resulting in an 'antinomy' of 'right against right'.²⁶ The occurrence of social evolution, therefore, can be explained neither by *work* and *instrumental action* nor by *helping intentions* or the *cooperative nature* of human beings. However, even if one combines both explanations, the pool of variation remains empty.²⁷ Therefore, only *interaction that generates argument and contest* can explain how negative communication

²⁴Luhmann, *Die Gesellschaft der Gesellschaft*, p. 461, my translation (German original: 'Variation kommt . . . durch eine Kommunikationsinhalte ablehnende Kommunikation zustande. . . . Die Ablehnung *widerspricht* der Annahmeerwartung oder auch einfach einer unterstellten Kontinuität des "so wie immer." Alle Variation tritt mithin als Widerspruch auf – nicht im logischen, aber im ursprünglicheren dialogischen Sinn'.) See Hannes Wimmer, *Evolution der Politik. Von der Stammesgesellschaft zur modernen Demokratie*. Vienna: WUV, 1996, p. 115.

²⁵Marx and Engels, *Deutsche Ideologie*, p. 29 (<http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm#a3>).

²⁶Marx, *Das Kapital I*. Berlin: Dietz, 1969, p. 249, engl. trans. quoted from: Marx, *Capital Vol. I*, <http://www.econlib.org/library/YPDBooks/Marx/mrxCpA10.html> (10 April 2012); for an alternative reading, see Çidam, *Geschichtserzählung im Kapital*.

²⁷The tremendous growth of normative communication and its *internal link to deviant behaviour and communicative negativity*, that is, *negation, dissent and disagreement*, is neglected by Tomasello's reconstruction of the emergence and development of social evolution, because he reduces social evolution to cultural adaptation.

reaches such a large quantity that social evolution can and must take off.²⁸ The elementary event of communication is 'the smallest unit that can be negated'.²⁹

Because communication is only completed with Alter-Ego's reaction, *it is not the action of a single actor*. There is no 'communicative intention' (Grice) before Alter-Ego's reaction. The other does not understand me because he shares my meaningful intention, but the other way around: Ego has a meaningful intention only because, and as far as, Alter has something to understand.³⁰ Moreover, communicative negations are not only disappointments of expectations, but also *answers* to speech acts that deny the truth claim or validity claim of a given speech act. Communication does not begin with Ego's communicative intention but with Alter-Ego's answer.³¹ This has the important implication (overlooked by Marx and Luhmann) that revolutionary contests, in particular, which pose a *right against a right*, cannot be 'decided' *only* by 'force' alone, but *must* be continued *also* by *discourse*.³² Making moral resentment explicit

²⁸The evolutionary thesis that communicative negation is at the beginning of social evolution is strongly supported by Tugendhat's critique of any explanation of the rules governing propositions, which goes back to stimulus-response-schemata or subjective intentions (as in Grice's and Tomasello's theory of communication): 'Thus in so far as the relation between speaker and addressee is not a one-way street it corresponds neither to the stimulus-response schema nor to the Gricean conception of a purpose related act. It is not just that the act of the hearer reacts upon the speaker or his act; rather both acts clearly relate – though of course in a way that has yet to be explained – to the same thing: the one denies what the other affirms. Moreover, the affirming, and likewise the questioning, doubting, etc., responses of the hearer refer back to the speaker's utterance in fundamentally the same way as denial, namely as different position-takings to the same thing whose negation is asserted in the denial.' (Tugendhat, *Traditional and Analytical Philosophy. Lectures on the Philosophy of Language*, trans. by P. A. Gerner. Cambridge: Cambridge University Press, 1982, p. 190). It is the negative *answer* to an assertion that is at the *origin of the meaning of truth and proposition* as well as at the *origin of social evolution*.

²⁹Luhmann, *Soziale Systeme*, p. 212, my trans. (German original: 'die kleinste negierbare Einheit'). This, however, does not mean that the negation of normative truth claims alone can explain the emergence of social evolution. It needs work and cooperation, and for the development of normative issues of justice, a broad context of gestural communication, play and ritual communication (hence a thick pre-ethical and pre-sacral context) is presupposed that reaches far back to the evolution of non-human animals and animal societies; see Bellah, *Religion in Human Evolution*, pp. 91–7; see Habermas, *Theorie des kommunikativen Handelns II*, pp. 118–33; Habermas, *Nachmetaphysisches Denken II*. Frankfurt: Suhrkamp, 2012, pp. 7–18, 77–95, 567–70; Habermas, 'Kommentar zu einigen grundbegrifflichen Entscheidungen in: Hauke Brunkhorst, *Critical Theory of Legal Evolutions*', e-manuscript. Starnberg, 2013 (English translation forthcoming in *Law and Society*, 2014), pp. 17–19.

³⁰Eike von Savigny, *Der Mensch als Mitmensch. Wittgensteins Philosophische Untersuchungen*. Munich: dtv, 1996, p. 125.

³¹Tugendhat, *Einführung in die sprachanalytische Philosophie*, p. 244; Habermas, *Theorie des kommunikativen Handelns I*; Apel, *Paradigmen der Ersten Philosophie*; but also Luhmann, *Soziale Systeme*, pp. 160, 203; Luhmann, *Die Gesellschaft der Gesellschaft*, p. 229.

³²Marx, *Das Kapital I*, p. 249, quoted from: Marx, *Capital, Vol. I*, <http://www.econlib.org/library/YPDBooks/Marx/mrxCpA10.html> (10 April 2012).

releases the universalizing power of the negative. If conflicts between equal rights were decided only by force or by functional mechanisms, and if negation and contradiction were oppressed, then evolution would quickly come to an end due to the lack of dissent. Bureaucratic socialism failed not least because of such a lack of dissent.³³

Making moral resentments discursively explicit enables *and* obliges us to take the universalizing perspective that this specific injury against me, or another person or group, was not just an injury against me, or another concrete person or group, but against 'all men'.³⁴ Therefore, *moral resentment* that expresses our negative 'sense of injustice' (Barrington Moore) is prior to the affirmative 'sense of justice' (John Rawls).³⁵ Rights stem from wrongs, justice stems from injustice, and not the other way around. It is the 'injustice one has had to endure that makes one take cognizance of the laws of equality'.³⁶ It is *only the negation* and not the affirmative statement that enables reflection and deliberation: the *dissociation, dissolution, deconstruction* and *differentiation* of concrete recognition and perception. Only if we know what 'red' or an 'apple' or a 'cat' is *not* (or which use of 'red', 'apple' or 'cat' is *wrong*), can we learn *and* know that a cat is a cat *because* it is not a dog or a man or anything else. To be able to distinguish 'cats' from 'dogs', good from bad soccer players, legal from illegal actions, just from unjust decisions, one must be able to *negate* that x is a dog, or that P is a just decision. Negation is *constitutive* of affirmation, and therefore all affirmation *is* affirmation *only as*

³³Eder, *Collective Learning Processes and Social Evolution*. Therefore, it is far from accidental that all great revolutions are a single 'great noise of discourse' (Foucault). But before the communicative-linguistic turn of philosophy and the cultural, social and historical sciences, nobody has drawn serious methodological consequences from that insight, which is a simple fact of everyday experience (see Brunkhorst, *Contemporary German social theory*, in Gerald Delanty (ed.), *Handbook of Contemporary European Social Theory*. London, New York: Routledge, pp. 51–68).

³⁴Strawson, *Freedom and Resentment*, p. 10.

³⁵Barrington Moore, *Injustice. The Social Bases of Obedience and Revolt*. New York: Sharpe, 1978. For the Augustinian roots of the priority of injustice, see Hannah Arendt, *The Life of the Mind (Vol. Two/Willing)*. Harcourt: Mariner Books, 1981, pp. 67–8 (with reference to: Augustinus, *Confessiones*); for more recent empirical research that strongly supports my thesis: Lawrence Kohlberg, Elsa Wassermann, Nancy Richardson, 'Die gerechte Schul-Kooperative. Ihre Theorie und das Experiment der Cambridge Cluster School', in Gerhard Portele (ed.), *Sozialisation und Moral*. Weinheim: Beltz, 1978, pp. 215–60, at 230; Rainer Döbert and Gertrud Nunner-Winkler, *Adoleszenzkrise und Identitätsbildung*. Frankfurt: Suhrkamp, 1975, pp. 162–9; Nunner-Winkler, 'Frühe emotionale Bindungen und Selbstbindung an Moral'; Augusto Blasi, "'Amicus Plato sed magis amica veritas': Bindung bei, moralischen Revolutionären", in Christel Hopf and Nunner-Winkler (eds), *Frühe Bindungen und moralische Entwicklung. Aktuelle Befunde zu psychischen und sozialen Bedingungen moralischer Eigenständigkeit*. Weinheim and Munich: Juventa, 2007, pp. 177–202, at 198; pp. 203–44, 210–13, 216.

³⁶Jean Piaget, *The Moral Judgment of the Child*, trans. M. Gabain. London: Routledge & Kegan Paul, 1968, p. 274, accessed: https://archive.org/stream/moraljudgmentoft005613mbp/moraljudgmentoft005613mbp_djvu.txt, (28 October 2013).

