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The Sociology of Law and Global Sociology

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Abstract: This article uses a perspective based in the historical sociology of law to set out a new interpretation of the rise of the modern democratic political system and to examine processes of political institution building in contemporary global society. The article argues that the differentiation of the modern political system was originally triggered by legitimational pressures within the legal system, such that the national political system initially emerged as an internal component of the legal system. The political system took a decisively democratic shape as the legal system attached its legitimational functions to the military system in the revolutions of the eighteenth century. This meant that, in its national form, the democratic political system developed as a type of coupling between law and the military, which always relied on a highly militarized, deeply destabilizing techniques of legitimacy production and integration, and never became a completely stable form of national government. The antinomies of modern democracy were only overcome through the rise of global human rights law, which reintegrated the political system in the legal system, transferred responsibility for legitimacy production from the national citizen to a system of global legal norms, and created a series of functional equivalents for national processes of political mobilization.

Keywords: Legal System; Political System; Legitimacy; Democratization; Militarization; Global Law; Human Rights Law.

Zusammenfassung: Dieser Artikel verwendet eine in der historischen Rechtssoziologie wurzelnde Perspektive, um eine neue Deutung der Entstehung des modernen demokratischen politischen Systems vorzustellen und Prozesse der politischen Institutionenbildung in der gegenwärtigen globalen Gesellschaft zu erläutern. Der Artikel vertritt die These, dass die Differenzierung des modernen politischen Systems ursprünglich durch legitimatorische Zwänge innerhalb des Rechtssystems ausgelöst wurde, so dass das politische System anfänglich als interner Bestandteil des Rechtsystems entstand. Das politische System nahm eine entschieden demokratische Form an, als in den Revolutionen des ausgehenden achtzehnten Jahrhunderts die legitimatorischen Funktionen des Rechtssystems mit dem Militärsystem verbunden wurden. Infolgedessen entwickelte sich das demokratische politische System als eine Art Kopplung zwischen Recht und Heerwesen, und es war ständig auf hoch militarisierte, zutiefst destabilisierende Mechanismen der Legitimationserzeugung angewiesen. Demokratie wurde deshalb nie zu einer völlig stabilen nationalen Herrschaftsform. Die Antinomien der modernen Demokratie wurden erst durch den Aufstieg der globalen Menschenrechtsordnung überwunden, die das nationale politische System in das Rechtssystem wieder integrierte, die Verantwortung für Produktion von Legitimität vom nationalen Staatsbürger auf ein System globaler Rechtsnormen übertrug, und eine Reihe von funktionalen Äquivalenten zu nationalen Prozessen der politischen Mobilisierung herstellte.

Schlüsselwörter: Rechtssystem; Politisches System; Legitimität; Demokratisierung; Militarisierung; Globales Recht; Menschenrechte.

1 Introduction[1]

Questions of global sociology are often focused on the ways in which the features of global society differ from those of national society. This approach is especially pronounced in analyses of global law, in which the legal forms of global society are often viewed as expressing ruptures with legal systems in national societies.[2] This article claims, by contrast, that the contours of global law, and of global society more widely, need to be approached from an alternative perspective. It argues that the structures of national societies are dialectically interlinked with the structures of global society, especially in their legal dimensions. In particular, it explains that the core processes that defined the institutional order of national societies were not fully stabilized within national legal and political orders, and it was only through the interposition of global legal norms

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1 To mark the author's tenure his text is an expanded and revised version of the inaugural lecture of the Niklas Luhmann Guest Professorship 2018 at Bielefeld University.

2 For this view in classical expression, see Kahn (200: 2, 5, 18).

into national institution-building processes that national societies and their institutions acquired finally enduring form. For this reason, global sociology must always remain attentive to processes rooted in national society, as global processes and national processes cannot easily be explained as separate phenomena. The realities of global society, and especially of global law, are most adequately elucidated by perspectives in global sociology that retain a foundation in classical sociology, and especially in classical historical sociology: *global sociology requires a deep historical memory in order to explain contemporary global conditions*.

In the analyses below, a method based in the historical sociology of law is used to explain salient aspects of global society, and the emergence of the legal/political order of contemporary global society is examined through a lens focused on deep-lying processes of legal formation within national histories. In this approach, the historical analysis concentrates on legal processes that can be observed as possessing a globally constitutive nature. In particular, it addresses processes that underpin the construction of societies on a common national model, and it is designed to isolate and explain legal phenomena that play a generic nation-forming role, which is reflected in patterns of political-systemic formation in societies at different points in history and in different parts of the globe. To address these phenomena, the article takes as its main examples societies in Europe that experienced nation-building processes in the eighteenth and nineteenth centuries. Such societies are selected because they provide ideal types of nation formation. However, core aspects of the formative trajectories in these societies were reproduced globally, both in Europe and elsewhere.[3] In such analysis, classical legal sociology is reflected as a vital, even defining, part of global sociology; in fact, the historical-sociological reconstruction of patterns of national legal formation is presented as the key to understanding prominent elements of global society.

2 The elements of modern society

The early formation of national societies in Europe in the eighteenth and nineteenth centuries was marked by a series of closely interlinked structural processes, in which these societies developed distinctively modern forms and propensities, and in which they assumed the characteristics now recognizable as those of nations. Each of these processes was, in key respects, a legal process, in which the form of society was defined by transformative occurrences in the legal system.

Differentiation

Emerging national societies in Europe were pervasively structured by processes of *differentiation*, in which different domains of social exchange were increasingly separated and organized on free-standing premises. This process has been widely described in legal and political sociology, with many variations.[4] Generally, however, this process had the result that each sphere of society generated a distinct set of institutions with a particular functional emphasis, and actions within such institutions were increasingly determined by distinct internal norms, modes of interaction, and specific objectives.

In this process of differentiation, the law obtained a central role in the construction of society. In fact, the advancing process of societal differentiation was, in many settings, deeply shaped by a prior trajectory, in which the legal system had slowly been detached from its original embeddedness in local customs and familial or other status-determined power structures, characteristic of feudal social order. The eighteenth century was broadly marked by the acceleration of a long-standing dynamic in which the law and the institutions applying law were separated from noble estates – that is, from land and from inherited privileges attached to land ownership. Through this dynamic, gradually, the law was constructed as a distinct medium of integration, which assumed a high degree of abstraction within society as a whole, and the differentiation of law promoted the emergence of relatively free-standing political institutions. This process of legal differentiation was in fact already reflected in the formation of territorial states in the later Middle Ages. The growth of territorial states occurred as a process in which, owing to the growing demand for formal law, legal authority was gradually concentrated in relatively compact legal and political institutions, which ultimately formed the basis for modern national states. Across medieval Europe,

3 For example, see discussion of analogues to European nation-building processes in Africa in Callaghy (1984: 36); Hyden (1987); Englebert (2000). See discussion of parallel processes in Latin America in Oszlak (1981); O'Donnell (1999). My argument is based in the claim that processes of national integration are usually conducted in opposition to forces, rooted in localized land-based privilege and legal particularity, which have some similarity to European feudalism. Such processes are invariably underpinned by the emergence of the legal system as a system of integration.

4 For different classical constructions of this process see Durkheim (1902); Weber (1921/22); Parsons (1951).

the first function of territorial states or state-like entities was to guarantee the security of law as a stable social domain.[5] Tellingly, one early historical analysis attached particular significance to the correlation between the differentiation of the law and the rise of modern centralized political institutions, stating that the constitution of the legal system (*Gerichtsverfassung*) acted as the 'mother of territorial sovereignty' (Hellfeld 1782: vii). In most societies, this trajectory reached a preliminary culmination in the middle or later decades of the eighteenth century, by which time, in much of Europe, the legal system had been at least partly transposed onto generalized normative foundations, so that the law could be transmitted in rapid and flexible forms and procedures across society.

At an institutional level, such formalization of the law was reflected in the increasing abolition of private and patrimonial courts, in widespread acts of centralized legal codification, and in growing judicial professionalization (see Burrage 2006). At a normative level, such formalization was reflected in the growing internalization of natural-law principles in national legal codes, which meant that law could be authorized by formal, easily identifiable and simply intuitive norms.[6] Through this process, the basic form of modern law, in which the law refers to internal legal principles to construct its authority, was established. This process was of course expressed in different ways in different settings. This was initially reflected in formally ordained processes of legal codification in France, in the German states, and in many other European societies, especially in societies whose legal systems were mainly based in Roman law. However, even in societies such as England that possessed legal systems of a precedential nature, this period saw the increasingly systematic organization of the law and the relative generalization of norms of legal authority.[7] This process was also reflected in different ways at different times, and judicial systemization was not a universally linear process. For example, by the early nineteenth century, historicist legal analysis became influential in some parts of Europe, and, especially in Germany, outlooks attached to historicism tended to be overtly hostile to uniform legal codification and to principles of natural law that supported codification. In this context, for example, Savigny opposed codificationism by arguing that valid law, or law guaranteeing freedom, is law which proceeds 'from the innermost essence of the nation itself and its history' (Savigny 1850: 113), and he viewed the reception of Roman law as a vital and organic reflection of the traditions and customs of the German people (Savigny 1840[1814]: 11). However, the Historical School still remained focused on the elaboration of formal legal principles, at least in private law, and it was centrally shaped by the endeavour to crystalize norms to address phenomena produced through societal differentiation, especially in the economy. In fact, Savigny's construction of property rights provided an early foundation for the ordering of private law. His analysis of property law, focused on the human will as legal fact, was specifically intended to propose general principles of legal order in a society in which feudal tenure was disappearing and noble privilege was about to be abolished (Savigny 1837[1803]: 25). Importantly, in addition, legal historicism was always close to, and in fact incorporated the origins of, legal positivism, which, by the middle of the nineteenth century, far outreached historicism in influence, and ultimately underpinned the processes of legal codification at this time. Even deliberate reactions against legal formalization, in other words, contributed to the increasing differentiation of the law.

The advancing differentiation of society as a whole was formatively correlated with this growing differentiation of the legal system. The most vital connection between societal differentiation in general and the transformation of the law lay in the fact that, as it assumed its modern, internally authorized form, the law was able to separate legal norms from particular places and persons, and it was able to produce principles of validity that could be replicated across different social spheres. Through its increasing codification, the law was able to establish authoritative norms to regulate exchanges in distinct domains of social practice, and it was able, in quite contingent procedures, to address sectorally varied, fluctu-

5 In England, for example, the idea of the monarch as the fount of justice became widespread through the first expansion of royal government. The Angevin monarchy was defined and obtained legitimacy as a *law state*, in which the king acted as the 'highest source of justice' or even as a *judicial king* (Jolliffe 1955: 32). In the Holy Roman Empire, the *Sachsenspiegel* defined the Emperor as 'the common judge of all' (III, 26). In France, the need to provide justice was almost an article of faith for the Capetian kings. In the early formation of the French state the monarchy explained its legitimate right to legislate as deriving from its custodianship of justice (Pettit-Renaud 2001: 180–81). In Spain, a codified law book, *Las Siete Partidas*, was introduced and promulgated throughout Castile in a period of far-reaching legal innovation undertaken by Alfonso X in the middle of the thirteenth century. This law book defined the monarchy as the primary centre of justice, and it aimed to concentrate the most important elements of jurisdiction around the crown (II, 1, 1).

6 In the earlier eighteenth century, the doctrine of natural law became the primary foundation for judicial reform. Classical natural law also provided the conceptual basis for modern contract law, which formed the axis of the economic aspects of the modern legal system (Nanz 1985: 145).

7 Blackstone's *Commentaries* were published in the 1760s

ating demands for secure regulation. Notably, increasing societal differentiation was reflected in the drafting of separate legal codes for different social spheres, so that, in many societies of later early modernity, generalized legal stabilization of the economy, urban life, rural life, military life, and religion became the norm.[8] In each respect, the law provided a normative precondition for societal differentiation, and modern society experienced an increased reliance on the law as a positive medium for stabilizing complex exchanges.

Integration

As they approached their modern national condition, early national societies were shaped by distinctive processes of *integration*, which were closely linked to underlying patterns of differentiation.[9] Such processes, also gaining momentum in the eighteenth century, were reflected in the fact that societal exchanges acquired an expansive form, as social agents were released, in different spheres, from localized affiliations. This meant that personal patterns of obligation became weaker, and individual social agents became more mobile and more easily incorporated in regionally overarching constituencies. This process often coincided with the rise of informal associations, outside the traditional structured domains of state, household, court and guild, focused on promoting integration, across widened social spaces, in specific areas of functional activity – for example, professional improvement bodies, educational associations, economic organizations, scientific orders, religious groups (see Müller 1965: 221; Nipperdey 1976: 176–77). At the same time, centrally, this process led to the increasing emergence of centralized political institutions, in which legislative power was formally attached to actors with elevated territorial authority, able to transmit legal norms across all parts of society.

This mass of integrational processes was marked by, and it in fact depended on, the increasing use of law as a formal instrument of social exchange, interaction, and spontaneous norm foundation. Of course, processes of societal integration were partly driven by deep-lying forces having, ostensibly, little to do with law, especially by economic factors. Nonetheless, the essential expansion of societal communications depended on the distillation of law as a positive, internally validated medium (Mooser 1984: 209). Processes of social integration almost invariably coincided with the decline in influence of legal orders founded in personal status, privilege and immunity, and such integration presupposed generalized, regionally and temporally overarching principles of legal authority. Indicatively, the formalization of law encountered its greatest opposition in the persistent power of guilds, estates, and families, which clung to structurally personified explanations of legal authority (Ennen 1971: 6, 118; Mooser 1984: 207–8). By the eighteenth century, many states had developed informal systems of constitutional law, and they were able to define certain norms as possessing higher-order obligatory force for all actors in society.[10]

The law assumed its most significant functions in this respect as, in most societies, national legal systems began to promote principles of legal validity that were rooted in *rights*.[11] At this time, the norm became generalized that law is legitimated by the fact that it recognizes each person, simply qua person, as a holder of invariable and securely protected freedoms (rights). Such rights were constructed in distinct fashion in different fields of social practice, and they could be transferred across different areas of society – for instance, as economic rights, aesthetic rights, rights of free movement, contractual rights, etc. However, law's authority was uniformly articulated with the idea that the person addressed by law had to be reflected as a rights holder.

In a primary dimension, the increasing concretion of rights as legal norms was an occurrence *within the law*, whose impact was most visible in the legal system itself. Through this occurrence, the law was able to extract legitimacy from the inner form in which it reflected its addressees, and it was able to sustain itself as a system of integration through this internal reference. At one level, legal rights began to assume formal security in early political constitutions or public-legal codes, which were widespread by the late eighteenth century. Through the rise of early constitutional law, the authority of persons responsible for creating law was increasingly contingent on the fact that public power was applied in a form proportioned to persons observed as rights holders.[12] The rise of central legal/political institutions was facilitated by

8 This began well before the late eighteenth century. But the 1789 Revolution in France led immediately to codification processes that supplanted previous local laws regarding the economy, city guilds, agrarian production, criminal law, taxation, and warfare. In common-law states, there was no analogous process of codification. However, consistent principles of contract law were established to construct a relatively unified legal order for society (see Atiya 1979).

9 On this connection see Schimank (1999: 50).

10 For instance, in the centuries before the Revolution, it was widely argued in France that the monarchical state possessed a distinctive constitutional order (Saguez-Lovisi 1984; Vergne 2006).

11 On the core link between early associational life and the doctrine of natural rights, see Nipperdey (1976: 180, 195); Pröve (2000: 92).

12 See below p. 381.

the construction of persons subject to such institutions as rights holders in administrative law, and the expansion of the state's legal power presupposed the formalization of rights.[13] Equally importantly, such rights began to appear as protected institutes of private law, in which principles to regulate different spheres of society were clearly defined, and formally separated from the mass of interwoven ordinances, privileges and conventions established under feudal law.[14] In both respects, rights underpinned the differentiation of the law as a distinct system.

In a secondary dimension, the emergence of rights had a deep impact on the external form of society more widely. Early legal rights created the basis for interactions and organizational structures in different spheres of society – in the economy, in education, in science, in religion, in the press – and the fact that social agents could claim distinct rights in different societal spheres generated a legal premise for newly emergent patterns of organization and integration. For example, the growing importance of rights concerning freedom of contract and freedom of movement helped to found increasingly integrated economic communities. Confessional rights integrated new religious constituencies and institutions. Rights to free expression created new information or media communities, and rights of scientific inquiry integrated new scientific communities and institutions. In each instance, social integration was conducted on individualistic legal foundations, in which one person, in a particular set of functions, could extract protection and entitlements directly from the law, as an inclusive system. This gave impetus for the construction of multiple patterns of integration, in which geographically determined, or locally personalized modes of inclusion lost ground, and individual agents, often unreflectingly, could freely enter extended communication constituencies – often many at the same time.

Overall, the processes of integration underlying modern society did not merely presuppose the relative autonomy of the legal system. On the contrary, these processes were partly impelled by the construction of law as a differentiated medium. The emergence of the law as a differentiated system imposed an imprint on society that separated legal validity from local structures, and that necessarily stimulated geographically and temporally overarching patterns of integration. Above all, the differentiation of the legal system led to the abstraction of principles of legal validity around individual persons, endowed with rights. The construct of the rights-holding individual, defined within the legal system as the primary addressee of law, instilled an authorizing self-reference in the law, which constantly intensified law's autonomy and law's inner differentiation qua system. At the same time, this construct dramatically extended law's penetration into society, and it formed a basic legal underpinning for the multiple professions and interest groups that condensed around modern society's differentiated structure. The emergence of a society divided into sectoral constituencies of integrated rights holders can be seen as a societal form necessarily created by the rise of a highly differentiated legal system, expressing an essentially *inner-legal* process. Analysis of the legal system thus provides the core perspective for understanding modern society as a whole.

Democratization

Early national societies were increasingly marked, in their political institutions, by processes of *democratization*, which acquired revolutionary momentum in the late eighteenth century. Democratization is in essence a pattern of integration that occurs specifically within the polity of modern society. However, it is a pattern of integration with deep importance for the formation of modern society as a whole, and it distinctively reflects processes linked to the differentiation of the legal system.

In a general perspective, the primary features of the modern polity were integrally shaped by the translation of the law into an internally authorized, positive system. First, the essential determinant of modern statehood – the assumption of judicial and legislative primacy by a group of centralized institutions, flanked by the elimination of variable private control of law – was unmistakably instituted as a result of law's increasingly differentiated and autonomous form, and the early growth of territorially focused state institutions clearly stabilized the positive transmission of law across widening social spaces. Second, early passages of proto-democratic reform in the polities of European society were generally linked to the rising expansion and autonomy of law as a system, and periods in which the consensual element in the polity was developed served to create norms that simplified the broadening use of positive law. Throughout European history, institutional reforms designed to promote consensus for government were usually preceded by occurrences in the judicial system (*Gerichtsverfassung*), in which the formality and the relative autonomy of the legal order had been increased. In such contexts, reforms in European political institutions were implemented to

13 On this process in France see Church (1981). On this process in Prussia see Poppitz (1944: 3).

14 On the original linkage between constitutional rights and rights in private law, see Grimm (2017: 4).

place the legal apparatus on more secure foundations, and to produce concepts and mechanisms to authorize the expanding production of law and the positive distribution of law as an autonomous medium.[15] This can be seen in the initial creation of medieval parliaments. Most medieval parliaments developed out of the *curia regis*, whose functions were originally judicial, and most early parliaments obtained increasing consultative functions as a means to intensify societal support for judicial rulings. The later representative functions of early-modern parliaments usually also evolved on this basis. This can be seen in the period after the Reformation, in which many parliaments acquired expanded competences, partly owing to the reduction in importance of papal law, leading to a deep transformation of national judicial institutions, such that states were forced to establish more consensual premises to authorize the legal system.[16] In each of these developments, the legal order was reinforced through the formation of devices for generating public consensus for the law, and the consolidation of the representative/consultative element in the state was a vital mechanism to provide legitimacy for the law as an increasingly differentiated system of integration.

The correlation between legal differentiation and political institution building was then exponentially intensified through early processes of revolutionary democratization in the 1780s and 1790s, expressed most intensely in the French Revolution, in which the basic form of the modern political system was established. The polity was restructured during the revolutionary period on a distinctive design, which clearly promoted the expanding circulation of law, and which produced diverse legitimational principles to underpin law's positive differentiated transmission through society. In the revolutionary era, above all, the normative entitlement to create law was condensed in a clearly centralized and demarcated set of institutions, so that volitional acts of legislation became the dominant, positive source of law.[17] Such centralization of legislative power was flanked by a process of legal de-privatization, in which the legal system was increasingly professionalized, and judicial institutions applied legal norms that were, in principle, generalizable across all addressees and indifferent to the local standing of persons to whom they were applied. This marked the interim culmination of the essential trajectory of early modern political-institutional formation.

Two principles of democracy 1: Normative Integration

On one hand, the articulation of early democratic principles in the revolutionary period can be placed on a continuum with pre-existing patterns of legal formation and authorization. As mentioned, the revolutionary period had been preceded in most European countries by a long process of legal systematization. In particular, prior to the revolutionary era, reforms had been often conducted to ensure that legal institutions were separated from private and venal prerogatives, and that the importance of inherited privileges was, to some degree at least, minimized in the application of the law. Accordingly, the law was underpinned across society by principles with increasingly universal validity and inner consistency.[18] Through such reforms, formal law had clearly begun to penetrate deeply into society, such that a rising quantity of social agents were implicated, with increasing immediacy, *in the same system of law*, and societal reliance on the law to structure everyday interactions across diffuse regions increased. Through this process, for the first time, the law began to appear as a system of mass inclusion, cutting through and imposing new norms on the patchwork normative structures of pre-modern society, and separating law from authority centred in custom or private power. In this process, further, the legal system began to assume the shape of a system of publicly founded authority, underscored by inchoate principles of public law, and able to project higher-order norms to underpin its status as a comprehensive system of inclusion.[19] Central to this was the ongoing transformation of the figure of law's addressee from the variably entitled subject of feudal law (based in power relations attached to land) into the equal,

15 One abidingly important work traces the essential differentiation of the public domain to the need to create a constitution for judicial institutions (Sohm 1871: xiv).

16 In England, the principle that law should be approved by the King-in-Parliament became doctrine in the Reformation. In Sweden, representative assemblies, present in the *riksdag*, played an important role in paving the way for the Reformation and for ensuring its retroactive approval. In Denmark in 1536, Christian III called a meeting of the *Rigsdag* to endorse the Reformation.

17 During the French Revolution, Saint-Just stated that the 'legislative body is like the unmoving light that distinguishes the form of all things … It is the essence of liberty' (Saint-Just 1791: 102).

18 On France see Carré (1912); Echeverria (1985); Stone (1986). This process of political concentration through uniform allocation of legal status, shaped by concepts of natural right, was discernible in the first general law reform of eighteenth-century Prussia: the *Codex Fridericianus*, introduced between 1747 and 1749. This process of early public law reform ultimately gave rise to a comprehensive legal code for Prussia, the *Allgemeines Landrecht* (ALR) of 1794. On similar processes in Savoy see Quazza (1957).

19 See note 10 above.

individual, rights-holding citizen (Brakensiek 1991: 1).[20] In the pre-revolutionary period, to be sure, the law did not become fully centred around individual rights,[21] and venal or late-feudal patterns of recognition still persisted in national legal systems (Koselleck 1977: 56–58). But the construct of the individual as rights holder acquired increasing importance as the focus of law's societal expansion and differentiated legitimacy.[22]

The intensification of the systemic autonomy and positive authority of the law in the French Revolution was also tied to the profound solidification of the vocabulary of legal rights.[23] During the revolutionary period, rights became orienting legal forms, both in constitutional law and in private law. Through this process, legal and political institutions observed persons or citizens subject to their functions as possessing certain inviolable subjective entitlements, such that, where these liberties were legally protected, persons in society obtained implicit internal recognition within the laws by which they were bound. On this premise, social agents entered a direct relation to more formally centralized legal and political institutions, becoming, comprehensively, *subjects of the law*, internally implicated in the construction of law's legitimacy. The emergence of formal legal subjectivity (*Rechtssubjektivität*) at this time dramatically reduced the prominence of other patterns of subjectitude (*Untertänigkeit*), and it ensured that all persons were equally integrated in the law as a system of inclusion (see Schrimpf 1979a: 343). In each respect, the orientation of law around rights had a dialectical impact on society. As mentioned, the construction of formal rights served to cement the organizational structure of different societal sectors. However, it also hardened the position of central legal/political institutions. The fact that states created through the revolutionary period recognized persons in different parts of society as holders of rights provided a powerfully legitimating public-law foundation for both the polity and the law.[24] The construction of rights played a key role in bringing to an end the system of indirect rule, which defined the diffuse and local personalized legal systems of pre-modern Europe (see Tammen 2017: 346).[25] It replaced this with a legal order linked to equal citizenship, in which state institutions acquired heightened obligatory power in society by allocating rights to all social agents, so that, in distributing rights, they placed citizens in an immediate communicative relation to their agencies, and their ability to create, legitimate and circulate law increased dramatically.

This state-building function of rights was most palpably articulated in eighteenth-century societies that established early techniques for political representation. In revolutionary France, the attribution of rights to single persons acted to eradicate the legal power of corporations, to eliminate private monopoly of political office, and to establish the state as the primary public body in society, possessing a distinct authority to create law.[26] This was closely correlated with the elaboration of a free-standing corpus of administrative norms, which, located outside the regular courts, was designed to consolidate a strong, internally divided order of state.[27] However, even in societies of the revolutionary era in which proto-democratic representation was not consolidated, the abstraction of formal rights was promoted by actors in the state in order to separate the state from the late-feudal monopolization of office by aristocrats, and to consolidate the state as an apersonal actor with distinct legitimacy in creating law (Schrimpf 1979a: 87). In Prussia and other German states, rights in private law were consolidated through the reform period after 1806. However, such processes were also mirrored in the early development of administrative law. It is often presupposed that administrative law in the German-speaking parts of Europe was not strongly developed in the nineteenth century. This opinion is usually attributable to the fact that separate administrative courts were

20 One analysis sees this process as a paradigmatic part of the general transformation of agrarian society in early modern Europe (Schissler 1978: 37).

21 Aristocratic privilege persisted in France until the Revolution. In the Prussian ALR, persons were defined as 'free citizens of the state' except in 'except in relation to the estate to which they are bound' (ALR II 7 147). On the persistence of informal courts after the revolutionary period see Wienfort (2001).

22 In writing the ALR, Svarez insisted that the codification of national law had to be shaped by principles of natural right and personal autonomy (Svarez 2000: 69). For excellent analysis of the role of natural law in the thought of Svarez and in the codification processes in Prussia generally see Breuer (1983: 199–200). One account has even stated that the 'doctrines of German natural law' were the 'foundation for the Prussian state' (Sieg 2003: 224).

23 All major revolutionary processes in the eighteenth century either set out declarations of constitutional rights or informally established rights in their legal systems. The early years of the French Revolution saw a number of attempts to codify civil law.

24 See note 13 above.

25 On the general role of indirect rule in early modern Europe see Tilly (2004: 165).

26 This was the express function of *La loi Le Chapelier* (1791).

27 After 1800, administrative complaints could be referred to the *conseils de préfecture*. The creation of separate bodies for review of administrative acts reflected an immovable ideological commitment to the separation of powers, resulting from revolutionary hostility to the venal *parlements* of the *ancien régime*. This is explained in Laferrière (1896: 189, 477).

not commonplace in German states until the 1870s (see Kohl 1991: 26). This opinion of course has a superficial validity. Yet, the absence of free-standing administrative courts does not mean that there was no administrative law in German regions in the early nineteenth century. On the contrary, even in the more autocratic among the German states standardization of administrative procedure was actively promoted (Cancik 2007: 226), and protection was provided for selected individual rights in administrative law, albeit usually under the jurisdiction of the ordinary courts. Indicatively, some (variable) protection for individual rights in taxation and police law was established in Prussia in different regulations and edicts, perhaps most notably in 1808 (see Loening 1914: 160; Poppitz 1943: 185; Schrimpf 1979b: 66).[28] One historian argues, rather optimistically, that the protection afforded by these regulations was 'very encompassing' (Bornhak 1889: 459). In Saxony, such protection was established, in alternative form, in 1835 (see Sellmann 1963: 65). In different societies, the formalization of rights meant that the reproducibility of law increased markedly, and it became far easier for central institutions to apply laws, adapted to individual rights holders, across the expanded environments that increasingly differentiated societies now contained. One analysis has explained, in very illuminating fashion, that early administrative regulations in Prussia led to increasing publicization of laws and to more effective communication between state agencies and private persons, which meant that laws were more widely recognized across society, thus promoting societal integration on a national scale (Cancik 2007: 204).