*far as it can be negated.*³⁷ To be sure, there is no negation without something ('being', 'existing', *ens*, *Sein*) to negate. But until affirmative statements are an object of negative linguistic operations, there is nothing affirmative to be known *as* affirmative (because it cannot be distinguished from its opposite). Language gives us a hint here, as Heidegger would have said. The classical term for the affirmative is 'Being'. However, there is no unified use of 'to be' or 'being', and a term for the copula ('is') does not even exist in every language. But every meaning of sentences with 'to be', whether existential ('x exists'), predicative ('x is P'), veritative ('p is true') or other, *can be negated*.³⁸ This is due to a constitutive *asymmetry* between affirmation and negation: Only negation is a reflexive operation that can make affirmative meaning explicit.³⁹ The latter is the logical reason why the negation that abolishes immediacy is (as Hegel rightly saw) the beginning and the driving force of all developmental processes in human history. In Piaget's terms, one could say that negation is the driving force for the gradual decentring of egocentrism.⁴⁰ Moreover, negation *is* abstraction in the sense of 'abstaining from something'. *Abstracting* from the ethnic belonging of a citizen implies the *distinction* of ethnic belonging from citizenship, and that implies the *negation* of ethnicity as something that matters for citizenship.⁴¹ Furthermore, it is not the affirmative statement (or linguistic sign) that mirrors the world out there, but the *difference between match and mismatch of statement and actuality* that structures our relation to actuality as an active and practical relation *within* the actuality. The early Heidegger, therefore, argued that being-in-the world (*in-der-Welt-sein*) is being within a temporal (or historical) horizon of being and nothing (*Sein oder Nichtsein*). Only through the possible negation of an affirmative statement by *Alter-Ego* can a relation of accordance between statement and actuality be assumed or claimed: this means it can be performed only as a speech act from within the actuality.⁴² Ego's statement implies that Alter-Ego can change

³⁷See Wilhelm Kamlah and Paul Lorenzen, *Logische Propädeutik*. Mannheim: Wissenschaftsverlag, 1967, p. 30: 'to draw a distinction I must negate something because rejecting a predication to something is negating the respective predication . . . , and affirmative predication I only can learn together with the negative rejection of a predication (needing always examples and counterexamples)'. (my translation).

³⁸See Tugendhat, *Philosophische Aufsätze*. Frankfurt: Suhrkamp, 1992, pp. 33–4.

³⁹Therefore, the affirmative is constituted by the negative. I am grateful for critical remarks and a controversial discussion of this point with Anne Reichold, Charles Larmore and Axel Müller. See, in particular, Reichold, Normativity and Negativity.

⁴⁰Thomas Kesselring, *Entwicklung und Widerspruch*. Frankfurt: Suhrkamp, 1981, pp. 25, 206; see Strawson, Freedom and Resentment, pp. 10–11.

⁴¹These and other aspects of 'negation' correspond to Hegel's analysis of the negative operator. For a brilliant and detailed reconstruction, see Kesselring, *Die Produktivität der Antinomie. Hegels Dialektik im Lichte der genetischen Erkenntnistheorie und der formalen Logik*. Frankfurt: Suhrkamp, 1984, pp. 140–65.

⁴²See Tugendhat, *Einführung in die sprachanalytische Philosophie*, p. 518.

the world by *refusing* to obey an order or by *questioning* an assumption. Ernst Tugendhat rightly addresses these negative acts of refusal and questioning which relate us to the world from within the world as the '*origin of freedom and rationality*' (Vernunft).⁴³

(2) *Egalitarian societies: Repression of negativity*

One can only speculate about the beginnings.⁴⁴ The evolution of *homo* started about 5 million years ago. Modern man – 'modern' in the language of evolutionary biology – needed 2 million years from *homo erectus* to *homo sapiens*, and *homo sapiens* probably evolved somewhere in Africa some 160,000 years ago, and found his or her way into all other continents of the globe. Human societies parted from other primate societies with the first *normative use* of gestural signs. The first human societies, which still used the universal language of gestures, probably were hunter societies. They did not only hunt cooperatively for strategic reasons, as the *homo economicus* would do. Human hunter societies *shared the killed prey in equal distribution* after strategic cooperation during the hunt. The social conformance of an individual member of the tribe to this and other group norms seems, if Tomasello is right, 'to be uniquely human'.⁴⁵ It took some 10,000 years from *gestural language* to the beginnings of *speech*, which immediately began to differentiate into more and more *particular colloquial languages and cultures*.⁴⁶ However, the *possibility of going back to the universal language of gestures* enables people who speak completely different colloquial languages and do not share a single spoken word or written sign with one another *to reach an understanding*, and even to (re)construct a complete common language

⁴³Ibid., p. 519. If we take it as a fundamental evolutionary operation of normative learning, even the famous Hegelian *negation of the negation* does not lead to affirmation because it is reflexive. If the labourer's right to equal freedom is negated by existing contract law, the negation of this negation through parliamentary legislation (or a revolution) does not lead to a status that is beyond new contradictions and antagonisms (in the way that minus times minus in mathematics equals plus, without any further negativity left). This is the case even if the double negation is not enforced by coercive means, but is the result of free, inclusive and rational discourse and consensus. Even in formal logic, not every negation of a negation leads to mere affirmation (for example: 'not [non p and non q]' means: 'p or q', which is true, for example, if either the mere affirmation 'p and q' or the partial negation 'non p and q' is true).

⁴⁴On the logical and ontological problems, see Frank Ruda, *Hegel's First Words*, e-Man., Berlin, 2012. For a comprehensive empirical account, see Bellah, *Religion in Human Evolution*.

⁴⁵Tomasello, *Origins*, p. 213, see also 187; Tomasello, *Why We Cooperate*, 21ff.

⁴⁶On the evolution of the latter (with further literature): Quentin D. Atkinson, Andrew Meade, Chris Vendetti, Simon J. Greenhill and Mark Pagel, 'Languages evolve in punctuational bursts', *Science* 319 (February 2008), 588; on the origins in a universal language of gestures: Tomasello, *Origins*. Gesture still is the basic condition of the translation of all human languages into one another. For a philosophical account, see Peter Rohs, *Die Zeit des Handelns*. Hain: Meisenheim, 1980.

of gestures.⁴⁷ The possibility to reach a *universal understanding*, therefore, is never lost throughout social evolution. Mankind is not only one species or race, but also *one communicative community* of different languages and cultures.

It might be that only the acceleration of communication through the invention of speech and the copious communicative *and* normative use of that language produced enough *deviant and negative communication* for the final take-off of social evolution about 100,000 years ago. Probably, the first human societies which had to reproduce themselves exclusively by the use of communicative operations were *band societies* or *egalitarian societies*.⁴⁸ *Social integration* was guaranteed by a dense and hieratic normative system of reciprocal *cooperation* and comprehensive *equality* which cannot be explained by economic reasons alone.⁴⁹ Rousseau was right and wrong, but more right, as new research clearly shows.⁵⁰ As a child of the bourgeois revolution of the isolated and possessive human individual, Rousseau was wrong when he attributed cooperation and equality, helping and sharing to de-socialized and pre-social human nature, because this nature *is* nothing beyond the socialization of chatting animals.⁵¹

But Rousseau was right on the point that really matters: *In the beginning there was equality and cooperation between chatting animals*, there was *reciprocal helping and sharing* of emotions and trust, of information and gossip, of social norms and cultural values, of political power and economic goods. Rousseau was right, in particular, to appeal to a kind of *original equality*. Even if modern ideas and normative systems of equal freedom are much more complex, reflexive and postconventional than the original egalitarian systems

⁴⁷Rohs, *Die Zeit des Handelns*.

⁴⁸Allen W. Johnson and Timothy Earle, *The Evolution of Human Societies*. Stanford: Stanford University Press, 1987; James Woodburn, 'Egalitarian Societies', *Man, New Series* 17:3 (1982), 431–51.

⁴⁹See Bellah, *Religion in Human Evolution*, p. 570.

⁵⁰See only Tomasello, *Origins*; Tomasello, *Why We Cooperate*, 3ff; Morton H. Fried, *The Evolution of Political Society*. New York: Random House, 1967, p. 106; Woodburn, *Egalitarian Societies*. For recent ontogenetic research, see E. Fehr and U. Fischbacher, 'The nature of human altruism', *Nature* 425 (2003), 785–91; E. Fehr, H. Bernhard and B. Rockenbach, 'Egalitarianism in young children', *Nature* 454, 2008, 1079–83. Bellah explains the normative integration of egalitarian societies as a *generalization* of the egalitarianism that had been "endemic in play and ritual" for a long time, Bellah, *Religion in Human Evolution*, pp. 570–3. There seems to be sufficient evidence now for Rousseau's thesis that simple hunter-gatherer societies are much more peaceful than complex and more hierarchical hunter-gatherer societies, not to mention highly complex stratified or functionally differentiated societies, see Douglas P. Fry, *Beyond War – The Human Potential for Peace*. Oxford: Oxford University Press, 2007, pp. 55, 77, 199–200.