In sum, the rise of early representative procedures in European society in the eighteenth century was attached to a process of *normative integration*, whose origins can be found well before the period of early democracy. In this process, the political order attached its functions to the idea of the citizen, both in private and in public law, as an *individual rights holder* or as a *legal subject (Rechtssubjekt)*, close in form to rights holders in other parts of society. The citizen as legal subject emerged as a key form for the polity, creating a public basis to uphold the expansion of the law and to define the source of law's differentiated legitimacy. In this dimension, vitally, the polity was not strictly differentiated from the legal system, and the innermost construction to which the polity attached its legitimacy (the citizen qua rights holder) was established within the law, to legitimate the positive production of law. To this degree, the modern political system first evolved *within the legal system*, and it was brought into reality by demands directed towards the legal system, shaped by deep-lying processes of legal differentiation and positivization. The early democratization of the state, in short, formed a core moment in the rising differentiation of the law, and the norms expressed through early democracy acted to accelerate the positive legitimation of the law as a differentiated system.

Two principles of democracy 2: Participatory Integration

On the other hand, the early expression of democratic principles in the revolutionary era contributed to the extension of law's integrational force in a rather different fashion. The rise of democratic procedures helped to secure the authority of law because democracy began to take shape as a model of governance, in which social actors were incorporated in decision-making processes through the active exercise of political – i. e. electoral – rights. This aspect of democracy was reflected in the classical claim in republican theory, exemplified first by Rousseau and later by Kant, that a democracy is a polity in which law is legitimated by the fact that social actors (citizens) affected by laws recognize laws, in some respects, as *their own laws*, and they observe themselves as implicated, as active citizens, in the creation of law.[29]

In this respect, democracy emerged as a system in which legitimacy for law was associated with *participatory integration*, which increasingly focused on persons in the collective dimensions of their lives, placing them in associational contexts such as representative assemblies, movements, electoral groups, political clubs and early political parties, and other common citizenship affiliations. In this respect again, democracy was brought into life, in essence, by the rising differentiation of the legal system, and it established a design for the polity adapted to the advanced demand for positive authority in the law. Through the nineteenth century, the figure of the participatory citizen became more and more important as central legal and political institutions were required to produce more law, reaching more profoundly and diffusely into society. The consensual dimension of legal production was constantly intensified as law's extension itself widened, and law relied more and more on emphatically public principles of legitimacy to support its thick-

28 Central to this was the *Verordnung wegen verbesserter Einrichtung der Provinzial-, Polizei- und Finanz-Behörden* (26.12.1808). This decree allowed ordinary courts to provide restricted legal protection in some administrative functions.

29 For Kant, a citizen is not obliged to show obedience to a law to which he or she has not given approval (Kant 1977a: 432–33).

ening circulation through society.[30] Distinctive in this legal process, however, was the fact that, around 1789, the law found in the revolutionary *citoyen*, participating freely and actively in the formation of laws, a symbolically *political* construct to articulate the origin of its authority and legitimacy. Through this construct, the legal system became dependent on patterns of subject construction not internal to law, and it attached its integrational functions to an idea of the citizen as *political participant* that stood at the margins of the law, which transmitted trans-sectoral interests towards political institutions, and which assumed the power to legitimate the law on collectively constructed premises.

This participatory aspect of democracy also needs to be positioned against a distinctive historical background.

In the decades prior to the revolutionary period, the legal system was not the only functional domain in society which had experienced deep intensification and positive expansion in European societies. The same was true, in many settings, of the military system. The years between 1648 and 1789 were marked in much of Europe by extensive endeavours to modernize the constitutional order of the army (*Heeresverfassung*), and, as in the law, these endeavours were intended to organize locate military activities on foundations distinct from the original connection between military force and land. After 1648, the rising deployment of standing armies meant that earlier, more temporary mercenary armies were dissolved, and the traditional authority of the landed noble estates in approving military expenditure was reduced (Vierhaus 1990: 117). This meant that the historical linkage of war to landed power, originally derived from the feudal levy, was finally severed. As a result, like the legal order, the realm of military administration assumed the form of a permanent and overarching system of formalized mass inclusion, bound by early norms of public law,[31] penetrating far beyond the functions of medieval military organizations (Büsch 1962: 71).[32] In many societies, the military system sat alongside the legal system as a system of mass inclusion, possessing a parallel codified normative order, a parallel contractual base, and a parallel set of tribunals, even guaranteeing a complex array of welfare provisions for those integrated into it.[33] In some cases, the military apparatus gave greater protection to principles of equality than the simultaneously emerging system of legal inclusion, and it clearly separated social actors from the localized and traditional structures of authority in which they were otherwise entangled (Hülle 1971: 75).[34] Of course, the military system of authority was not fully distinct from traditional hierarchies, especially as members of the nobility often sought to reinforce precarious familial security through the pursuit of ranked military office (Büsch 1962: 93; Hofmann 1962: 116). However, even where traditional power reproduced itself through assumption of office in the army, the military system weakened traditional sources of familial authority, it subject noble ambition to formal control, and it formed a function system quite distinct from traditional aristocratic prerogatives (Göse 2001: 136). The army generally formed the domain in which persons were most immediately and directly connected to the emergent central state, outside the intermediary local authority of estates, towns and guilds (see Winter 2005: 202–06). The army thus created a core sphere of proto-citizenship, piercing through the societal obstructions to direct rule and national citizenship well before 1789 (von Schroetter 1892: 29; Koselleck 1977: 123).

In view of this background, the revolutionary events of the late eighteenth century did not only place the legal system on increasingly autonomous foundations. All aspects of social transformation at this time had strong legal implications, and the legitimational forms of citizenship that emerged in the eighteenth century were rooted in an underlying process of an essentially legal nature, reflecting the law's impetus towards maximum societal autonomy and expansion. However, this transformation of the law occurred as one part of a broader process of transformation, in which both the law and the military evolved into clearly public systems of inclusion, based in early public-legal principles of legitimacy. In

30 Tellingly, it was argued by one of the leading theorists of criminal law in the nineteenth century that 'the constitutional participation' of representative bodies in drafting penal codes made them acceptable amongst the people (Mittermaier 1841: 208). An important case study in this regard is Jacksonian America, a period marked by rapid national integration and rapid democratization (for white citizens) (see Sellers 1991).

31 On the public-law essence of the modern military system see Pröve (1995: 24). Like my account, Pröve argues that the power of the early modern ruler was based on three pillars – interventions in the legal order, military development, and fiscal control. On the less successful attempts in France to place the military system on public foundations, and especially to abolish noble entitlements to military rank, see Opitz-Belakhal (1994: 92, 106).

32 One classical account states that in the early modern governance order the military system involved 'the introduction of a completely alien element in the daily life of feudal administrative regions, village communes and towns' (Gneist 1966[1879]): 120).

33 By the eighteenth century, professional soldiers expected services including material provision, hospital care, invalidity treatment, even pensions. On the early-modern army as a fully evolved 'sub-system' of society see Pröve (2016: 253).

34 On earlier origins of this see Möller (1976: 60).

fact, the intensification of the military system in the eighteenth century meant that a third societal domain was in the process of assuming autonomous form and acquiring autonomous legal premises – namely, the system of fiscal extraction (*Finanzverfassung*). Overall, the polity of later early modernity was constructed through a massive transformation of the privatistic societal constitution of feudalism into a three-pillared system of (albeit still rudimentary) public order, in which agents in society were ordered simultaneously in a judicial constitution, a military constitution, and a fiscal constitution. Through these processes, other historical aspects of the societal constitution – for example, the constitution of religion, the press, the arts, the sciences, or the economy – were gradually removed, in part, from political control and formalized around separate norms and separate sets of integrational rights. Law, war and tax, however, became the essential objects of modern public order, and the public organization of these spheres underwent deepened constitutionalization in the late eighteenth century.

Each of the different revolutions in the eighteenth and early nineteenth century, first, contained an endeavour to formalize the law itself, using principles of citizenship to sustain law's expansive authority. At the same time, each revolution contained an endeavour to impose formal legal norms on the system of fiscal extraction. Most societies emerged from the revolutionary period with a fiscal system in which privileges and personal variations were greatly diminished and status-determined tax exemptions were reduced. This was usually conducted through the recognition that payment of taxes was the duty of citizens, that – in principle – no citizens were exempt from this duty on grounds of privilege, and that citizens might have some powers of oversight over legislation regarding taxation.[35] In this respect, tax was incorporated, relatively seamlessly, in the system of public-legal integration. At the same time, the military system underwent a parallel restructuring, as military activities were transposed, in part, onto public-legal footing, and the system of military integration was further separated from private control. This was an especially acute necessity as most early democratic revolutions were caused, at least partly, by the fact that the fiscal constitution of the previous regime had collapsed owing to pressures caused by rising military spending, meaning that the military constitution required rapid reform (Köllner 1982: 37). Such reform was accomplished, in most cases, through the creation of citizens' armies, in which the debilitating cost of standing armies was reduced. In many societies, mass recruitment and public conscription replaced the expensive contractual systems of military recruitment used in the *ancien régime*. The concept of the citizen (*citoyen*) assumed vital importance in each of these constitutional domains, and it provided the basis for the production of law, for generating military force, and – because of the link between war and tax – for covering fiscal requirements.

What is notable in this regard is that, owing to the tripolar construction of public order in the late eighteenth century, the citizen, around which law's positive authority was increasingly centred, acquired a categorically military form. In early democracies, the citizen emerged as a concept that acted both to produce legitimacy for law and to facilitate recruitment of military manpower without excessive monetary outlay, thus bringing two distinct systems into close alignment. In many cases of early democratic institution building, the citizen was incorporated in the army and in the legal system at the same time and in the same capacity, and the right to claim legal protection and the democratic right to participate in the legitimation of law were often dependent on citizenship rights acquired through service in the army.[36] The link between the citizen of law and the citizen of war was clear enough in many theories of legitimate law in the eighteenth century. Many such theories stated that the citizen, creating legitimacy for law through acts of collective self-determination, was in essence a military agent, whose autonomy was correlated with military obligations. Kant of course assumed that Republican constitutionalism would banish war from national society, and he viewed the *Staatsbürger* as an irreducibly legal form (Kant 1977b).[37] But other Republicans took a different view.[38] The figure of the militarized citizen then became the central element in the social order of revolutionary democracy.[39] On one hand, military units of the revolutionary period enacted advanced experiments in democracy, and revolutionary armies often reached

35 In France, a fiscal constitution, recognizable as part of a modern corpus of administrative law, was created by decree in September 1790 (Duvergier 1834: 359).

36 See excellent analysis in Stein (1872: 1).

37 However, note that Kant also saw military volunteers in revolutionary France as soldiers of law, motivated to take up arms by pure thought of the 'the law of the people to which they belonged' (1976c: 359).

38 See reflections in Rousseau (1782); Mably (1793: 199). For comment see Gembruch (1990: 240).

39 In the early months of the French Revolution, Dubois de Crancé proclaimed simply: 'Tout citoyen doit être soldat'. Art 109 of the Jacobin Constitution of 1793 declared: 'Tous les Français sont soldats; ils sont tous exercés au maniement des armes.' Formal conscription was introduced in 1798.

greater levels of democratic equality than national societies as a whole (Bertaud 1979: 48; Hippler 2006). On the other hand, the *soldat-citoyen* became a prominent symbolic element in emergent democratic legal systems, in which the self-sacrificing virtuous citizen, morally obligated to die for the revolutionary Republic, was imagined as the supreme reference for law's authority.[40] In the French Revolution, in particular, leading revolutionaries viewed democratic citizenship and military citizenship as essentially identical (see Palmer 1970: 277; Kruse 2003: 25). In the Jacobin period, the formal legal aspect of citizenship was partly eradicated, and military mobilization became a dominant emphasis of citizenship construction. A similar elision of military duty and citizenship was expressed at the centre of the American Revolution (see Cress 1982: 51). Parallel principles were formulated in societies that did not undergo full revolution, but instead witnessed far-reaching reform.[41]

To be sure, the attachment of citizenship to military service was not wholly peculiar to the revolutionary period in the eighteenth century. This had been a common feature of some societies before the revolutionary era, as clearly described by Machiavelli. In feudal societies, social integration and participation in law making were closely connected to military engagement (see Brunner 1942: 119). Moreover, the bearing of arms in feudal societies was often seen as the expression of a public-legal right (see Fehr 1914: 112). Yet, in the revolutionary period, military integration and legal integration became inextricably fused, and military force acquired acutely intensified relevance for underlying processes of legal formation. The legitimational source of legal authority, expressed in the figure of the democratic citizen, was strictly attached to the system of military inclusion and mobilization, and the essential source of the law's autonomy, generated through acts of citizenship, was consolidated through military obligations.[42] This meant that the central and underpinning determinant of modern societal form – the construction of law's legitimacy as a positive system – became an object of violent contest. In some societies, such as the early American Republic and the German states before 1815, the violence attached to citizenship was reflected in the idea of citizenship as liberation from an occupying army. The idea of citizenship as liberation then became central to dominant patterns of citizenship formation in the twentieth century. In revolutionary France, however, the war caused by revolution, giving birth to the *soldat-citoyen*, was both a regular external war between France and other states and a civil war at the same time (see Soboul 1959: 67). This naturally meant that citizenship was tied, not only to military duties, but to military duties against (potential) co-citizens, so that the basic condition of citizenship became doubly militarized, defined against external and internal enemies.[43] Robespierre made this point quite clear in 1792, stating '*domptons nos ennemis intérieurs, et marchons ensuite contre nos ennemis étrangers, si alors il en existe encore*' (1954: 47).

Overall, the basic definition of the law of modern national societies took shape as early democracies were required to integrate members of society, not only as rights-holding individuals, but, to an at least equal degree, as military agents, capable of providing military support for the polities that replaced earlier modes of territorial statehood. At the core of the modern state, in consequence, we find two principles of citizenship, and two principles of legitimacy for law. One principle was based in integration through rights, expressed in the citizen as subject of law, with legally protected rights (*Rechtssubjekt*). One principle was based in integration through participation, originating in the idea of the citizen as combatant (*soldat-citoyen*). These principles were expressed, respectively, in two sets of rights, in protective legal rights and in participatory political rights. These principles emanated from constitutional domains that had been

40 During the Revolution, Billaud-Vaurenne described the experience of death in defence of the Republic as a 'recall to equality', distilling an essentially formative – elective/collective – aspect of Republican existence (Billaud-Varenne 1794: 31).

41 This is expressed in Hardenberg's famous 'Rigaer Denkschrift' (1931[1807]): 331). 1813 witnessed the establishment of the *Landwehr* and the *Landsturm* in Prussia, in which citizenship and mandatory military engagement were closely connected. Obligatory general military service was introduced in 1814. One analysis claims that the transformation of the subject (*Untertan*) into the citizen (*Staatsbürger*) was the 'basis of the reform' conducted in Prussia after 1806 (Stübig 1971: 193). See parallel discussion of the militarization of social life at this time in Russia in Beyrau (1984: 439). On the immediate connection between the rise of mass politics and the rise of the mass army in Russia see Sanborn (2003: 5, 62).

42 See the account of revolution, war and nation as parts of a 'triadic historiographic pattern of explanation' in Planert & Frie (2016: 1). See the claim that conscription and mass voting are deeply connected in Crépin (1918: 93); Leonhard (2004: 85). Note the broad sociological argument that universal suffrage and military conscription are elements of the 'propédeutique de la citoyenneté' that underpins the emergence of modern society in Gresle (1996: 107). To reinforce the legitimational reliance of modern law on military mobilization, Gresle also identifies a link in France between conscription and secularization (1996: 108).

43 One excellent analysis describes the period 1789–1815 quite generally as defined, simultaneously, by the 'universalization of the paradigm of civil war and the ideologization of war in the name of the nation' (Leonhard 2008: 419).

kept partly separate in the crude order of public law that defined pre-revolutionary states: the judicial constitution (*Gerichtsverfassung*) and the military constitution (*Heeresverfassung*).[44] Naturally, these two elements of the early modern state had never been completely distinct from one another. The noble estates in early modern governance regimes had always utilized periods of warfare to contest the terms of fiscal contribution and to strengthen their own legal protection. However, the essential structure of the early modern political order, around which the modern political system had first begun to assume differentiated form, relied on the fact that the law and the army were functionally distinct. The establishment of armies funded directly by regents, and not reliant on the willingness of estates to provide revenue, formed the constitutional crux of the early modern state in much of Europe (see Willems 1984: 26), and it directly limited the extent to which aristocratic estates could influence legislation by declaring support (or otherwise) for military ventures (von Schroetter 1892: 87; Leonhard 2008: 77). The underlying separation of law from land, which stood at the essential core of early modern social structure, necessarily involved the separation of law from war, as capacity for waging war was historically rooted in land: *the early positivization of law also entailed the demilitarization of law*. In some ways, in fact, the separation of law and war in the early modern state had played a central role in the original construction of subjective rights as principles of legitimacy for law. Legal codes that promoted rights as sources of validity were first devised because they helped to secure positive legitimacy for formally generalized laws, in the creation of which the estates had *not* been required to participate, and whose authority was necessarily stored within the law itself.[45] In revolutionary Europe, however, the figure of the *soldat-citoyen* partly reversed this deep-lying secular process, and it brought these two constitutional domains into congruence. Principles of the military constitution came close to determining principles for all aspects of government, even at times absorbing the judicial constitution. In the early democratic revolutions, the legal system was established on the principle that agreements between (at least potentially) militarized social agents formed the essential premise of law's authority, and the mass inclusion of militarized citizens, and of the conflicts between them, formed an essential premise for law's legitimacy. In this, two structural processes at the core of modern society, the separation of law from land and the separation of war from land, coalesced. Prior to the revolutionary era, the legal system had been progressively separated from land through the construction of citizens as holders of rights. Prior to the revolutionary era, the military system had been separated from land through the construction of the soldier as the subject of an autonomous apparatus, constitutionally distinct from other parts of society (Papke 1979: 207). In the revolutionary era however, the differentiation of both law and war was attached to the promotion of mobilized citizenship. These two processes joined together in the revolution to produce the foundations of the early democratic state. The source of law's legitimacy was placed on military footing.

The fact that the legitimacy of law became tied to military acts lies at the core of the modern democratic political system. From the outset, the modern political system evolved as a system oriented towards the production and legitimation of law and the promotion of social integration on foundations reflecting immediate (democratic) consensus between state and citizens.[46] In this form, the political system was required to extract legitimacy for its functions from the citizen in a heightened state of mobilization, in which both state and citizen were bound by deep reciprocal expectations. Underlying this construction of the political system was a process of systemic hybridization, in which the differentiation of the legal system, which had previously pervasively shaped societal form, gave rise to a secondary system, or a sub-differentiated part of the legal system, in which the legitimacy of law was constructed through reference to a militarized pattern of subjectivization. *This militarized sub-differentiation of the legal system produced the system that we now identify as the system of modern politics*. It is commonly argued in sociological theory that the rise of the political system is a dominant feature in modern society. Even theorists who relativize the standing of politics argue that the differentiation of politics is a distinct formative trajectory in modern society (Luhmann 1984). Viewed at the level of functional abstraction, however, the essential formation of the modern political system occurred, in effect, not as a separate process of differentiation, but as a contingent secondary occurrence in the course of law's positivization and societal expansion, in which the legal system finally attributed aspects of its own legitimacy to military mobilization and subject formation. As intimated above,

44 Here I dispute Hintze's claim that every 'every constitution of state is originally a military constitution' (1962: 53).

45 In most societies, the rise of codified legal systems, based in formal rights, coincided with the decline of estate-based legal systems, based in participatory rights. In fact, legal codification was usually intended to expedite the weakening of the estates (Brakensiek 1991: 73).

46 One historian argues simply that 'politics in the modern sense of the word did not exist' in pre-1789 France (Sonenscher 1989: 46).

the differentiation of the political system was initially a secondary phenomenon, attached closely to the differentiation of the legal system. After 1789, however, the differentiation of the modern political system evolved through a structural coupling between the legal system and the military system.[47] From the revolutionary period onwards, patterns of subject formation specific to military mobilization acquired a dominant role in the construction and legitimation of law.

This places a deep and intractable paradox at the core of the modern political system. At one level, the modern political system evolved, within the law, as a system for the production and legitimation of law, and for the promotion, on legal premises, of social integration. Yet, as outlined below, the political system eventually developed forms of legitimation and subject formation that impeded its ability to perform its primary integrational functions. Indeed, the patterns of subjectivization that emerged in the formation of the democratic political system ultimately stood in the way of the effective realization of core political functions, especially in the legitimation of law as a system of integration. This antinomy was of course clearly recognized in early legal and political sociology, and consciousness of the contradictions between the socio-integrational functions of the democratic political system and the normative patterns of subject formation that supported it was evident in the works of most classical sociologists. The claim that the modern political system has the primary function that it promotes integration through commonly acceded laws is common throughout the classical sociological canon.[48] However, the claim that functions of political integration rely on quasi-militarized processes of legitimization was central to this same canon, and to theories that have grown out of it.[49] Underlying the disparities between these constructions of the political system is the fact the modern political system has emerged through a fusion of law and war, and the functional promotion of generalized legal integration is attached to subjects that are ill-proportioned to the performance of this function. On this basis, the common model of democratic legitimacy, around which the modern political system has been built, may be viewed as misconstructed. In fact, the projection of legitimacy for democratic law as the outcome of acts of mobilized subjects is focused on a selective image of democracy, extracted from the militarized sub-differentiation of the legal system, into politics. In most settings, as analysed below, this projection failed to create a premise for democratic legal integration.

3 Paradoxes of democratic integration

Analysis of the political system of modern society as the result of the militarized sub-differentiation of the legal system makes it possible to provide distinctive historical-sociological explanations of the development of modern democracy. The claim that, owing to the distinctive features of early democracy, the modern political system is centred on a form of legitimational subjectivity (*soldat-citoyen*) that impedes its essential functions allows us to capture some core problems of contemporary democracy. Above all, analysis of such pathologies in national democracy enables us to elucidate the trajectories through which democracy has actually developed and acquired enduring form, and to explain the distinctive global foundations of democracy in contemporary society. Such analysis opens a vital perspective on the core political questions of global society.

No national subjects

We can observe first that, as a general rule, national societies, concentrated around actual mobilized political subjects, did not create democracies, they did not perform effective processes of democratic integration and legitimation, and they did not establish generalized systems of legal inclusion. Democracy first began to take shape as a system designed to create legitimacy for law by integrating all persons, as citizens, in the production and legitimation of law. However, the basic normative function of democracy in devising generalized principles of legitimacy to support the law was not realized in societal environments dominated by national constructions of citizenship.

This failure of democratic formation in national societies occurred for a number of reasons. Generally speaking,

47 An alternative differentiation-theoretical account of the position of the army in modern society argues that in the transition to modernity the military became a 'sub-system of the political system' (Kuchler 2013: 58). This contrasts with my analysis of the political systems as the manifestation of a coupling between law and the army.

48 This point was clearly intuited in classical legal sociology. This is seen in Durkheim's theory of the democratic state as the result of individualized, organic patterns of contractual interaction, attached to the exercise of subjective rights by individual agents (Durkheim 1950: 93). This is seen in Weber's argument that democratic institution building originates in the formalization of law (Weber 1921/22: 387, 571). See for later analogous views Marshall (1992[1950]); Parsons (1965); Luhmann (1965).

49 Weber of course claimed that societal integration is determined by 'conflict' for resources of political domination (Weber 1921/22: 852).

however, most national societies that embarked on a path toward democratization using solely national resources of integration and legitimation arrived at one of two results: (1) *intermittent democracy*, in which short-lived periods of full political integration stimulated a brutal backlash amongst elites, who then used democratic instruments to assume control, of the means of social coercion;[50] (2) *partial democracy*, in which full democratic inclusion remained a privilege for designated social groups, so that some groups were excluded on grounds of socio-economic class position, ethnicity or gender. In both categories, the formation of democratic institutions came to a halt some way short of comprehensive democratic integration and legitimation.[51] In national contexts, democratic citizenship only formed a partial, unstable foundation for the law, and very few societies were able to extract a generalized political-legitimational form from the comprehensive integration of citizens.

Particularly important in this respect is the fact that full democratic integration and legitimation was often blocked by dimensions of national political systems that were connected with the military aspect of political citizenship. Central to the historical incompleteness of national democracy, typically, was the recurrent incapacity of the political system to translate militarized societal conflicts into an essentially public constitutional order, able to provide solid legitimacy for the law. National political systems have widely proved unable to metabolize the conflicts to which their legitimacy has been attached. In consequence, malfunctions in the political system have repeatedly spilled over to contaminate the production of law, such that the law itself has often forfeited its ideal quality as a comprehensive system of integration.

To explain this, first, it is important to note that modern democracy, at least in its origins, is not simply separable from civil war. The democratic political system has been integrally shaped by militarization, so that the diffuse societalization of military experience appears as a dominant characteristic of modern political order (see Ritter 1965: 70; Sikora 2008: 146). In particular, most early democracies had features of military dictatorships,[52] and basic practices of citizenship were not clearly separate from military activities.[53] It has been widely observed that democratic sovereignty is often marked by 'militarization of the state', so that the division between democracy and dictatorship is uncertain (Schmitt 1921: 183). Once established, most democracies have internalized modes of conflict first established during civil war or revolution. In particular, the ambiguous relation between regular war and civil war in the revolutionary era of the eighteenth century left a profound imprint on subsequent political thinking and practice. Throughout the nineteenth century, reactionary elites increasingly construed political opponents as military adversaries, against which the use of military power became acceptable. The deployment of Prussian troops in Frankfurt in 1849 and the foundation of the Third Republic in France after the mass annihilation of the political left are perhaps the most important examples of this. Across Europe, however, the linkage between reactionary parties and military associations became a conventional part of nineteenth-century politics, and military intervention in politics became the norm (see Trox 1990: 157, 283; Gresle 2003: 788). Moreover, the early consolidation of bourgeois political affiliations was often linked to demands for military participation (Pröve 1995: 137, 223, 479), in civil or voluntary units, and to attempts to subordinate the army to constitutional rules.[54] Organized class formation amongst the urban bourgeoisie was rarely free of military character. Simultaneously, radical social theorists, notably Karl Marx, insisted that only the militarized, deeply integrational aspect of citizenship could lead to real democracy (Marx 1956). In envisioning democracy as the triumph of the organized vanguard of the industrial reserve army, Marxists evidently projected citizenship as a form of civil war. In general, the period in which democratic movements first took organizational shape was defined by the delimiting of war against civilian life and by a profound internalization of military conflict in the structures and diction of public order.

50 This category includes European states between 1918 and 1940, most of which momentarily became (partial) democracies and then became authoritarian. It also includes many post-colonial states in Africa. Most Latin American states fit this model until the 1980/90s.

51 This includes most states at some point in their trajectory, as generalized political inclusion only became widespread after 1945. As recent paradigms, it includes South Africa until 1991–96 (ethnic exclusion); the USA until 1964/65 (ethnic exclusion); the UK until 1950 (class-determined over-inclusion). Elements of this model are found in Bolivia until 2009 (ethnic exclusion); Colombia until 1991 (ethnic exclusion); Switzerland until the 1970s (gender exclusion).

52 This was the case in both revolutionary France and the revolutionary period in America. Of revolutionary France, one historian states simply: 'La Révolution française n'a été qu'une longue dictature' (Mathiez 1937: 97).

53 One sociologist has generalized the claim that 'postrevolutionary regimes' are likely to be 'garrison states' (Gurr 1988: 57). An alternative account states that most early democracies tended to be 'democratizing in the mass-mobilizing sense', such that democratic participation and military authoritarianism tend to emerge together (Skocpol 1988: 149-5).