⁵¹Tomasello, *Why We Cooperate*, 14ff; Tomasello, *Human Cognition*. Cambridge: Harvard University Press, 2000, p. 215; on the 'cooperative and chatting species' see also Habermas, 'Ein großer theoretischer Wurf – Michael Tomasello über die Ursprünge der menschlichen Kommunikation', in *DIE ZEIT* 2009.

of norms that are binding in segmentarily differentiated band societies, it is the collective *memory of the original equality* of our phylogenesis and our ontogenesis that is the social-psychological basis of our *sense of injustice*.

Because people can negate an existing order of the world from within their historical horizon of affirmative and negative speech acts (and other symbolic actions), the *universalized* memory of original equality can be (and has been) called upon again and again in history – by the monotheistic intellectuals of the Axial Age, as well as by the lawyers and legal philosophers of canon law in the twelfth century, by the Protestant peasants of southern Germany in 1525, as well as by the French Declaration of Human and Civic Rights in 1789, or by the communist revolutionaries of the nineteenth and twentieth century. The original *equality* of egalitarian band and hunter societies is something like the first and unwritten *normative charter of the whole evolution of human society*. It is something like its *first constitutional principle*: The reciprocal right to equal treatment – originating hundreds of thousands of years before the legal form of rights was invented. It is carried through history by the *universalizing negativity* of the sense of injustice, which is a *cognitive sense*, transforming the mere contingency of *individual suffering into an objective wrong*.⁵² This cognitive moral emotion is what Kant had in mind when he wrote ‘that a violation of rights in *one* place is felt *throughout* the world’.⁵³

But the first *egalitarian societies* were already *far too complex* to trust simply in the anthropologically deep-rooted cooperative and helping intentions of man. Therefore, they had to be stabilized by *systemic mechanisms* that reduced the environmental complexity in a way that lowered the margin for communicative experimentalism to zero.⁵⁴ In such a society, the communicative *variation* that is produced by every deviant speech act is immediately *selected* so that the difference between variation and selection is blurred.⁵⁵ Therefore, all astonishing, surprising and unexpected communication is selected negatively once it occurs. A good example is the magic automatism of archaic law. All legal transactions were strictly bound to the correct form, the right expression and the exact wording of legal speech acts. The smallest variation, such as stutters or slips of the tongue, immediately caused the loss of the case.⁵⁶

Egalitarian societies come up with series of *levelling mechanisms* to prevent the emergence of any kind of inequality.⁵⁷ (1) Systematic weakening

⁵²See Koskeniemi, *Constitutionalism as Mindset*, p. 35.

⁵³Kant, *Zum ewigen Frieden*, in *Werke* XI, Frankfurt: Suhrkamp, 1977, pp. 191–251, at 216. English transl. quoted from: <http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm> (5 May 2012).

⁵⁴On the need for a systemic stabilization of socially integrated groups, see Habermas, *Theorie des kommunikativen Handelns*, Bd. II, p. 228.

⁵⁵Luhmann, *Die Gesellschaft der Gesellschaft*, Bd. 1. Frankfurt: Suhrkamp, 1997, pp. 498–505.

⁵⁶See Hans Hattenhauer, *Europäische Rechtsgeschichte*. Heidelberg: C. F. Müller, 1992, p. 43.

⁵⁷Woodburn, *Egalitarian Societies*, p. 442; see Fry, *Beyond War*, pp. 25–8, 54–6, 70–2.

of family bonds anticipates family egoism from the very beginning. No inheritance from parents to children is possible, and the borders between common and family life are completely fluid. (2) Property is common to the tribe as a whole, and everybody is allowed to take from the hunting what he or she needs. (3) Immigrants are immediately integrated without any reservation, and on the other hand, there exists no commitment to stay with your tribe and to remain a member of the respective society. (4) Specialization of labour is minimal, even the social divisions of sex and age are kept marginal. (5) Individual achievements such as extraordinary hunting success are answered by total neglect.⁵⁸ *Unequal hunting success* leads to *equal distribution* in the same way as equal success.⁵⁹ (6) All means of coercive power are completely decentralized; hence, political rule with a centre and a top position is rendered impossible.⁶⁰ (7) Massive normative pressure guarantees the equal distribution of power, prestige and wealth. By these and other mechanisms, any *accumulation of individual wealth by the hard-working and skilled* is *subverted*. Exchange of goods is completely randomized (*gambling* under the rule that the winner must carry on until he or she has lost everything again). (8) Egalitarian societies are stabilized by relations of economic production and exchange which are based on an *immediate return system*.⁶¹ In such a society, any accumulation of a surplus product is impossible.⁶² Furthermore, (9) everything that appears has its place and its category in an egalitarian hunter society. Nothing new can happen or is supposed to happen. The mythical world view is closed, and its world is 'round and concave' (Lévi-Strauss), and there is no place for history at all. Finally, egalitarian hunter and gatherer societies on the one hand often have open borders for migration, but (10) on the other hand usually combine *rigid egalitarianism with parochialism*. This, by the way, is in accordance with recent research on the cooperative development of young children.⁶³ For all these reasons, neither privileges nor hierarchies can emerge.

Such a society has no opportunity to allow any kind of social conflict to emerge, hence, *it cannot learn*. Evolutionary learning processes are rendered impossible by systemic exclusion and suppression of negative speech acts. The same assumption arguably is true of specific *cast societies* in old India, or of *bureaucratic socialism* as in the former Soviet Union. All these societies *exclude* and *suppress*, or at least try to exclude and

⁵⁸Ibid., pp. 434, 440.

⁵⁹Ibid., p. 441.

⁶⁰Ibid., pp. 436–7.

⁶¹Ibid., pp. 441–3.

⁶²Ibid., p. 443.

⁶³Fehr, Bernhard and Rockenbach, Egalitarianism in young children, p. 1081.

suppress, *the communicative articulation of class antagonisms* from the very beginning.⁶⁴

In our paradigm case of an archaic tribe society, the discursive accumulation of negative speech acts is repressed. Therefore, change can only emerge gradually by natural selection, or (and more and more probably) by *external* catastrophes and the following *punctuational bursts* (see next section).⁶⁵ Once an egalitarian hunter society is confronted with the more complex *delayed return system* of agricultural farmer societies in its own environment, and if it has to try and cope with it, this will either lead to a destruction of agriculture or a tragic decline of the old egalitarian society, and usually in a very short time.⁶⁶

The same phenomenon has been observed once an *illiterate* egalitarian society is confronted internally with the communicative use of written language. Lévi-Strauss already reported experimental proof for a punctuational burst in social evolution, caused by the irruption of written language into an illiterate society. The one who introduces written language into a society of illiterates quickly wins prestige and authority: 'Power over the others.'⁶⁷ This brings the integrative capacities of egalitarian societies under stress, and rapidly pushes them over their limits. In the case of the egalitarian band society of the Brazilian boondocks, the observing European anthropologist who lived with the aborigines for some time was continuously making written records of his daily observations. The aborigines finally asked him for paper and pencil, and he arranged paper and pencil for everybody. Yet the chief of the tribe, at best a *primus inter pares* with highly restricted power, was the first who learnt to use paper and pencil *as if* he could write, and successfully cheated his fellows: 'Probably he alone understood the social function of writing.'⁶⁸ A short time later, heated arguments accompanied the first step in the evolution of written language in this small and isolated community. The society suddenly was confronted with overburdened claims of power and prestige. A violent conflict occurred, and the catastrophe of modernization took its course.⁶⁹ Empirical findings seem to prove that in

⁶⁴Eder, *Collective Learning Processes and Social Evolution*, p. 25. To avoid misunderstandings, I have to clarify two things: 1. I understand 'class antagonism' here in the broad sense of *any* conflict between social groups that is triggered by the *structure* of the respective society. 2. Not the exclusion of social and other inequalities in itself leads to the suppression and blockage of societal learning processes (as the usual neo-liberal vulgarized Darwinist misrepresentation would have it), but *only* the systematic *repression of negative speech acts*.

⁶⁵On punctuational bursts, see Connie J. G. Gersick, 'Revolutionary Change Theories: A Multilevel Exploration of the Punctuated Equilibrium Paradigm', *The Academic Management Review* 16:1 (1991), 10–36.

⁶⁶For examples, see Woodburn, *Egalitarian Societies*, pp. 441–3.

⁶⁷Claude Lévi-Strauss, *Tristes Tropiques*. New York: Criterion, 1961, pp. 290–1.

⁶⁸Lévi-Strauss, *Tristes Tropiques*, pp. 288–9.