54 For an example see Rotteck (1816: 134–35). For comments see Höhn (1938: 28, 32, 39, 119); Pröve (1995: 120).

To explain this, second, we can observe that democratic enfranchisement is normally very closely connected to military control, and it reflects a deepening of political integration which almost invariably has military implications. Through the nineteenth century, the consolidation of democratic citizenship and electoral participation was widely accompanied by the introduction of mass military conscription and by the general construction of political interactions on a military template. Often, of course, national democratic citizenship has routinely been expanded in periods of actual military conflict between national political institutions and external adversaries, in which war-time homogenization levelled out private societal distinctions and promoted demands for increased citizenship rights. This is a general phenomenon, and it began in the revolutionary era of the eighteenth century. However, this phenomenon acquired particular prominence in World War I, in which the link between democratic formation, social integration and military mobilization found its most intense expression.[55] Between 1914 and 1918, democratic citizenship became a broadly established phenomenon, so that processes first articulated around 1789 approached realization. At this time, the correlation between citizenship rights and mass military mobilization was profoundly intensified.[56] In Germany, indicatively, World War I was specifically observed, by some liberal thinkers, as an opportunity for the full *politicization* of the German people, and for their emergence, for the first time, as a society of national citizens, subject immediately to a national state (Preuß 1915: 186–87). In cases where the expansion of citizenship has occurred in wartime, political institutions have been required to construct legitimacy by incorporating citizens in a state of high (often armed) volatility, demanding rights that were intensified by wartime sacrifices. In such contexts, commonly, the strict distinction between war and civil war has been at least partly eroded, and democratization occurred in circumstances in which external militarization was partly reproduced in internal militarization.[57] In extreme cases, of course, democratic citizenship was directly created by civil war, and this often resulted in the continued contestation of citizenship rights *post bellum*, effectively through the protraction of civil war at a reduced level of intensity.[58]

More generally, third, most national societies struggled to establish everyday organizational forms to channel expressions of political citizenship. Persistently, for example, political parties emerged as organs of democratic citizenship designed to aggregate conflictual interests in society in a national system of representation (see

55 One analysis sees 1914 as the 'result of a process which, since 1789, had lasted about 120 years', in which a deep 'approximation between state and society' had been realized (Ingenlath 1998: 16)

56 Demands for expanded enfranchisement can be identified, for instance, in the USA after 1865, and again after 1945. But this is best exemplified by World War I. In most of Europe, World War I promoted a profound and radically revolutionary experience of nation building, resulting in intensified regional integration of population groups within nation states and deep societal levelling. Regional integration was effected by the fact that in the course of the war military conscription brought soldiers from different regions into close proximity. In the earlier part of the war, recruitment in most belligerent states was still localized, but this regional focus was reduced through the war. Relative societal homogenization was effected through the following factors: mobilization and conscription caused increased contact between social classes; all classes were connected by hostility to a common enemy; increased taxation led to growing engagement of state officials in social spheres traditionally protected by privilege; increased socio-political inclusion of trade unions, increased enfranchisement of working-class voters, and growing political centrality of Socialist parties became pronounced; increased integration of women in regular work patterns became commonplace; men in different social classes experienced broadly equal exposure to violent death; in many cases, about shortages led to increased inclusion of ethnic minorities in public activities; the aristocracy lost land and the importance of agriculture in national economies declined. On the integrational outcomes of these processes in different societies see Kocka (1973); Leed (1979: 45); Chambers (1987: 6); Cannadine (1990: 455); Llanque (2000: 42); Slotkin 2005 (153–55); Gregory (2008: 205); Capozzola (2010: 34). Together, these processes created the strongest impetus for the general renegotiation of national citizenship, so that in and after 1918 most belligerent states evolved a political system with an – at least momentarily – expanded franchise. The UK is very indicative in this regard. Before the war the UK did not have compulsory military service, and positions of military command were closely aligned to social standing. Necessities of military recruitment changed this reality, and military experience heightened class proximity (see Fletcher 2013: 20). One classical analysis of working-class experience in England stated, more broadly, that the 'first world war cracked the form of English lower-class life and began an erosion of its socio-economic layers' (Roberts 1971: 186). An important sociological analysis of the French military between 1914 and 1918 explains that, uniquely amongst British, German, Australian, American and Canadian soldiers on the Western front, French soldiers were located in France, in their own political environment, which meant that military and political realities were closely fused and new configurations of the *soldat-citoyen* were created (Loez 2012: 77).

57 After World War I, for instance, most societies in Europe and many societies beyond Europe developed democratic features amidst populations that were not fully demilitarized. This was reflected in the fact that most interwar societies experienced highly volatile interclass conflicts, usually culminating in military violence against organized labour (see Halperin 2004: 193–96). However, similar examples can be found in the formation of post-colonial states, in the 1950s and 1960s, some of which underwent democratization while still militarized against colonial powers.

58 In the USA, the civil war of the 1860s was not fully finished until the 1960s.

Caramani 2004). However, political parties have failed to provide adequate public-legal coordination for society's political impulses. Political parties first originated in the nineteenth century from the same individualistic legal principles as private associations, and their origins in private interest groups never entirely disappeared (see Müller 1965: 269; Erbentraut 2016: 15, 176). Importantly, political parties were often transformed from private associations into specifically political organs in periods of military or revolutionary conflict. In classical national societies, then, political parties often retained a relation to military or paramilitary organizations, and their position within the polity enabled them to radiate private or milieu-specific interests into the political system (see Schmitt 1958: 362–63). In some ways, political parties presented, historically, the same problem as the military. They formed powerful organs of collective mobilization, on which the state's legitimacy was deeply reliant, yet their obligation to public-legal norms remained persistently uncertain. In many classical national societies, consequently, political parties did not construct a generalized order to link the state and the citizen, and they promoted unmanageable societal militarization, repeatedly unsettling the basic structures of the state.[59]

On each of these grounds, the means of political communication used for democratic citizenship formation in national societies habitually burst the parameters created by national legal/political systems. National political systems normally proved incapable of conducting the effective integration of the constituencies around which they projected their legitimacy, and they did not establish principles of citizenship able to reach beyond and integrate particular factions in national society. Above all, the means of political communication did not produce a reliable basis for the legitimation of law. In most national democracies, the source of legitimate law remained an object of contest between rival citizenship groups, and norms expressing sufficient societal convergence to support the law were not established.[60] In most such settings, existing political institutions fractured under the pressure of intensified demands for inclusion, flanked by large-scale social mobilization, and emergent citizenship groups experienced rapid and violent re-exclusion.[61] This is the main reason for the enduring partial or intermittent character of national democracy.

Overall, it is observable that the sources of legitimation underlying the emergence of the modern political system are inherently insecure, and they are not easily translatable into premises for stable and integrational law production. In particular, the *legitimational* construction of the actively mobilized citizen as a source of authority for law has regularly confronted the political system with expectations that it has not been able to manage, and this has led to acute crisis in its *functional* or *integrational* dimension. A conflict between legitimational expectations and functional performance lies at the core of the modern political system.

The primary reason for the historical inability of the national political system to perform core integrational-legitimational processes is that the political system was expected to construct legitimacy for law by integrating national citizens at a historical juncture in which the dominant pattern of collective subject formation appeared, not in the simple construction of national citizenship, but in the formation of social classes. Beneath the rhetoric of nation building and political integration, the processes of differentiation and integration articulated in Europe in the later eighteenth century and the early nineteenth century resulted, most essentially, in the emergence of *classes* as the primary collective actors in society. The transformation of the *Stand* into the *Klasse* can be seen as the most pervasive socio-political outcome of the embedded logics of differentiation, integration and the consolidation of private rights described above.[62] This transformation was the result of the emergence, in the eighteenth century, of the economy as a national system, extending beyond the confines of early-modern manufacturing units. This transformation meant that the emergence of citizens as militarized claimants to mass participation in national legislation coincided with the gradual construction of citizens as agents with militarized class identities and class-determined organizational prerogatives. In consequence, the militarization of citizenship was reflected in conflict between classes, in which hostile economic groups challenged each other for the power to determine the conditions of law's legitimation. Both symbolically and materially, the political expression of class antagonisms was patterned on warfare, and, in most societies, real wars acted both to deepen the claims inherent in citizenship and to intensify the conflict over such claims. In most classical national societies, such conflicts had the simple

59 This is striking in the close link between parties and military politics in interwar Germany, Spain, Italy and other states. On post-1918 paramilitary actions as an extension of war into peace see Gewarth & Horne (2011: 495).

60 See classic analysis in Kirchheimer (1932: 14).

61 This model can be used to explain the widespread collapse of democracy in the years after World War I.

62 On the economic processes underpinning this see Kocka (1990: 3).

eventual outcome that comprehensive political integration was suspended, and economically marginal social groups were effectively excluded from the system of political competition and integration. In classical democratic theory, democracy is imagined as a mode of socio-political organization, in which individual and collective subjects in society exercise citizenship rights, especially the right to create law, as a process of peaceful emancipation. Some sociologists have held closely to the emancipatory beliefs of earlier democratic thinkers, even declaring that 'perfected democracy' is 'the victory of pacifism' (Goldscheid 1914: 24). In most societies, however, national democracy developed, of necessity, not as a public system of peaceful emancipatory integration, but as a private system of selective repression, in which powerful social groups asserted monopoly over law (see Goldstein 1983).

The failure of the national political system to function as an integrational-legitimational system was caused by the fact that it presupposed massive participatory integration, and it forced trans-sectoral conflicts, incubated by the expansive military vocabulary of citizenship, to converge around the state. This often caused trans-sectoral societal crisis. The number of democratizing societies that did not experience civil war caused by political integration is small. However, the integrational weakness of the political system is deeply connected to the relation between politics and law. As discussed, in many respects, the democratic political system first assumed shape as a sub-differentiated system within the law. The crisis of the democratic political system occurred as it became progressively separated from law, and as it articulated the legitimation of law with military modes of citizenship that were outside the law, or which the law was not able to pre-structure or to mediate. Where it converged with factual collective subjects, projected through its original sub-differentiation within the law, the political system almost invariably exposed its own legitimacy, and the legitimacy of law, to extreme, hyper-political, military duress. Under such conditions, the political system almost invariably lost its distinction as a system of differentiated integration, as powerful societal actors utilized political offices for their own prerogatives and unsettled political institutions.[63] The military construction of the political citizen failed, eminently, to realize a secure basis for democratic integration and for the production of generalized legitimacy for law-making functions.

Global law instead of national democracy

We can observe, second, that the eventual stabilization of most democratic political systems was integrally linked to a process in which the legal system experienced accentuated differentiation, so that democracy was ultimately constructed, not within politics, but within the legal system. The eventual legitimation of modern law, in other words, depended on the re-inclusion of the source of law within the legal system. This occurred largely as the continuation of a process of normative evolution that pre-dated the rise of democracy, in its modern form.

Ultimately, democracy was stabilized, regionally, as a political form between 1945 and the 1970s. It was then established, globally, as – at least – a legitimate expectation after the 1980s (see Franck 1992; Benhahib 2012). Of course, not all democracies created after 1945 remained democratic, and many democracies underwent repeated regime change. Moreover, many polities are now organized, politically, on a hybrid model, combining democratic and authoritarian features. Nonetheless, the period beginning in 1945 witnessed a deep-lying process of transformation, in which democracy moved, slowly, from being in essence a system of selective repressive to being, more fully, a system of collective integration and legitimation. This transformation took place, indicatively, as societies lost their essentially national character, and as, by consequence, they abandoned the original democratic attempt to construct the legitimational origin of law through trans-societal processes of subject aggregation and participation, reflecting classical citizenship ideals. With very few exceptions, democracy emerged as a relatively stable and inclusive political regime as the legitimational source of democratic law was transferred from the national people itself, integrated in forms of mass-political mobilization, to an extra-societal system of norms, attached primarily to the corpus of international human rights law, which began to take shape after 1945. The period after 1945 was marked by a very profound revolutionary occurrence – namely, by the consolidation of human rights as globally recognized norms. Prior to that point, human rights law, in the strict sense, had not existed. To be sure, some national constitutions had possessed – albeit weakly enforceable – catalogues of constitutional rights. Moreover, some generalized norms had been invoked to underpin international law, and it was occasionally argued that such norms could even assume effect within national jurisdictions (see Scelle 1932: 13). However, human rights were scarcely actionable within national societies, and there was no general corpus of human rights law at the international level. Even in societies, such as

63 This can be observed in many European societies in the interwar era. Typically, the concept of hyperpoliticization is employed to explain state collapse in Latin America (Chalmers 1977; García Villegas 2009: 32).

Austria and the USA, that possessed courts with power to subject laws to constitutional judicial review, the capacity of such courts to enforce rights across society was very limited.[64] After 1945, by contrast, human rights law became a core, sui-generis aspect of international law. Moreover, such law penetrated very deeply into national jurisdictions, so that most national constitutions obtained catalogues of basic rights that were, to all intents and purposes, international norms, applied to individual citizens within national societies. Together, these normative orders began to constitute a diffusely linked global legal system, in which legal and political systems in different societies experienced accelerated normative convergence. Very few societies reached a condition of full democratic integration before 1945, as they relied on nationalized legal systems and fully nationalized patterns of legal construction and authorization, based in national political citizenship practices. Then, very few societies reached a condition of full democratic integration after 1945 without premising their core legitimational processes, not on incorporated acts of national citizens, but on norms articulated in the international domain: that is, on global citizenship patterns, structured around international human rights law.

The growing force of international human rights reinforced democracy in a number of ways, some of which had only limited relevance to the basic structure of national society. However, the rise of international human rights law impacted on many societies at a deep structural level. In many cases, the domestic internalization of international human rights law created sociological conditions that enhanced the legitimational functions of democratic government, specifically eradicating pathologies caused by the original political vocabulary of democratic legitimation.

For instance, international human rights law often entered national societies as a normative order that projected uniform citizenship entitlements. In this, human rights law created a diction of individual inclusion in national societies that was relatively indifferent to embedded societal positions, and it meant that persons at different points on the spectrum of national in- or exclusion could lay claim to full citizenship rights, such that citizenship could be detached from solidified interests in national society. This diction often led to the weakening of regional memberships, to the increased integration of minority groups, and to the erosion of status monopolies in national political systems. As the source of legal authority was withdrawn from factual collectives in society, it became possible, in principle, for diverse citizenship groups to claim rights of integration and participation on socially abstracted foundations. As a result, the domestic assimilation of international human rights law led to the heightened integration of national populations in the domestic political system, and it greatly extended processes of equal democratic enfranchisement that had not reached completion in national societies. In some cases, the assimilation of international human rights in domestic law acquired importance in democratic stabilization because it obviated ethnic monopolization of political rights.[65] In other societies, international human rights law contributed to democracy because it reduced the importance of social class as a framework for political integration. As international human rights were primarily accorded to individuals, political interaction between state and society was less strongly focused on collective demands, and group affiliation lost some importance as a focus for demanding rights.[66] Beneath the constitutional guarantees provided for basic rights, then, smaller, individualized groupings could assume integrated positions, and large organized class groups could not easily exert privileged influence on law. The dissolution of fixed group affiliations reduced the power of traditional cleavages in society, and, by converting classes into aggregates of individuals, it facilitated social integration at a reduced level of intensity. Only through *transnational* legal processes, reflecting the heightened formalization of global law, did all *national* citizens become engaged in the authorization of national law.

More generally, the incorporation of international norms in domestic legal systems created a new matrix for political organization, which diminished the extent to which the political system was unsettled by the actual processes through which it extracted legitimacy for law from its subjects. After 1945, political participation was increasingly framed within an abstracted overlying normative order, in which norms of individual liberty and recognition were placed above norms constructed through concrete mobilization, and the original source of legitimacy for laws was located firmly in a body of norms defined at

64 The Austrian Constitution of 1920, in many ways a procedural model for later constitutional systems with strong human rights protection, did not contain a separate catalogue of rights. The supposed 'Bill of Rights' in the federal Constitution of the USA was not (if it ever was) incorporated in state-level legal procedure until after 1945.

65 The classical examples are the USA in the 1960s and South Africa in the 1990s. But Kenya and Bolivia since circa 2000 could be considered in this way.

66 See legislation in the FRG and Japan after 1945 to place economic interactions between state and trade unions on a footing framed by individual rights. The classical example is the *Tarifvertragsgesetz* (1949).

the supra-national level. On this basis, mobilized political participation lost its status as the defining source of legitimacy for laws, laws could assume validity and integrational force without deriving content from positional struggles between citizenship groups, and concrete acts of participation were only able to affect the content of laws if they were proportioned to, or filtered through, internationally constructed rights. This meant that the national polity articulated its core focus of legitimacy, not by interacting with the citizen as a concrete or collectively mobilized participant, but by interacting with the citizen in a form predefined in global law, which in turn meant that particular citizens or citizen groups could not easily dominate the production of law. The state in fact came to instil legitimacy in law by communicating, not with real citizens, in collective organizations, but with citizens as components of the global legal system, whose rights were defined in primarily individualistic fashion. Most societies approached a condition of democratic integration as they extracted legitimacy for law, not from an objective or mobilized citizen, but from a subject projected in the international domain, under an increasingly robust corpus of externalized human rights. In most democratic systems, national citizens now engage with national political organs in normative procedures that originate in international human rights, and the national citizen cannot easily assume a substantive shape that is not internally configured around human rights norms of international provenance.[67] The fact that the political system is separated from the citizen means that some norms are supra-politically entrenched and that dominant principles of legitimacy are not easily destabilized. Generally, this means that international human rights law forms a metasystem of public law, removed from the original selective or conflictual emphases of collective mobilization, and it heightens the integrational functions of both the national polity and the national legal system, which were traditionally disturbed by the process of their own legitimation.

In both respects, democracy ultimately took factual shape through processes of norm construction and legitimation, which are relatively independent of collective agents and reside on strongly individualistic legal principles. The rise of the global human rights regime that began after 1945 can be seen as an occurrence in which the essential form of the legal system differentiated itself, progressively, from its historical embeddedness within national societies, and in which the global legal system began to secure and articulate formal rules of recognition – essentially, human rights – that did not originate in inner-societal institutional realities. Democratic integration then became globally prevalent as these norms, originally set out in international legal codes, pre-defined the content of national legal systems, such that national legal/political systems were transformed into geographically localized dimensions of a global legal system, and basic legitimational principles were constructed prior to the factual interaction between national political systems and national citizens. In both respects, democratic formation resulted, most constitutively, from the growing autonomy, positivity and deep self-reliance of the legal system, and it was *the redoubled differentiation of the law*, vitally, that created the patterns of integration and legitimation that democracy presupposes. The emergence of political systems capable of creating democratic legitimacy for law in national contexts only occurred through a hyper-differentiation of the legal system, sustained by the entrenchment of fixed norms of global human rights law, in which national political institutions renounced some of their constitutive distinction from the legal system. This necessarily entailed a redirection of citizenship away from its militarized form, and it insulated the legal system against its eminently modern association with civil war. In this respect, democracy only became a generalized source of legitimacy for law as the political citizen was reinternalized in the legal system, and as citizenship as legitimational norm was severed from citizenship as factual practice. The citizen now acts as a focus of legitimacy for law by binding the national political system – in part – into a hyper-differentiated global legal system.

Democracy eventually evolved, in short, as a system of legal inclusion, or even as an inner-legal phenomenon. In this process, the principle that had given rise to the formation of the modern political system, the militarized citizen, lost some importance, and the legitimational linkage of war and law receded. The hyper-differentiation of the legal system led to the creation of democracy by weakening the differentiation of the political system, and by, as at the first origin of modern democracy, reincorporating core legitimational aspects of the political system in law. This led to a partial pacification of the otherwise intractably contested processes of democratic legitimacy production.

67 Cases where citizenship practices are detached from international norms are typically intensely disruptive of democracy. The 2018 presidential elections in Brazil are the most recent, and most acutely admonitory, example.

4 Histories of functional equivalence

A deep paradox of global society is that the form of political system that characterizes national society (democracy) was not created by national citizens. The rise of democracy eventually rested on the fact that international law crafted functional equivalents for national populations, and national populations became subjects (citizens) in their own political systems by arranging their communications with the political system through globally constructed normative articulations. Such patterns of functional equivalence were established as internationally defined human rights norms were assimilated in domestic legal systems, expressing alternatives to mobilized citizenship as the source of legitimacy for domestic law. These processes naturally vary from polity to polity, but they generally fall into two classes. In some cases, first, the establishment of functional equivalents for democratic will formation created foundations on which classical political-democratic procedures could be consolidated. In such instances, international normative integration formed a simple underpinning for more classical forms of democracy. In some cases, second, the construction of functional equivalents for the demos acted, not as a basis, but as a simple surrogate, for standard patterns of public will formation. In both instances, the history of contemporary democracy can largely be narrated as a history of functional equivalence, and the construction of democratic legitimacy for legislation has commonly involved the pre-construction of democratic procedures by the global legal system.

Examples of processes leading to the construction of functional equivalents for democratic citizenship can be seen in the following:

Functional equivalence and democratic participation 1: Democracy promotion through global norms

Democracy often simply originates in normative orders designed outside national societies, imposed on national institutions by external actors. This can be seen in Western Germany and Japan after 1945. This can be seen in the process of democratization in Eastern Europe in the 1990s,[68] and even in Spain after 1975. In Central Asia after 1991, some democracies were created in societies that had little original interest in the assertion of national sovereignty, and only a limited sense of a national demos.[69] This can be seen in most societies created through processes of decolonization, in which constitutional order was often imposed by retreating colonial powers (see Parkinson 2007). In many societies, in fact, democracy has simply been created through acts of territorial administration.[70] The USA itself only became a democracy in 1964–65 because of the pressurizing incursion of international norms in the domestic legal system (see Layton 2000; Skrentny 2002); this occurred in a process not dissimilar to territorial annexation, as the federal government used martial means to impose control – via uniform citizenship norms – on the Southern States. In cases where democracy results from external norms, democracy is usually measured, at least in part, as a condition of rights holding, and it is created, at least in part, to fulfil rights, linked to international expectations. In such instances, democracy evolves through the complex interplay of national and international equivalents for citizenship, but the actual citizen is not actively implicated in casting the form of democracy or in defining the legitimacy of law. The founding source of legitimacy is located outside national law, and it cannot be created by material citizenship practices.

Functional equivalence and democratic participation 2: Mobilization around human rights

Democracy is often created through the mobilization of inner-societal actors around human rights, especially around rights that are declared at the international level. Even mobilization around particular rights, for example health rights or indigenous rights, can have a broad spillover effect, creating and reinforcing democracy as a whole. Both processes are widely observed in Latin America.[71] In such cases, the mobilization of society is directed towards pre-formed norms, and it occurs as a process that actually obstructs the comprehensive transformation of society by citizens. In key cases, mobilization around internationally defined human rights reduces the impact of collective organizations in democratic formation, and it often places persons, as individual actors, in direct relation to the political system.[72] In both respects, mobilization around rights softens the impacts of social mobilization, and it averts

68 See discussion in Merkel, Puhle, Croissant, Eicher & Thiery (2003: 151–53).

69 Uzbekistan can be seen as the key example. In 1991, Uzbeks originally showed great unwillingness to become independent (Sengupta 1997; Kurzman 1999: 77).

70 The FRG and Japan can be placed in this category. More recently, this applies to Sudan, Iraq, East Timor, Kosovo.

71 In Bolivia, the push towards democratization beginning in the 1980s was triggered by mobilization for health rights.

72 Promotion of rights to this end was a conscious strategy in the recreation of democracy in Argentina after 1983.

the uncontrollable aggregation of social conflict around the political system. Democracy thus results from communication between actors in the political system and a normatively pre-formed and structurally bounded construction of the citizen. Above all, as the citizen communicates with the political system through rights, demands articulated in this form can usually be satisfied in local or delineated form, within the law itself.

Functional equivalence and democratic participation 3: Democracy and International Courts

The jurisprudence of international courts widely defines the form of national democracy, and such courts typically promote rights that are likely to lead to democracy. In many cases, democracy has been consolidated by international courts, and even fundamental swathes of constitutional law have been put in place by judicial actors outside national societies.[73] In cases where democratic norms are upheld by international courts, the core indicator of democracy is, not that the law originates in processes of collective will formation, but that it shows compliance with court rulings or judicially established norms, and that it actively internalizes global norms. In many cases, domestic courts are able to appropriate international norms to stabilize democratic institutions in national societies, often allowing norms extracted from the international domain to acquire immediate legislative force.[74] In such cases, too, democracy is created through a judicial construction of the citizen, and laws acquire legitimacy as they are proportioned to this construction, such that the actual citizen is not strongly present as a factual actor in producing law's legitimacy.

In these examples, democracy is created and reinforced by processes that specifically do not require the mobilization of national citizenship. In such cases, the citizen is defined in a form that places checks on the extent to which society needs to be materially visible in law. Democracy emerges primarily as result of the modelling of the citizen on inner-legal global norms, so that the citizen is inserted into society, not as the legitimational origin of law, but as a formal measure of the quality of democracy. Above all, the source of democratic law is stabilized around principles not created by citizens, reflecting an intensified pre-construction of the political system by the legal system, acting in hyper-differentiated form.

Functional equivalence instead of democratic participation 1: Proportionality

International human rights standards are now broadly implied in the law of all democracies, and law is considered legitimate, across divides between national societies, to the extent that it does not deviate egregiously from core norms (human rights) implied in the global legal order. This is reflected in particular in the rise of proportionality as a global principle of legal finding and legal enforcement. Through the universalization of proportionality, democratic law is adapted, apriori, to a loose global construction of the rights-holding individual, and law can be created or validated, democratically, without any material reference to actual citizens, or without any origin in volitional acts.[75] Proportionality in fact implicitly transforms the citizen from the original subject into the normative end of law, and it authorizes law by adapting it to a subject that only exists, as an abstraction, in the global order of human rights.

Functional equivalence instead of democratic participation 2: Law and Depoliticization

In some societies, the most hotly contested societal questions are strategically regulated under international law, and judges who address such questions deliberately apply international law to create authoritative, quasi-legislative rulings. In such cases, international law stands in for active will formation, and it defines the normative form of society, especially in situations marked by potentially acute conflict. This is particularly the case in societies with complex ethnic structures, in which contests over certain rights risk the mobilization of citizenship groups along ethnic fault-lines.[76] In such cases, international law is used to create a unifying figure of the national citizen, above the factually existing citizens, occupying historically adversarial positions, within society.

Functional equivalence instead of democratic participation 3: Composite citizenship

In some societies, analogues to general patterns of will formation are constructed through the creation and rein-

73 The most important example of this is the constitutional reform in 2011 in Mexico, triggered by adverse rulings of the Inter-American Court of Human Rights. Throughout Europe, Latin America and Africa, however, domestic democratic law is anchored in regional human rights law.

74 Exemplary of this is Colombia, where, up to the recent electoral victory of Ivan Duque, the Constitutional Court functioned as a de-facto legislative actor, drawing legitimacy from international law.

75 See the seminal case in the Supreme Court of Canada, *Slaight Communications Inc* v. *Davidson*, [1989] 1 S.C.R. 1038.

76 See the famous South Africa, *S* v. *Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), concerning the constitutionality of the death penalty in South Africa.

forcement of sectoral rights: that is, rights specifically pertaining to one functional domain of society. This can of course be accomplished through sectoral organizations, which often flesh out domains of sectoral citizenship, generating rights in particular functional spheres.[77] However, sectoral rights are now increasingly generated through litigation, often of an individual nature, focused on rights such as health rights, environmental rights, or sexuality rights, which are already protected at the global level. In some societies, litigation for globally protected sectoral rights at least rivals more typical patterns of political engagement as a mode of citizenship and as a source of law production. In fact, the construction of sectoral rights often leads to the formation of a multi-focal constitution in society, in which individual legal actions build up layers of rights in separate spheres, acting in a form of sectoral equivalence to classical, generalized modes of citizenship.[78] In some ways, this produces an overlying societal constitution which appears as a composite analogue to the classical political constitution, created by the demos as a unified actor. However, it is structural to societies with sectoralized constitutions of this type that they expressly do not rely for legitimacy on the convergence of the political system around a uniform, mobilized pattern of citizenship.

Functional equivalence instead of democratic participation 4: Litigation as citizenship

In these respects, litigation has become a core democratic practice, forming an important equivalent for legislative participation and classical citizenship practices. The legislative impact of litigation is usually most marked when individual actors engage in litigation in relation to globally defined norms, and when, on this basis, they force national political institutions to communicate with them as actors linked to the global legal system. In such instances, citizens appear as citizens of two worlds, of national polities and of global law, and they reach legislative or quasi-legislative outcomes by forcing the political system to engage with these two socio-political environments at the same time.[79] In such litigation, citizenship is expressed as the practice in which the citizen appears in selective, globally pre-constructed form, and the political system is specifically not required to produce legitimacy for law by accommodating massive acts of mobilization.