⁶⁹*Ibid.*, pp. 295–6.

general, the acceptance of 'principles of mediation and compensation' (in the aftermath of serious damages, conflicts and mediation), followed by some (weakly differentiated) 'agencies of adjudication and control', precedes the invention of writing.⁷⁰

Lévi-Strauss describes the invention of written language as a twofold sword. Even if the conflicts are solved, the solution is at the price of the original equality. A chapter in the dialectic of enlightenment begins.⁷¹ The *original sin here appears as an activation of the sense of injustice*. The egalitarian and socialist Sandinistas in Nicaragua argued in the 1980s: 'Alphabetization is emancipation.' That is true. But on the other hand, alphabetization is, as one could add with Lévi-Strauss, always accompanied by a 'distribution of those individuals into a hierarchy of castes and classes', and hence it seems that 'the primary function of writing, as a means of communication' consists in facilitating 'the enslavement of other human beings'.⁷²

(3) A revolution of world views: Unleashing negativity

The *revolution of literacy* and the earlier *agrarian revolution* were not yet *revolutions* in the modern meaning of that term, but punctuational bursts. The first punctuational burst of human history that was a revolution *in a way* was the *revolution of world views* during the Axial Age. A dyed-in-the-wool counter-revolutionary thinker such as Heidegger denounced it as the beginning of the 'time of the world view' (*Zeit des Weltbilds*) and later as the beginning of the 'Gestell' of 'Onto-Theo-Logie'.⁷³ But what was truly revolutionary about the *time of the world view* was the monotheistic reaction to the barbarian inequalities of the highly developed stratified societies of the great Empires of the Eurasian continent, between approximately 800 (or 1200) and 200 BCE (or 600 CE if we include Islam).⁷⁴

⁷⁰Richard D. Schwartz and James C. Miller, 'Legal Evolution and Societal Complexity', *American Journal of Sociology* 2 (1964), 159–69, at 160.

⁷¹Max Horkheimer and Theodor W. Adorno, *Dialektik der Aufklärung*. Frankfurt a. M: Fischer, 1997.

⁷²Lévi-Strauss, *Tristes Tropiques*, p. 292.

⁷³Martin Heidegger, 'Zeit des Weltbilds', in Heidegger (ed.), *Holzwege*. Frankfurt: Klostermann, 1972, pp. 69–104; Heidegger, 'Die Onto-Theo-Logische Verfassung der Metaphysik', in Heidegger (ed.), *Identität und Differenz*. Pfullingen: Neske, 1957, pp. 31–68.

⁷⁴Karl Jaspers, *Vom Ursprung und Ziel der Geschichte*. Munich: Piper, 1966 (1949). Today, the beginning of the time of the Axial Age is placed earlier by some authors than by Jaspers in his original essay. See for controversial contributions: Aleida Assmann, Jaspers' Achsenzeit, oder: Vom Glück und Elend der Zentralperspektive in der Geschichte, in Dietrich Harth (ed.), *Karl Jaspers. Denken zwischen Wissenschaft, Politik und Philosophie*. Stuttgart: Metzler, 1989, pp. 187–205; Stefan Breuer, Kulturen der Achsenzeit. Leistung und Grenzen eines geschichtsphilosophischen Konzepts, *Saeculum* 45, 1994, 1–33, at 2; Jörg Dittmer, 'Jaspers' "Achsenzeit" und das interkulturelle Gespräch', http://www.chairete.de/Beitrag/TA/jaspers_achsenzeit.pdf.

In these complex hierarchical societies, the daily evidence of tremendous inequalities and unbearable injustice and exploitation had awakened the sense of injustice of the slaves, the lower classes and some of the morally more sensitive intellectuals. This, together with heavy class struggles (as in the myth of the revolutionary class struggle of the Jewish slaves against their Egyptian oppressors), led to a turn from the pagan *theodicy of fortune* to a universal *theodicy of suffering* that we can find in Buddhism as well as in Judaism or Christendom.

The new theodicy of suffering no longer served the functional purpose of justifying the fortune of the happy and mighty few at the top of social hierarchy, as the theodicy of fortune had done. The latter simply legitimates the social and political difference between the ruling and the ruled classes by the higher virtue of the ruling class, and the greater achievements of this class for the common good. But in a more complex stratified society, this ideology no longer worked. Injustice screaming for vengeance was evident to everyone on a daily basis. As Max Weber writes:

Individually undeserved suffering was all too frequent [in imperial class societies]. And, not only if we impose the standards of a so called slave morality, but also if we impose the internal standards of the ruling class, it was all too frequently not the best, but the “bad ones” who were better off than the others.⁷⁵

Now, and that was the *revolutionary turn of the monotheistic world view*, one question became the centre of religious ethics: ‘*What is the cause of suffering?*’⁷⁶ The basic distinction of the metaphysical and religious world views of the Axial Age was that between *transcendence* and *immanence*.⁷⁷ The ontological difference between transcendence and immanence functions at one and the same time as an abstract schema for an enlightening normative insight *and* as an ideology of legitimization. The distinction between immanence and transcendence discloses a view of the world that is ‘both an expression of real suffering and a protest against real suffering.’ It ‘is the sigh of the oppressed, the heart of a heartless world, the spirit of spiritless conditions.

⁷⁵Max Weber, *Gesammelte Aufsätze zur Religionssoziologie I*. Tübingen: Mohr, 1978, p. 246 (my trans., German original: ‘Allzu häufig war individuell unverdientes Leid. Und keineswegs nur nach einer “Sklavenmoral”, sondern auch an den eigenen Maßstäben der Herrschaftsschicht gemessen, waren es allzu oft nicht die Besten, sondern die “Schlechten”, denen es am besten geriet.’) On the origins in Hawai’i and other cultures of the Axial Age, see Bellah, *Religion in Social Evolution*, pp. 573–6.

⁷⁶Weber, *Religionssoziologie I*, p. 243.

⁷⁷Shmuel N. Eisenstadt, ‘Allgemeine Einleitung’, in Eisenstadt, Hg. *Kulturen der Achsenzeit*, Bd. 1. Frankfurt: Suhrkamp, 1987, p. 21.

It is the *opium* of the people.⁷⁸ This distinction is not at all abolished by the great revolutions that disclosed the evolutionary path to modern society, but *copied into the immanence of this-worldly society*.⁷⁹ In exactly this way the distinction between transcendence and immanence manifests itself as a preadaptive evolutionary advance. In systems-theoretical terms, one can describe the process of the *internalization of transcendence* as a re-entry of the distinction between transcendence and immanence into immanence.

From the very beginning, the metaphysical and religious world views of the Eurasian Axial Age led to an *institutionalization of the difference between immanence and transcendence* in philosophical academies, religious churches and border-transgressing, universal discourses. This was already the first step in the long evolutionary process of its societal internalization, but still strictly bound to class and caste. However, all the Axial Age world views already developed a variety of strategies to *overcome this difference* (by inner-worldly ascetism, practical political commitment or in other ways).⁸⁰

A good example is the myth of the exodus of a people of slaves from the old Egyptian Empire. This myth seems to make a kind of revolutionary claim for *equality and freedom from any earthly rule*, and a *new foundation* of the rule *only* of God and his realm of divine justice, based on a double covenant among the people themselves, and between God and his people.⁸¹ *All* power is drawn out of the relations between the people, and *recredited entirely* to the account of God.⁸² While the state-apologetic (or, in a manner of speaking, right-Hegelian) 'royal theology, in classic archaic form, sees the relation of God and people as necessarily mediated by the king', it is 'this understanding that the prophets challenge: for them *God relates directly to the people*.' What the prophets 'insisted on was that the king had no monopoly in relation to Yahweh'. They finally 'rejected kingship altogether'.⁸³ Moreover, once the 'relationship between God and the people' was disconnected from, and opposed to kingship, the relationship between 'God and the individual' also was detached from state power, and both *direct and immediate* relationships, that between God and people, and that between God and the individual, 'were mutually

⁷⁸Marx, 'Introduction to a Critique of Hegel's Philosophy of Right', English translation quoted from: <http://www.cddc.vt.edu/bps/CF/marx-hegel.htm>.

⁷⁹Illuminating: Charles Taylor, *A Secular Age*. Cambridge, MA: Harvard, 2007, pp. 221–5.

⁸⁰Eisenstadt, *Allgemeine Einleitung*, p. 21.

⁸¹For a strongly projective and unhistorical, but instructive analysis, see Michael Walzer, *Exodus and Revolution*. Berlin: Rotbuch, 1988. For an evolutionary reconstruction, see Bellah, *Religion in Human Evolution*, pp. 306–10.

⁸²For the brilliant idea of a total recrediting of power, see Jan Assmann, *Politische Theologie zwischen Ägypten und Israel*. Munich: Siemens-Stiftung, o. J.

⁸³Bellah, *Religion in Human Evolution*, pp. 303–4 (my emphasis), see pp. 312, 316.

reinforcing'.⁸⁴ Even if there is little evidence of a revolutionary war and mass break-out of Hebrew slaves from Egypt, there is stronger evidence that the myth that contained one of the greatest *anti-mythical* mental revolutions in history was born in the course of actual

peasant uprisings against the local feudal monarchies of Canaan up and down the length of Palestine. At least the archaeological research of Albright, Mendenhall, Gottwald and others suggests a revolution of massive proportions.⁸⁵

Even if there was no great legal revolution anywhere, there is evidence for some kind of preadaptive revolutionary advances in Eurasia during the Axial Age. The ideas of '*emancipation and salvation*' from the evil of this-worldly order was already at the core of all the new world views that emerged on the East-West Axis of the Eurasian continent.⁸⁶ Many of them expressed the belief that man can contribute to the improvement of the world by true knowledge of the transcendent; that we can change things '*through insight, education, reform*'; that (to a certain amount) man can '*take over history by planning activities*'.⁸⁷

In the cosmopolitan and normatively universalistic world views of the Axial Age, for the first time in history *society itself became aware of the critical and negative potential of its own history*, a point Horkheimer and Marcuse have made in the late 1930s. Horkheimer and Marcuse showed in a couple of essays that philosophy from the very beginning of metaphysical thinking was *bound to the historical destiny of mankind by its critical and negative potential*, hence, its contribution to the social evolutionary pool of negative communication, and its ability to make this negative potential of history cognizable as the potential of a *radical critique* of the existing.⁸⁸ The reflexive

⁸⁴Ibid., p. 317, for similar deliberations in ancient China, see p. 479. In ancient Indian religion, the city of Nirvana plays the same practical role for the idea of changing the world as the Judaist, and later the Christian and Islamic God, see pp. 529–30, 534–5, 541–2.

⁸⁵Graham Maddox, 'Religion, Political Science and Society', in Maddox and Elim Papadakis (eds), *The Limits and Possibilities of Social Science, Joint Inaugural Lectures*. Armidale: University of New England, 1992, p. 6. Maddox writes further: 'Since the Canaanite kingdoms were connected by alliance with Egypt, and since their oppressive rule resembled the oriental despotism typified on the grand scale by pharaoh, the exodus was an apt dramatisation of the release from local oppression.' (pp. 6–7, with further literature). A similar argument is made in Bellah, *Religion in Human Evolution*, p. 286.

⁸⁶Jaspers, *Vom Ursprung und Ziel der Geschichte*, p. 22 (my transl.).

⁸⁷Jaspers, *Ursprung und Ziel*, p. 23 (my transl.).

⁸⁸See, apart from Horkheimer, Zur Kritik der instrumentellen Vernunft, in particular, the earlier essay: Horkheimer and Herbert Marcuse, 'Philosophie und kritische Theorie', *Zeitschrift für Sozialforschung* 3 (1937), 625–47. At 626 Horkheimer writes that despite all interdependency between philosophy and science, philosophy aims at the emancipation of man from social relations that enslave him. Already Plato and Aristotle, Horkheimer adds, argued that the free development of individual human beings depends on the rational constitution of society. Going further along this track, it

revolutionary turn to the negative potential of history becomes even more evident in the above-mentioned universal theodicy of suffering which was combined directly with the very critical question about the causes of suffering. Insofar as both are *manifestations of reflexive negativity*, metaphysical thinking and the monotheistic theodicy of suffering are at the very origin of a conception of a theoretical attitude that is *critical with respect to the existing world order as a whole*.

Hegel has elaborated this point in his reflections on the social relations of recognition that emerge between master and slave. Seen *from the perspective of the slave*, slave labour is the 'living negation' (Marx) of the master's 'vain-glory, (his) self-consciousness of being superior' to other living things as well as his self-consciousness of 'being self-sufficient'.⁸⁹ If and only if it takes the slave's perspective, the reflexive self-description of the social difference of advanced stratified societies by metaphysical and religious world views immediately leads to the *augmentation of negativity*. The augmentation of negativity indicates a *learning process* that finally makes the slave realize 'that living is a social, not an individual, category'.⁹⁰ Once he loses the struggle for recognition, the slave must 'experience' himself as 'absolute negativity', that is, his consciousness must feel the 'complete perturbation of its entire substance, this absolute dissolution of all its stability into fluent continuity'.⁹¹ As the subject of enforced labour (i.e. the permanent transformation of his *living* labour into his master's *dead* labour), his consciousness finally 'becomes aware of its own proper negativity, existence on its own account'.⁹² The slave as the disciplined,

became the critique of political economy, and as critique it is not in affirmative accordance with the existing society. Marcuse adds: 'For philosophy, to the extent that it has been, up to the present, more than an occupation or a discipline within the given division of labor, has drawn its life from reason's not yet being reality. Reason is the fundamental category of philosophical thought, the only one by means of which it has bound itself to human destiny. . . . Under the name of reason it [expressed the] conviction that what exists is not immediately and already rational but must rather be brought to reason. . . . In this form philosophy is idealism; it subsumes being under thought. But through this first thesis that made philosophy into rationalism and idealism it became critical philosophy as well.' It contained the idea that 'all that contradicted reason . . . was posited as something that had to be overcome'. (Herbert Marcuse, *Philosophy and Critical Theory*, in idem *Negations: Essays in Critical Theory*. London: MyFlyBooks, 2009, pp. 100–1) Therefore, historical materialism is nothing else but a theory of society that reveals and discloses the *negative potential of history* and its internal relation to reason, which is bound to the destiny of mankind through the *evolutionary pool of negative communication*.

⁸⁹Miguel Vatter, 'Biopolitics and Geist: Hegel and the Tragedy of Civil Society', in: Vatter, *The Republic of the Living. Biopolitics and the Critique of Civil Society*. Fordham University Press, 2014, p. 51 (forthcoming).

⁹⁰Vatter, *Biopolitics and Geist*, p. 51.

⁹¹Hegel, *Phänomenologie des Geistes*, p. 148, quoted from the engl. transl.: <http://www.marxists.org/reference/archive/hegel/works/ph/phba.htm> (05 April 2012).

⁹²Ibid., p. 149, quoted from the engl. transl.: <http://www.marxists.org/reference/archive/hegel/works/ph/phba.htm> (05 April 2012).

obedient and working animal learns to express 'the radical equality of all living self-consciousnesses'. The expression of *universal equality* gives him the *political* 'power of absolute negativity'⁹³ that – at least *latently* – is the *founding power of a new egalitarian formation of society*.

However that may be, in the Axial Age the contingent evolutionary growth of disturbing and interrupting negative communication reappears for the first time within the horizon of human praxis. To say 'no' becomes a reflexive and deliberative action. In the reflexive recognition of our ability to say 'no', social evolution itself becomes reflexive, and, at least partly, a matter of collective learning processes. This was, if we follow the (in this case) Christian reading of Hannah Arendt, the very discovery made by Paul, namely that the (biblical) law becomes valid only through the use of our autonomy – 'autonomy' in the literal meaning of that word, which combines the old Greek prefix 'auto-' with the noun 'nomos', or the 'self-' with the 'law': 'the Thou-shalt of the law demands and expects a voluntary act of submission, an I-will of agreement.'⁹⁴ The point is that voluntary and deliberately consenting submission to the law at the same time and through the same deliberative process can turn into *negative statements* of dissent. From now on, negativity has become constitutive for the validity of all legal and moral norms. The law itself presupposes

that there is a faculty in man by virtue of which, regardless of necessity and compulsion, he can say "Yes" or "No", agree or disagree with what is factually given, including his own self and his existence, and that this faculty may determine what he is going to do.⁹⁵

Like all meaning, *political and legal meaning* is constituted by different statements for and against the same matter.⁹⁶ The enormous growth of negativity during the Axial Age can be observed already at the level of cultic practices of communication between the human and the divine sphere, such as oblation. The main difference to archaic oblation rituals is a much greater part of human intentionality and freedom within the oblation procedure, which immediately leads to an accordingly higher risk concerning the divine answer.⁹⁷ Hence, the *pool of negative communication is expanding* even between the divine and the human. In particular, the monotheist ban on graven images gives further powerful impulses to the growth of negative communication.⁹⁸

⁹³Vatter, *Biopolitics and Geist*, p. 51.

⁹⁴Arendt, *The Life of the Mind*, p. 68.

⁹⁵*Ibid.*

⁹⁶Tugendhat, *Einführung in die sprachanalytische Philosophie*, p. 244.

⁹⁷Robert N. Bellah, 'Religiöse Evolution', in C. Seyfarth (ed.), *Religion und gesellschaftliche Entwicklung*. Frankfurt: Suhrkamp, 1973, 281f.

⁹⁸See Maddox, 'Hebrew Prophecy and the Foundations of Political Opposition', *Australian Religion Studies Review (ARSR)* 1 (2008), vol. 21, 70–92, at 73.

Only a 'God who is finally outside society and the world provides the point of reference from which *all* existing presuppositions can be questioned.' Bellah rightly calls this 'a basic criterion for the axial transition.'⁹⁹

Stratified class societies with literate language, a far-developed state formation and urban centres can no longer suppress communicative variation the very moment it appears. It is written, you can reread it and make as many copies as you like. An empire can be governed only from a centre far away from the crucial negative action, and no direct control is possible any longer (as it would have been in communication between those immediately present who have no alternative to the use of oral language). In systems-theoretical terms, more complex societies must distinguish between *variation* and *selection*, and therefore, the *time lag* between communicative variation and social-structural selection causes the *permanent production of alternative possibilities*. This time lag enables a tremendous increase of centralized power and the oppression and exploitation of huge populations and the rule over a nearly endless periphery. However, at the same time, this is very dangerous for the rulers and the ruling classes, because the time lag between variation and selection for the first time makes *effective performance of social criticism* possible, and the long discourse that begins with the prophets of the Eurasian world religions to this day has not ceased.