5 Conclusion

In key respects, we can observe that democracy has developed on a pattern that is at variance with the implications of classical democracy, but which is rooted in processes of legal differentiation that preceded the rise of the modern political system. Modern democracy first emerged within the law, as a form for sustaining and legitimating law's positive, differentiated form. It was then, ultimately, the global hyper-differentiation of the legal system that allowed democracy to acquire an enduring form, by reintegrating the sub-differentiated part of the legal system (the political system) into the legal system itself. This process generated a form for the authorization of law that severed the nexus between law and military practice, forged in the revolutions of the eighteenth century. The rise of international law provided a response to basic problems affecting the stabilization of modern societal structure, and it distilled a positive legitimational form for law, which had historically remained acutely precarious. This inevitably immunized the law against the collective actors from which, in national constructions of democracy, it was forced to depend, and it pacified the basic projection of law's legitimacy. This meant that democratic practices were detached from collective subjects – or even from real subjects *tout court* – so that the rights-holding individual, pre-defined within the law, became the core reference for democratic institutions. In fact, the law's autonomy now reaches such a degree that democracy itself becomes, in some cases, a series of inner-legal acts. The association of democracy with militarized expressions of national political agency always entailed a simplification.[80] This was clearly underlined by the fact, of defining importance for the later twentieth century, that the hyper-differentiation of the global legal system formed the premise for democracy.

In each of these processes, the key to comprehending national society lies in global sociology, and the key to comprehending global society lies in the historical sociology of national societies. Other lines of global legal-po-

77 For early discussion see Scholz (1978). For the most advanced articulation see Teubner (2012).

78 Colombia is again exemplary, where the Constitutional Court has constructively interpreted the rights contained in the Constitution to build up an education constitution, a health constitution and an environmental constitution.

79 See the construction of sexuality rights in the UK in *Smith and Grady v UK* 29 EHRR 493. This case brought a UK case to the European Court of Human Rights. See the construction of broad indigenous rights in Colombia, extending well beyond normal rights of group recognition, to entail rights to indigenous identity, and rights to recognition and protection of traditional medicines. Important examples are Constitutional Court cases T-001/12 and T-282/11.

80 Exemplary is the claim that 'Nations ... are the foundations of politics, they form the subject of constitutions' in Weihnacht (1994: 120).

litical sociology have tended to adopt an approach based in the analysis of world culture. Many accounts of world culture arrive at substantive analyses that are congruent with my claims, arguing that world culture drives interstate convergence and shared socio-political norm construction (see Meyer, Boli, Thomas & Ramirez 1997; Koo & Ramirez 2009). Alongside this, however, the version of global sociology advanced here claims distinction in that it indicates that core features of national and global society are primarily explicable through internal analysis of the legal system, and it is the rise of *world law*, overcoming primary antinomies in national polities, that imprints convergent normative characteristics on global society. At a methodological level, further, this approach deviates from that in other lines of global sociology as it questions the usual presumption that global sociology is required to explain realities that have extended beyond national society. In fact, the opposite is often true. A global sociological outlook is needed to explain both the historical structure of national societies and the given reality of global society at the same time, as elements of the same picture. Processes of institution building at a global level often reach back into national society and they allow completion of formative processes at a national level that could not be concluded within the normative structures of national society. As a result, aspects of global systems cannot be identified as distinctively global, as they remain deeply correlated with, and in fact often *temporally precede*, national societal structures. In particular, global norms play a nationally constitutive role because they articulate equivalents to the classical political subjects required to underpin formative processes of national integration. In the aspect of national/global society discussed here, the construction of a political system capable of integrating national society was concluded through the internalization of the national polity in the global legal system. This global process is explicable through the fact that the national political system originally evolved as a functional dimension of the legal system. To explain this, a fusion of classical sociology and global sociology is required – in particular, historical legal sociology obtains particular importance in explaining the conditions of global society, and it illuminates the deep interpenetration between national and global processes of political integration and legitimation. On this basis, in fact, legal-sociological analyses alert us to the constant possibility that, where they withdraw from the system of global law, national political systems always run the risk that they jeopardize national processes of legal inclusion and legitimation.

Bibliography

Atiyah, P.S., 1979: The Rise and Fall of Freedom of Contract. Oxford: Oxford University Press.

Benhabib, S., 2012: Is There a Human Right to Democracy? Beyond Interventionism and Indifference. S. 191–213 in: C. Corradetti (Hrsg.), Philosophical Dimensions of Human Rights: Some Contemporary Views. Dordrecht: Springer.

Bertaud, J.-P., 1979: La revolution armée. Les soldats-citoyens et la Révolution en France. Paris: Robert Laffont.

Beyrau, D., 1984: Militär und Gesellschaft im vorrevolutionären Russland. Köln: Böhlau.

Billaud-Varenne, J.N., 1794: Rapport fait a la convention sur la théorie du gouvernmement démocratique. Paris: Imprimerie du tribunal révolutionnaire.

Bornhak, C., 1889: Preußisches Staatsrecht, 3 Bde. Freiburg: Akademische Buchhandlung, Bd. 2.

Brakensiek, S., 1991: Agrarreform und ländliche Gesellschaft. Die Privatisierung der Marken in Nordwestdeutschland 1750–1850. Paderborn: Schöningh.

Breuer, S., 1983: Sozialgeschichte des Naturrechts. Wiesbaden: Springer.

Brunner, O., 1942: Land und Herrschaft. Grundfragen der territorialen Verfassungsgeschichte Südostdeutschlands im Mittelalter, 2. Aufl. Brünn: Rudolf. M. Rohrer.

Burrage, M., 2006: Revolution and the Making of the Contemporary Legal Profession. England, France and the United States. Oxford: Oxford University Press.

Büsch, O., 1962: Militärsystem und Sozialleben im Alten Preußen 1713–1807. Die Anfänge der sozialen Militarisierung der preußischen-deutschen Gesellschaft. Berlin: de Gruyter.

Callaghy, T.M., 1984: The State-Society Struggle: Zaire in Comparative Perspective. New York: Columbia University Press.

Cancik, P., 2007: Verwaltung und Öffentlichkeit in Preußen. Tübingen: Mohr.

Cannadine, D., 1990: The Decline and Fall of the British Aristocracy. New Haven: Yale University Press.

Capozzola, C., 2010: Uncle Sam Wants You. World War I and the Making of the Modern American Citizen. Oxford University Press.

Caramani, D., 2004: The Nationalization of Politics. The Formation of National Electorates. Cambridge: Cambridge University Press.

Carré, H., 1912: La fin des parlements. Paris: Hachette.

Chalmers, D.A., 1977: The Politicized State in Latin America. S. 23–46 in: J. M. Malloy (Hrsg.), Authoritarianism and Corporatism in Latin America. Pittsburgh: University of Pittsburgh Press.

Chambers II, J.W., 1987: To Raise an Army. The Draft Comes to Modern America. London: Macmillan.

Church, C., 1981: Revolution and Red Tape. The French Ministerial Bureaucracy 1770–1850. Oxford: Clarendon.

Crépin, A., 1998: La conscription en débat. Arras: Artois Presses Université.

Cress, L.D., 1982: Citizens in Arms. The Army and the Militia in American Society to the War of 1812. Chapel Hill: University of North Carolina Press.

Durkheim, É., 1902: De la division du travail social, 2. Aufl. Paris: Alcan.

Durkheim, É., 1950: Leçons de sociologie. Paris: Presses Universitaires de France.

Duvergier, J.B., 1834: Collection Complète des Lois, Décrets, Ordonnances, Réglements, Avis du Conseil-D'État, 2. Aufl. Paris: A. Guyot et Scribe, vol. 1.

Echeverria, D., 1985: The Maupeou Revolution. A Study in the History of Libertarianism. France, 1770–1774. Baton Rouge: Louisiana State University Press.

Englebert, P., 2000: Pre-Colonial Institutions, Post-Colonial States, and Economic Development in Africa. Political Research Quarterly 53: 7–36.

Ennen, R., 1971: Zünfte und Wettbewerb. Möglichkeiten und Grenzen zünftlerischer Wettbewerbsbeschränkungen im städtischen Handel und Gewerbe des Spätmittelalters. Köln: Böhlau.

Erbentraut, P., 2016: Theorie und Soziologie der politischen Parteien im deutschen Vormärz (1815–1848). Tübingen: Mohr.

Fehr, H., 1914: Das Waffenrecht der Bauern im Mittelalter. Zeitschrift für Rechtsgeschichte, German. Abteil. 35: 111–121.

Fletcher, A., 2013: Life, Death and Growing Up on the Western Front. New Haven: Yale University Press.

Franck, T.M., 1992: The Emerging Right to Democratic Governance. The American Journal of International Law 86(1): 46–91.

García Villegas, M., 2009: Caracterización del régimen político colombiano (1956–2008). S. 16–83 in: M. García Villegas & E.R. Rebolledo (Hrsg.), Mayorías sin democracia. Desequilibrio de poderes y Estado de derecho en Colombia, 2002–2009. Bogota: Dejusticia.

Gembruch, W., 1990: Staat und Heer. Ausgewählte historische Studien zum ancien régime, zur Französischen Revolution und zu den Befreiungskriegen. Hrsg. von J. Kunisch. Berlin: Duncker & Humblot.

Gewarth, R. & J. Horne, 2011: Vectors of Violence: Paramilitarism in Europe after the Great War, 1917–1923. The Journal of Modern History 83: 489–512.

Gneist, R., 1966[1879]: Der Rechtsstaat und die Verwaltungsgerichte in Deutschland. Darmstadt: Wissenschaftliche Buchgesellschaft.

Goldscheid, R., 1914: Das Verhältnis der äußern Politik zur Innern. Ein Beitrag zur Soziologie des Weltkrieges und Weltfriedens. Wien: Anzengruber-Verlag Brüder Suschitzky.

Goldstein, R.J., 1983: Political Repression in 19th Century Europe. London: Croom Helm.

Göse, F., 2001: Zum Verhältnis von landadliger Sozialisation zu adliger Militärkarriere. Das Beispiel Preußen und Österreich im ausgehenden 17. und 18. Jahrhundert. Mitteilungen des Instituts für österreichische Gesellschaftsforschung 109: 118–159.

Gregory, A., 2008: British Society and the First World War. Cambridge University Press.

Gresle, F., 1996: Le Citoyen-Soldat garant du pacte républicain. L'Année sociologique 46: 105–125.

Gresle, F., 2003: La «Société Militaire». Son devenir à la lumière de la professionnalisation. Revue française de sociologie 44: 777–798.

Grimm, D., 2017: Verfassung und Privatrecht im 19. Jahrhundert. Die Formationsphase. Tübingen: Mohr.

Gurr, T.R., 1988: War, Revolution, and the Growth of the Coercive State. Comparative Political Studies 21(1): 45–65.

Halperin, S., 2004: War and Social Change in Modern Europe. The Great Transformation Revisited. Cambridge: Cambridge University Press.

Hardenberg, K. A. Freiherr von, 1931[1807]: Rigaer Denkschrift. S. 302–363 in: G. Winter (Hrsg.), Die Reorganisation des Preußischen Staates unter Stein und Hardenberg. Erster Teil. Allgemeine Verwaltungs- und Behördenreform, Bd. 1: Vom Beginn des Kampfes gegen die Kabinettsregierung bis zum Wiedereintritt des Ministers von Stein. Leipzig: Hirzel.

Hellfeld, B.G.H. von, 1782: Versuch einer Geschichte der landesherrlichen höchsten Gerichtsbarkeit und derer Hofgerichte in Sachsen besonders des gesammten Hofgerichts zu Jena. Jena: Johann Rudolph Crökers.

Hintze, O., 1962: Staat und Verfassung. Gesammelte Abhandlungen zur allgemeinen Verfassungsgeschichte. Hg. von G. Oestreich, 2. Aufl. Göttingen: Vandenhoeck & Ruprecht.

Hippler, T., 2006: Soldats et citoyens. Naissance du service militaire en France et en Prusse. Paris: PUF.

Hofmann, H.H., 1962: Adelige Herrschaft und souveräner Staat. Studien über Staat und Gesellschaft in Franken und Bayern im 18. und 19. Jahrhundert. München: Kommission für Bayerische Landesgeschichte.

Höhn, R., 1938: Verfassungskampf und Heereseid. Der Kampf des Bürgertums um das Heer (1815–1850). Leipzig: Hirzel.

Hülle, W., 1971: Das Auditoriat in Brandenburg-Preußen. Ein rechtshistorischer Beitrag zur Geschichte seines Heerwesens mit einem Exkurs über Österreich. Göttingen: Schwartz.

Hyden, G., 1987: Capital Accumulation, Resource Distribution, and Governance in Kenya: The Role of the Economy of Affection. S. 117–136 in: M. G. Schatzberg (Hrsg.), The Political Economy of Kenya. New York: Praeger.

Ingenlath, M., 1998: Mentale Aufrüstung. Militarisierungstendenzen in Frankreich und Deutschland vor dem Ersten Weltkrieg. Frankfurt am Main/New York: Campus.

Jolliffe, J.E.A., 1955: Angevin Kingship. London: Black.

Kahn, P.W.K., 2000: Speaking Law to Power: Popular Sovereignty, Human Rights, and the new International Order. Chicago Journal of International Law 1(1): 1–18.

Kant, I., 1977a: Metaphysik der Sitten in Kant, Werkausgabe, hrsg. W. Weischedel, 12 Bde. Frankfurt am Main: Suhrkamp, Bd. 8.

Kant, I., 1977b: Zum Ewigen Frieden. S. 195–251 in: Kant, Werkausgabe, hrsg. W. Weischedel, 12 Bde. Frankfurt am Main: Suhrkamp, Bd. 11.

Kant, I., 1977c: Der Streit der Fakultäten. S. 265–393 in: Kant, Werkausgabe, hrsg. Wilhelm Weischedel, 12 Bde. Frankfurt am Main: Suhrkamp, Bd. 11.

Kirchheimer, O., 1932: Legalität und Legitimität. Die Gesellschaft 9(1): 8–26.

Kocka, J., 1973: Klassengesellschaft im Krieg. Deutsche Sozialgeschichte 1914–1918. Göttingen: Vandenhoeck & Ruprecht.