Complex class societies with a literate culture can no longer suppress communicative and normative learning successfully. But the emancipation of the reflexive capacity to negate the 'bad existing' (Adorno) of ancient class societies is stopped by mechanisms of *systemic stabilization*. In stratified societies, the functional mechanisms of *re-stabilization* are identical with the mechanisms of *social selection*. Therefore, in these societies, critique is possible, but the legal and political embodiment of critique in new institutions is blocked effectively. In these societies, there is thus no possibility of stabilizing social liberation movements. There is no possibility of *embodying the advances* of the most impressive normative learning that ever happened in history (from Aristotle to Joshua, from Confucius to Paul, from Buddha to Zarathustra, with a never-ending list of famous names) *in institutions that transcend the class structure of society*. The tremendous potential of negativity that is accumulated and systematically reinforced by a worldwide institutionalized intellectual discourse *is completely neutralized by the social class structure*.

Therefore, the idealistic discourse remains *ideological* in principle. On the one hand, there is the egalitarian message of the coming kingdom of God: 'May it be averted that in Thy tabernacle the persons of the rich should be accepted before the poor, or the noble before the ignoble; since rather' – and

⁹⁹Bellah, *Religion in Human Evolution*, p. 322, (my emphasis).

here, Augustine quotes the Church Father of the *New Testament* – ‘Thou hast chosen the weak things of the world to confound the things which are mighty; and base things of the world, and things which are despised, hast Thou chosen, yea, and things which are not, to bring to naught things that are.’ Accordingly, Augustine held it against the pagan philosophers that they were incapable of imparting their doctrine of the rational life (*bios theoretikos*), correct as it was, to the masses of those who labour and are heavily laden: ‘Philosophy promised reason, and only with difficulty liberated a very few.’¹⁰⁰ But the price of this liberation was high, and it was surely always too high when the ones upon whom such liberation was bestowed did not even want to be freed, but had to be forced into the truth that is the life, by fire, wheel and sword. In particular, the Christian denaturalizing and spiritualizing of a human solidarity that is mediated by God’s love is deeply ambivalent. To be sure, the denaturalization extends Jewish and early Christian universalism to the outermost extreme of a community of abstract souls directly before God who are no longer recognizable in their social, ethnic and cultural origins (just like the people behind the Rawlsian veil of ignorance in contemporary political philosophy). But the simultaneous universalization and individualization of morality, because it was purchased with the dualistic coins of the radical spiritualization of intersubjective relations, had a high price. What philosophers – for the sake of their true happiness – autonomously determine through their own knowledge, and ordinary mortals must heteronomously learn and practise by way of authoritarian indoctrination and beating with sticks, is the rigid asceticism of Christian hostility towards the body and sexuality. What Augustine expected from the striving of the soul towards true being was, above all, its detachment from the ‘bird-lime of that pleasure.’¹⁰¹

However, the cognitive and normative paradigm change of the Axial Age, reluctantly and interrupted by regression, but finally successfully established the ‘preadaptive advances’ (Luhmann) of a worldwide communicative community that was oriented towards a postconventional moral universalism and a formal and operative rationality.¹⁰² At the latest from the time of the Axial Age onwards, the spontaneous articulation of the *sense of injustice* can be *reinterpreted* within the *conceptually rationalized framework of a universal concept of justice*. This was a normative evolutionary advance that could then be used again and again in different social constellations. Under certain (and highly unlikely) conditions of crisis, it finally led to the destruction of the old European order of inequality.

¹⁰⁰Aurelius Augustinus, *De Ordine* II, pp. 5, 16, quoted in Kurt Flasch, *Augustinus. Einführung in sein Denken*. Stuttgart: Reclam, 1994, p. 79.

¹⁰¹Augustine, *The Confessions*, trans. J. G. Pilkington. New York: Boni & Liveright, 1927, Bk. 7, Ch. 12, p. 128.

¹⁰²Breuer, *Kulturen der Achsenzeit*, p. 5.

II Normative constraints

Contrary to orthodox Marxism, class struggle must be understood as an *independent source of evolutionary change*.¹⁰³ If we follow Post-Darwinism, evolution in general is driven by at least *two* different *mechanisms of change*.¹⁰⁴ On the one hand, there is (as in classical Darwinism) gradual improvement of adaptive capacities by *natural selection*. In social evolution, natural selection is replaced by *social selection*, and the gradual improvement of adaptive capacities consists in random variation of communicative deviance combined with cultural group selection, social class selection or other kinds of structural selection and systemic restabilization. Marxism explains the gradual and incremental evolution of 'greater generalized adaptive capacity' by reference to the *growth of productive forces*.¹⁰⁵ Modern functionalist systems theory has generalized this idea, and the growth of productive forces has become part and parcel of the *growth of systemic complexity*.¹⁰⁶ However, already Darwin argued that *natural selection*, while, of course, the most important mechanism of evolutionary change, *is not the only one*.¹⁰⁷ Neo-Darwinists such as Mayer, Gould, Lewontin and others detected *rapid, catalytic or revolutionary change* that *cannot be explained by the improvement of adaptation* through natural (or social) selection. Evolution in these cases just is too rapid. There is not enough time for adaptation. The organic systems must be adapted to survive, but there is no improvement, nor yet always a maintaining of adaptive capacities. Non-adaptive change in natural organic evolution is explained by the theory of *punctuated equilibria* and *punctuational bursts*. Punctuational bursts change

¹⁰³Eder, *Collective Learning Processes and Social Evolution*, p. 23.

¹⁰⁴See Ernst Mayr, 'Speciational Evolution or Punctuated Equilibria', in A. Somit and S. A. Peterson (eds), *The Dynamics of Evolution*. Ithaca, NY: Cornell University Press, 1992, pp. 21–53, http://www.stephenjaygould.org/library/mayr_punctuated.html (04 April 2012); Niles Eldredge and Gould, 'Punctuated equilibria: an alternative to phyletic gradualism', in T. J. M. Schopf (ed.), *Models in Paleobiology*. San Francisco: Freeman-Cooper, 1972, pp. 82–115; Stephen Jay Gould and Richard C. Lewontin, 'The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme', http://www.aaas.org/spp/dser/03_Areas/evolution/perspectives/Gould_Lewontin_1979.shtml, (04 April 2012); Gould, 'Episodic change versus gradualist dogma', *Science and Nature* 2 (1978), 5–12; Gould, *The Structure of Evolutionary Theory*; Gersick, *Revolutionary Change Theories*; Gisela Kubon-Gilke and Ekkart Schlicht, 'Gerichtete Variationen in der biologischen und sozialen Evolution', *Gestalt Theory* 20:1 (1998), 48–77, at 68 (www.semverteilung.vwl.uni-muenchen.de, 04 April 2012); Quentin D. Atkinson, Andrew Meade, Chris Vendetti, Simon J. Greenhill and Mark Pagel, 'Languages evolve in punctuational bursts', *Science* 319 (February 2008), 588.

¹⁰⁵Parsons, *Societies. Evolutionary and Comparative Perspectives*. Englewood Cliffs: Prentice Hall, 1966, p. 110.

¹⁰⁶Luhmann, *Legitimation durch Verfahren*. Frankfurt: Suhrkamp, 1983 (1969), pp. 144–5 (with reference to Parsons).

¹⁰⁷Gould, *The Structure of Evolutionary Theory*.

the basic body plan of a species (*Bauplan*). This change does not lead to better adaptation, but to *new constraints* of adaptation: 'Evolutionary change' in these cases is 'channeled' 'by developmental constraints'. Therefore, the 'limitation of possibilities rather than adaptive honing to perfection becomes a dominant theme in evolution. At a minimum, in explaining evolutionary pathways through time, the constraints imposed by history rise to equal prominence with the immediate advantages of adaptation.'¹⁰⁸ The 'basic body plans of organisms are so integrated and so replete with constraints upon adaptation' that these 'constraints restrict possible paths and modes of change so strongly that the constraints themselves become much the most interesting aspect of evolution.'¹⁰⁹

Punctuational bursts are triggered, for instance, by *speciation* in long-term isolated sub-populations. The latter is a phenomenon that can also be observed in social evolution in the time before great revolutions. Reform monks experiment with social formations long before the outburst of the Papal Revolution of the eleventh century. Heretic corporations are breeding later Protestants long before the first Protestant revolutions of the sixteenth century. Masonic lodges from Hamburg to Haiti and from Paris to Philadelphia experiment with new nuclear forms of social life long before the Atlantic Constitutional Revolution of the eighteenth century. The geographically and socially isolated settlers of North America experiment with grassroots or town hall democracies during the seventeenth and eighteenth century, changing the traditional English meaning of 'rights' and 'representation' radically. Communist and anarchist underground parties experiment with new kinds of political organization long before the social revolutions of the twentieth century.¹¹⁰

¹⁰⁸Gould, 'Darwinian Fundamentalism', *New York Review of Books* 44:10 (1997); see Gould, *The Structure of Evolutionary Theory*, p. 26. For a functional application to legal revolution, see Henke, *Über die Evolution des Rechts*, pp. 84, 87–91, 107 (on the case of women's suffrage) 114–19. However, Henke mentions the difference between *evolutionary improvement of adaptation* and *normative constraints on adaptation* which are not just moral wishful thinking, but internal to social evolution (see p. 64). However, he subsumes the normative constraints, for instance, of international *ius cogens*, under the improvement of adaptation (p. 154).

¹⁰⁹Gould and Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm*, quoted from: http://www.aaas.org/spp/dser/03_Areas/evolution/perspectives/Gould_Lewontin_1979.shtml (04 April 2012).

¹¹⁰*Speciation* is only one kind of punctuational burst, which is generalized in social evolution by great legal revolutions, as we will see. Natural or societal *catastrophes* are another. In organic evolution, these are cases of mass extinctions of species caused, for instance, by giant meteorites hitting the earth, as in the case of the dinosaurs, opening the path for the mammals' gradual and adaptive evolutionary growth and their development from mice to men. In social evolution similarly they can consist in famine, or the invention and communicative use of writing, as we have seen in Section I of this chapter, or in mass deportation, ethnic and social cleansing, concentration camps and genocides, as we know them from the twentieth century, or in climate change, atomic wars, etc.

The distinction between two kinds of evolutionary change, rapid and gradual, and catalytic and incremental, has proved fruitful in many evolutionary studies that are dispersed over a great variety of scientific disciplines, ranging from physics to linguistics, from sociology to the history of science, from economics to the history of ideas.¹¹¹ Since Thomas Kuhn's famous book on the *Structure of Scientific Revolutions* of 1962, for instance, the distinction between *normal* and *revolutionary science* is used for research on the evolution of science.¹¹² Revolutionary scientific change is explained by the *cumulation of anomalies*, which finally leads to *degenerating scientific research programmes*, *crisis* and the revolutionary constitution of a new and *progressive research programme*.¹¹³ As Apel and Lakatos have shown, crisis is the beginning not only of *predatory competition* (Kuhn), but *also* of a discourse on the rational cogency of the *better argument* (Lakatos, Apel).¹¹⁴

The same is true in social evolution. Not every evolutionary change can be explained by the growth of productive forces or the growth of systemic complexity. On the contrary, as one can regularly observe, great revolutions are preceded by stagnation and the crisis of productive and systemic growth (and at best some peripheral developments that counteract that trend, e.g. the advanced urbanization of the Netherlands in the fifteenth century). For this reason alone, it seems much more fruitful to explain the punctuational bursts of great revolutions with Klaus Eder by reference to the specific *developmental logic of social class struggles which are embedded in discourse*. Both mechanisms of change, the growth of systemic complexity and structural social conflict, vary independently from each other. They never reach an understanding or a common ground. They express *contradictory principles* of societal integration or sociation (*Vergesellschaftung*). But they have to complement each other in a specific way *if* a post-revolutionary society, or more generally, a new societal formation of understanding and production, is to be restabilized. Without a certain growth of systemic complexity, revolutionary advances of class struggle cannot be stabilized.

However, the functional adjustment of systemic mechanisms is blind to the victims and losers of history. In the normal and functional course of social evolution, right or wrong does matter only as far as it improves adjustment. But revolutions *have another inherent subject* than adaptation and adjustment. They are moral events. It was not by accident that Kant was

¹¹¹Brief overview: Gersick, *Revolutionary Change Theories*.

¹¹²Thomas S. Kuhn, *The Structure of Scientific Revolutions*. Chicago: Chicago University Press, 1970.

¹¹³Imre Lakatos, *The Methodology of Scientific Research Programmes, Philosophical Papers, V.I*, London, 1974.

¹¹⁴Apel, *Paradigmen der Ersten Philosophie*; Lakatos, *The Methodology of Scientific Research Programmes*.

transported into a state of moral enthusiasm by the French Revolution, but for good reasons, and even despite the evidence of terror that could never allow a moral person to suggest such a bloody experiment for a second time. Nonetheless, the revolution sent Kant into moral rapture *because* he perceived it as a *Geschichtszeichen* (sign of history) that indicated a constant progress of mankind towards the better.¹¹⁵ At least the great revolutions are a *Geschichtszeichen* insofar as they are the expression of class struggles which give a voice to the usually silenced victims and losers of history. Revolutions are *Geschichtszeichen* insofar as the awakened sense of injustice of oppressed and exploited social classes and groups becomes *avenging force*. The 'symbiotic mechanism' (Luhmann) of *avenging force* is the reserve fund of communicative rationality.¹¹⁶ The revolution argues just as the old prophets and the ancient Chinese philosophers did¹¹⁷: Not justice has to submit to adaptation but adaptation has to submit to justice.

The invention of normative constraints begins with the negative: the articulation of the sense of injustice. But once 'a violation of rights in one place is felt throughout the world', it is no longer a particular violation of the rights of a single person or a single people alone, *but of those of all persons and peoples* (and therefore, Kant argues that this indicates the *existence* 'of world citizenship' – just in the sense of a Hegelian *existing Notion*).¹¹⁸ As a *universal violation of every human being* (or mankind), it can be transformed into a normative constraint that bans, for instance, the use of slave labour or torture *unconditionally*, whatever the negative effects for the adaptive advances and even for the self-preservation of society may be.¹¹⁹ This is the evolutionary meaning of Kant's use of the old and correct normative insight: *Fiat justitia*

¹¹⁵Kant, *Streit der Fakultäten Werke XI*. Frankfurt: Suhrkamp, 1977, p. 361. Hegel repeats this in his lectures on the philosophy of history. But with the affirmative category of 'wirkliche Versöhnung' (real reconciliation, i.e. reconciliation with the existing real), he represses the moral rupture between the *justified moral feeling of enthusiasm* and the *unjustifiable plan or suggestion of making a revolution* (see Hegel, *Vorlesungen über die Philosophie der Geschichte*. Frankfurt: Suhrkamp, 1970, p. 529; see Ruda, *Hegels Pöbel*. Konstanz: Konstanz University Press, 2011, pp. 214–15).

¹¹⁶Moore, Injustice. On the primacy of negation in the process of moral development, see Piaget, *The Moral Judgment of the Child*, p. 274; more general: Arendt, *The Life of the Mind*, pp. 67–8; on avenging force: Brunkhorst, 'Kommunikative Vernunft und rächende Gewalt', *Sozialwissenschaftliche Literaturrundschau* Heft 8/9, S. 7–34; with further differentiations: Brunkhorst, 'The Man Who Shot Liberty Valence – Von der rächenden zur revolutionären Gewalt', *Paragrana. Internationale Zeitschrift für Historische Anthropologie*, Bd. 15, 1: Performanz des Rechts, pp. 159–67.

¹¹⁷On the latter, see Bellah, *Religion in Social Evolution*, p. 479.

¹¹⁸Kant, *Zum ewigen Frieden*, p. 216. English transl. quoted from: <http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm> (5 May 2012). For the 'existing Notion', see Hegel, *Wissenschaft der Logik II*. Hamburg: Meiner, 1975 (1934), p. 424; see Hegel, Lectures on the History of Philosophy, quoted from <http://www.marxists.org/reference/archive/hegel/works/hp/hparistotle.htm> (15 September 2013).

¹¹⁹See Koskeniemi, 'What Should International Lawyers Learn from Karl Marx?', *Leiden Journal of International Law* 17 (2004), 229–46, at 244–5.

et pereat mundus.¹²⁰ It is here that an evolutionary theory which includes the concept of normative constraints coincides with *universal history*:

Radical antislavery is a human invention that belongs to no one, because it belongs to everyone. Such ideas are the residues of events, rather than the possession of particular collectives, and even if they fail, they can never be forgotten.¹²¹

Only because radical anti-slavery belongs to everyone is it an *evolutionary universal* that can be reinvented again and again, and against every new form of 'slavery', including that which Marx called *wage slavery*.

As in natural evolution, punctuational bursts that are social revolutions *presuppose* adaptation but *do not improve it*. Revolutions are at the peak of *maladjustment*, and they are not a cumulation of tiny maladjustments, but a grand experiment with societal structures that are badly adjusted.¹²² However, the great revolutions are not (as from the point of view of Luhmann's systems theory) experimentalism for experimentalism's sake (or experimentalism by chance alone). At issue in all *revolutionary* experimentalism is the *idea of egalitarian freedom*. Therefore, the revolutions are not only about *material (class) interests* ('materielle Interessen'), but also about *ideal (class) interests* ('ideelle Interessen').¹²³ In modification of a famous thesis by Max Weber, one might say that *ideas and ideal class interests act like pointsmen, changing direction at junctions in the track of evolution*.¹²⁴ In a similar way to that in which a catalytic punctuation of an evolutionary equilibrium creates a new '*Bauplan*' (Gould) for an organism which *constrains its adaptive capacities physiologically*,¹²⁵ the great and successful revolutions impose *normative constraints* upon the blind environmental adjustment and self-preservation of social systems. Class struggles and revolutions transform social evolution into an evolutionary *learning process* of socially integrated groups – a learning process that often has a deadly end.¹²⁶

¹²⁰Kant, *Zum ewigen Frieden*, p. 241.

¹²¹Susan Buck-Morss, *Hegel, Haiti, and Universal History*. Pittsburgh: University of Pittsburgh Press, 2009, p. 148. On a more immanent Hegelian version of this process of universalization, see Ruda, *Hegels Pöbel*.

¹²²Luhmann goes even further with his assumption that social evolution in itself (or at least the evolution of modern societies) presupposes adaptation to the purpose of experimenting with ever more risky maladjustments (see Luhmann, *Gesellschaft der Gesellschaft*, pp. 433, 446).

¹²³Weber, *Gesammelte Aufsätze zur Religionssoziologie I*, p. 252, quoted from: Weber, Max 1963, *The Sociology of Religion*. Boston: Beacon Press, p. 280 (http://web.grinnell.edu/courses/soc/f01/soc295-02/marx_weber.html).

¹²⁴Max Weber, *Gesammelte Aufsätze zur Religionssoziologie I*, p. 252.

¹²⁵Gould, 'Morphological Challenging by Structural Constraint'. *Palaeobiology* 10 (1984), 172–94, at 191; Gould, 'Punctuated Equilibrium in Fact and Theory', *Journal of Social Biological Structure* 12 (2002), 117–36, at 124; Gould, *The Structure of Evolutionary Theory*, pp. 290, 753, pp. 884–5.

¹²⁶As in Alexander Kluge's film: *Lernprozesse mit tödlichem Ausgang*.

Punctuational bursts 'are not smooth trajectories toward pre-set ends because both the specific composition of a system and the "rules" governing how its parts interact may change unpredictably during revolutionary punctuations'.¹²⁷ Yet, unlike revolutionary learning processes, the *adaptive evolutionary process of variation and selection* is completely immoral, brutal and gruesome, a process that (described from the observer's perspective) experiments with everything, even with totalitarian rule and concentration camps. Contrary to normatively blind evolutionary adaptation, the revolutionary advances of normative learning processes are working as normative constraints that *shall protect us from certain kinds of evolutionary experiments*, such as, in our days, totalitarian rule and concentration camps.

The *normative constraints* of evolutionary adaptation are embodied in a *new constitutional and legal order* of society. This is so because law that is modern (and only law that is modern) is at once emancipatory and repressive: *law as freedom* (Kant's and Hegel's *Dasein der Freiheit*) and *law as the immune system of society* (Luhmann). From the Papal Revolution of the eleventh and twelfth century onwards, law became a professionalized and functionally differentiated social system. However, this process coincided accidentally with the co-original emergence of law that is emancipatory because it was, for the first time, based on a universal idea of redemption, identified with the legal body of Christ, and explained in logically reconstructed categories of republican Roman law. From that time onwards, the culture of legal experts and lawyers has been a culture that has to cope with the dialectical tension between the (*avant la lettre*) *Kantian constitutional mindset* of the emancipatory, *existing concept* of law and the *managerial mindset* of academically trained professionals who are operating as autonomous experts implementing and concretizing the Kantian mindset through their *legal work* – Friedrich Müller's *Rechtsarbeit*.¹²⁸ However, they normally (and more habitually than intentionally) perform this day-to-day business in the service of the ruling classes of their time.

The great revolutions are *co-original with the emergence of modern society*, and all great revolutions are *legal revolutions*.¹²⁹ This is one of the

¹²⁷Gersick, *Revolutionary Change Theories*, p. 12.

¹²⁸On the concept of *Rechtsarbeit* cp. Müller and Ralph Christensen, *Juristische Methodik, Bd. I: Grundlagen, Öffentliches Recht*. Berlin: Duncker & Humblot, 2002.

¹²⁹See Eugen Rosenstock-Huussy, *Die europäischen Revolutionen und der Charakter der Nationen*. Stuttgart: Kohlhammer, 1958 (1931); Harold Berman, *Law and Revolution. The Formation of the Western Legal Tradition*. Cambridge, MA: Harvard University Press, 1983; Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition*. Cambridge, MA: Cambridge University Press, 2006; James A. Brundage, *Medieval Canon Law*. London: Longman, 1995; Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought 1150–1650*. Cambridge: Cambridge University Press, 1982; John Witte, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation*. Cambridge: Cambridge University Press, 2002.

main differences between the small number of great revolutions and the huge number of smaller revolutions. Great revolutions generate a new formation of society in the way that punctuational bursts generate a new animal species. They change the framework of the normative constraints of society, and that is possible if, and only if, the new normative constraints are implemented legally. Otherwise, any new formation of normative constraints would disintegrate as soon as it is established.¹³⁰ In contrast, all smaller or 'normal' revolutions in evolutionary terms are part and parcel of gradual change through social selection, even if a cumulation of smaller revolutions can lead to a great revolution (such as a cumulation of anomalies in normal science can lead to a scientific revolution).¹³¹ Normal revolutions have a socially selective effect. They change the power structure of society, or at least challenge it in such a way that (as a criterion of a normal revolution) a kind of diarchy (*Doppelherrschaft*) or balance of antagonistic powers or social classes exists in a region or a state over a certain period. A good example of a revolutionary diarchy is the decade before 1989 in Poland, where the power of the communist military dictatorship and the power of the popular union Solidarność were in (relatively peaceful) balance for a long time. Intellectuals and historians such as Leon Trotsky and Charles Tilly have analysed (and in the case of Tilly counted) revolutionary events from the latter point of view, which focuses on the power structure and the control of capital alone, whereas historians such as Marx and Berman focus on the structural and comprehensive change of the societal totality that is caused only by great legal revolutions.

For Marx (who analysed modern capitalism in the legal categories of private property and developed his own categorical framework out of Hegel's philosophy of law), it was still self-evident that great revolutions, such as the Protestant English Revolution and the French Revolution, were legal revolutions, and therefore alone had world-historical meaning, as the following quotation clearly shows:

The revolutions of 1648 and 1789 were not English and French revolutions, they were revolutions in the European fashion (*Revolutionen Europäischen Stils*). They did not represent the victory of a particular social class over the old political system; they proclaimed the political system of the new European society. The bourgeoisie was victorious in these revolutions, but the victory of the bourgeoisie was at that time the victory of a new social order, the victory of bourgeois ownership over feudal ownership, of nationality over provincialism, of competition over the guild, of partitioning

¹³⁰See Kant, *Zum ewigen Frieden*, p. 224; Hegel, *Grundlinien der Philosophie des Rechts* § 4, *Werke* 7. Frankfurt: Suhrkamp, 1970, § 141, pp. 286–91.

¹³¹Kuhn, *The Structure of Scientific Revolutions*, Ch. VI and VII.

[of the land] over primogeniture, of the rule of the landowner over the domination of the owner by the land, of enlightenment over superstition, of the family over the family name, of industry over heroic idleness, of bourgeois law over medieval privileges. . . . These revolutions reflected the needs of the world at that time rather than the needs of those parts of the world where they occurred, that is, England and France. . . . The French bourgeoisie of 1789, when it confronted monarchy and aristocracy, the representatives of the old society, was . . . a class speaking for the whole of modern society.¹³²

Marx was right, even if he did not go far enough and still retained a Eurocentric perspective. He did not even mention the American Revolution, let alone Haiti and other places all over the world where revolutions occurred. As has recently been demonstrated in the historical literature, the entire global legal and political order was re-founded and constituted anew in the decades following the constitutional revolutions of the late eighteenth century. This was a fact which contributed greatly to the formation of *one modern world society*. The new political, legal, economic and cultural world order consisted, from its beginning in the age of the Papal Revolution, in the *invention and co-evolution* of a new national *as well as* a new international order of powers. Modern law, in particular, constitutional law, is not at all a national and nation-state phenomenon, but from the beginning is transnationally embedded.¹³³ It was also based on the dense and momentous intersection and interpenetration of national *and* international law, and, more generally, of processes of simultaneous nationalization *and* internationalization, as we will see in Chapter 2, Section II.

But Marx was completely right to analyse the advances of the English and French Revolutions *as* legal and constitutional advances. It was the *new constitutional and civil law* that established the *nation* as a sovereign power and disempowered the fragmented powers of *provincialism*, that replaced the many *medieval privileges* with one *bourgeois law* such as the French Code Civil, that replaced particular *feudal ownership* with *universal rights to private property*, that abolished the *guild* and established *universal markets for labour and real estate*, that replaced the *privileged right of primogeniture* with *equal rights of inheritance*, that finally *emancipated family and marriage* definitively

¹³²Marx, *Bourgeoisie und Konterrevolution*, in Marx and Engels (eds), *Werke*, in 43 vols. Berlin: Dietz. Volume 6, 1973, pp. 102–24, at 107–8. quoted from: <http://www.marxists.org/archive/marx/works/1848/12/15.htm> (19 October 2013).

¹³³See David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism', in Legal Studies Research Papers Series No. 10-01 (June 2011), pp. 1182–4, especially at 1183, 1223–4, 1240, 1243 (available at: <http://www.californialawreview.org/assets/pdfs/99-5/01-LawVersteeg.pdf>, 1 November 2013).