Kocka, J., 1990: Arbeitsverhältnisse und Arbeiterexistenzen. Grundlagen der Klassenbildung im 19. Jahrhundert. Bonn: Dietz.

Kohl, W., 1991: Das Reichsverwaltungsgericht. Ein Beitrag zur Entwicklung der Verwaltungsgerichtsbarkeit in Deutschland. Tübingen: Mohr.

Köllner, L., 1982: Militär und Finanzen. Zur Finanzgeschichte und Finanzsoziologie von Militärausgaben in Deutschland. München: Berhard & Graefe.

Koo, J.-W. & F. O. Ramirez, 2009: National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004. Social Forces 87(3): 1321–1353.

Koselleck, R., 1977: Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848, 2. Aufl. Stuttgart: Klett-Cotta.

Kruse, W., 2003: Die Erfindung des modernen Militarismus. Krieg, Militär und bürgerliche Gesellschaft im politischen Diskurs der Französischen Revolution 1789–1799. München: Oldenbourg.

Kuchler. B., 2013: Krieg und gesellschaftliche Differenzierung. Zeitschrift für Soziologie 42(6): 502–520.

Kurzman, C., 1999: Uzbekistan: The Invention of Nationalism in an Invented Nation. Critique: Journal for Critical Studies of the Middle East 8(15): 77–98.

Laferrière, E., 1896: Traité de la jurisdiction administrative et des recours contentieux, 2te Auflage. Paris: Bergher-Levrault, Bd. II.

Layton, A. S., 2000: International Politics and Civil Rights Policies in the United States, 1941–1960. Cambridge: Cambridge University Press.

Leed, E. J., 1979: No Man's Land. Combat and Identity in World War I. Cambridge: Cambridge University Press.

Leonhard, J., 2004: Die Nationalisierung des Krieges und der Bellizismus der Nation. S. 83–105 in: C. Jansen (Hrsg.), Der Bürger als Soldat. Die Militarisierung europäischer Gesellschaften im langen 19. Jahrhundert: ein internationaler Vergleich. Essen: Klartext.

Leonhard, J., 2008: Bellizismus und Nation. Kriegsdeutung und Nationsbestimmung in Europa und den Vereinigten Staaten 1750–1914. München: Oldenbourg.

Llanque, M., 2000: Demokratisches Denken im Krieg. Die deutsche Debatte im Ersten Weltkrieg. Berlin: Akademie.

Loening, E., 1914: Gerichte und Verwaltungsbehörden in Brandenburg-Preußen. Ein Beitrag zur preußischen Rechts- und Verfassungsgeschichte. Halle: Verlag der Buchhandlung des Waisenhauses.

Loez, A., 2012: Militaires, combattants, citoyens, civils: Les identités des soldats français en 1914–1918. Pôle Sud 36: 67–85.

Luhmann, N., 1965. Grundrechte als Institution. Ein Beitrag zur politischen Soziologie. Berlin: Duncker und Humblot.

Luhmann, N., 1984: Staat und Politik. Zur Semantik der Selbstbeschreibung politischer Systeme. S. 99–125 in: U. Bermbach (Hrsg.), Politische Theoriegeschichte (Politische Vierteljahresschrift, Sonderheft 15). Opladen: Westdeutscher Verlag.

Mably, G.B. de, 1793: Collection complète des Oeuvres de l'abbé de Mably. Paris: Desbriere, Bd. 8.

Marshall, T.H., 1992[1950]: Citizenship and Social Class. London: Pluto.

Marx, K., 1956: Zur Judenfrage. S. 347–377 in: K. Marx & F. Engels, Werke, Band 1. Berlin: Dietz.

Mathiez, A., 1937: Le gouvernement révolutionnaire. Annales historiques de la Révolution française 80: 97–126.

Merkel, W., H.-J. Puhle, A. Croissant, C. Eicher & P. Thiery, 2003: Defekte Demokratie, I: Theorie. Opladen: Leske & Budrich.

Meyer, J. W., J. Boli, G. M. Thomas & F. Ramirez, 1997: World Society and the Nation-State. American Journal of Sociology 103(1): 144–181.

Mittermaier, C.J.A., 1841: Die Strafrechtsgesetzgebung in ihrer Fortbildung geprüft, I. Heidelberg: Winter.

Möller, H.-M., 1976: Das Regiment der Landesknechte. Untersuchungen zu Verfassung, Recht und Selbstverständnis in Deutschen Söldnerheeren des 16. Jahrhunderts. Wiesbaden: Steiner.

Mooser, J., 1984: Ländliche Klassengesellschaft 1770–1848. Göttingen: Vandenhoeck & Ruprecht.

Müller, F., 1965: Korporation und Assoziation. Eine Problemgeschichte der Vereinigungsfreiheit im deutschen Vormärz. Berlin: Duncker und Humblot.

Nanz, K.-P., 1985: Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert. München: J. Schweitzer Verlag.

Nipperdey, T., 1976: Gesellschaft, Kultur, Theorie. Gesammelte Aufsätze zur neueren Geschichte. Göttingen: Vandenhoeck & Ruprecht.

O'Donnell, G., 1999: Polyarchies and the (Un)rule of Law in Latin America. A Partial Conclusion. S. 303–338 in: J. E. Méndez, G. O'Donnell & P. S. Pinheiro (eds.), The (Un)rule of Law and the Underprivileged in Latin America. Notre Dame, Ill.: University of Notre Dame Press.

Opitz-Belakhal, C., 1994: Militärreformen zwischen Bürokratisierung und Adelsreaktion. Das französische Kriegsministerium und seine Reformen im Offizierskorps von 1760–1790. Sigmaringen: Thorbecke.

Oszlak, O., 1981: The Historical Formation of the State in Latin America: Some Theoretical and Methodological Guidelines for its Study. Latin American Research Review 16(2): 3–32.

Palmer, R.R., 1970: Twelve who Ruled. The Year of the Terror in the French Revolution. Princeton: Princeton University Press.

Papke, G., 1979: Von der Miliz zum Stehenden Heer. Wehrwesen im Absolutismus. München: Bernhard & Graefe.

Parkinson, C.O.H., 2007: Bills of Rights and Decolonization. The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territory. Oxford: Oxford University Press.

Parsons, T., 1951: The Social System. Illinois: Free Press.

Parsons, T., 1965: Full Citizenship for the Negro American? A Sociological Problem. Daedalus 94(4): 1009–1054.

Petit-Renaud, S., 2001: ›Faire Loy‹ au royaume de France. De Philippe VI à Charles V (1328–1380). Paris: De Boccard.

Planert, U. & E. Frie, 2016: Revolution, Krieg, Nation – ein universelles Muster der Staatsbildung in der Moderne? S. 1–20 in: E. Frie & U. Planert (eds.), Revolution, Krieg und die Geburt von Staat und Nation. Tübingen: Mohr Siebeck.

Poppitz, J., 1943: Die Anfänge der Verwaltungsgerichtsbarkeit. Archiv des öffentlichen Rechts 72(2/3): 158–221.

Poppitz, J., 1944: Die Anfänge der Verwaltungsgerichtsbarkeit (Fortsetzung). Archiv des öffentlichen Rechts 73(1/2): 3–40.

Preuß, H., 1915: Das deutsche Volk und die Politik. Jena: Eugen Diederichs.

Pröve, R., 2000: Stadtgemeindlicher Republikanismus und die »Macht des Volkes«. Civile Ordnungsformationen und kommunale Leitbilder politischer Partizipation in den deutschen Staaten vom Ende des 18. bis zur Mitte des 19. Jahrhunderts. Göttingen: Vandenhoeck & Ruprecht.

Pröve, R., 2016: Systematische Herrschaftskonkurrenz durch Instanzenzüge und Patronatsbeziehungen. Probleme im Verwaltungshandeln des 18. Jahrhunderts. s. 251–268 in: J. Nowosadtko, D. Klippel & K. Lohstäter (Hrsg.), Militär und Recht vom 16. bis 19. Jahrhundert. Gelehrter Diskurs – Praxis – Transformation. Göttingen: Vandenhoeck & Ruprecht.

Quazza, G., 1957: Le riforme in Piemonte nella prima metà del Settecento. Modena: Società tipografica editrice Modenese.

Ritter, G., 1965: Staatskunst und Kriegshandwerk. Das Problem des Militarismus in Deutschland, Bd. I: Die altpreußische Tradition (1740–1890), 3. Aufl. München: Oldenbourg.

Roberts, R., 1971: The Classic Slum. Salford Life in the First Quarter of the Century. London: Penguin.

Robespierre, M., 1954: Œuvres complètes, 11 Bde. Paris: Presses Universitaires de France, Bd. 8.
Rotteck, C. von, 1816: Ueber stehende Heere und Nationalmiliz. Freyburg: Herdersche Universitäts-Buchhandlung.
Rousseau, J.-J., 1782: Considérations sur le gouvernement de Pologne. Paris: Cazin.
Saguez-Lovisi, C., 1984: Les lois fondamentales au XVIIIe siècle. Recherches sur la loi de devolution de la couronne. Paris: Presses Universitaires de France.
Saint-Just, L. A. L. de, 1791: Esprit de la Révolution et de la Constitution de France. Paris: Beuvin.
Sanborn, J. A., 2003: Drafting the Russian Nation. Military Conscription, Total War, and Mass Politics, 1905–1925. Dekalb: University of Illinois Press.
Savigny, F.C. von, 1837[1803]: Das Recht des Besitzes. Eine civilistische Abhandlung, 6. Aufl. Giessen: Georg Friedrich Meyer.
Savigny, F.C. von, 1840[1814]: Vom Beruf unserer Zeit für Gesetzgebung. Heidelberg: J.C.B. Mohr.
Savigny, F.C. von, 1850: Vermischte Schriften. Berlin: Veit und Comp.
Scelle, G., 1932: Précis de droit des gens. Principes et systématique. Paris: Sirey.
Schimank, U., 1999: Funktionale Differenzierung und Systemintegration der modernen Gesellschaft. S. 47–65 in: J. Friedrichs & W. Jagodzinski (Hrsg.), Soziale Intregration (Kölner Zeitschrift für Soziologie und Soialpsychologie, Sonderheft 39). Wiesbaden: VS.
Schissler, H., 1978: Preußische Agrargesellschaft im Wandel. Wirtschaftliche, gesellschaftliche und politische Transformationsprozesse von 1763 bis 1847. Göttingen: Vandenhoeck & Ruprecht.
Schmitt, C., 1921: Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf. Berlin: Duncker und Humblot.
Schmitt, C., 1958: Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre. Berlin: Duncker und Humblot.
Scholz, R., 1978: Pressefreiheit und Arbeitsverfassung. Verfassungsprobleme um Tendenzschutz und innere Pressefreiheit. Berlin: Duncker und Humblot.
Schrimpf, H., 1979a: Herrschaft, Individualinteresse und Richtermacht im Übergang zur bürgerlichen Gesellschaft. Studien zum Rechtsschutz gegenüber der Ausübung öffentlicher Gewalt in Preußen 1782–1821. München: Minerva.
Schrimpf, H., 1979b: Die Auseinandersetzung um die Neuordnung des individuellen Rechtsschutzes gegenüber der staatlichen Verwaltung nach 1807. Der Staat 18(1): 59–80.
Sellmann, H., 1963: Der Weg zur neuzeitlichen Verwaltungsgerichtsbarkeit – Ihre Vorstufen und dogmatischen Grundlagen. S. 25–86 in: H. R. Külz & R. Naumann (Hrsg.), Staatsbürger und Staatsgewalt. Verwaltungsrecht und Verwaltungsgerichtsbarkeit in Geschichte und Gegenwart. Karlsruhe: Müller.
Schroetter, F. von, 1892: Die brandenburgisch-preußische Heeresverfassung unter dem Großen Kurfürsten. Leipzig: Duncker und Humblot.
Sellers, C., 1991: The Market Revolution. Jacksonian America, 1815–1846. Oxford: Oxford University Press.
Sengupta, A., 1997: Minorities and Nationalizing States in Central Asia. International Studies 34(3): 269–98.
Sieg, H.M., 2003: Staatsdienst, Staatsdenken und Dientsgesinnung in Brandenburg-Preußen im 18. Jahrhundert (1713–1803). Studien zum Verständnis des Absolutismus. Berlin: de Gruyter.
Sikora, M., 2008: Die französische Revolution der Heeresverfassung. S. 135–163 in: P. Baumgart, B. R. Kroener & H. Stüble (Hrsg.), Die preußische Armee zwischen Ancien Régime und Reichsgründung. Paderborn: Schöningh.
Skocpol, T., 1988: Social Revolutions and Mass Military Mobilization. World Politics 40(2): 147–168.
Skrentny, J.D., 2002: The Minority Rights Revolution. Cambridge MA: Harvard University Press.
Slotkin, R., 2005: Lost Battalions. The Great War and the Crisis of American Nationality. New York: Henry Holt.
Sohm, R., 1871: Die fränkische Reichs- und Gerichtsverfassung. Weimar: Böhlau.
Soboul, A., 1959: Les Soldats de l'an II. Paris: Le Club français du livre.
Sonenscher, M., 1989: Work and Wages. Natural Law, Politics and the eighteenth-century French Trades. Cambridge: Cambridge University Press.
Stein, L. von, 1872: Die Lehre vom Heerwesen. Als Theil der Staatswissenschaft. Stuttgart: Cotta.
Stone, B., 1986: The French Parlements and the Crisis of the Old Regime. Chapel Hill: University of North Carolina Press.
Stübig, H., 1971: Armee und Nation. Die pädagogisch-politischen Motive der preußischen Heeresreform 1807–1814. Frankfurt am Main: Lang.
Svarez, C.G., 2000: Gesammelte Schriften. Hg. von P. Krause. 6 Bde. Stuttgart: Frommann-Holzboog, Bd. 4/1.
Tammen, A., 2017: Frühmoderne Staatlichkeit und lokale Herrschaftsvermittlung. Normgebung und Herrschaftspraxis im Herzogtum Holstein des 17. Und 18. Jahrhunderts. Bielefeld: Verlag für Regionalgeschichte.
Teubner, G., 2012: Constitutional Fragments. Societal Constitutionalism and Globalization. Oxford: Oxford University Press.
Tilly, C., 2004: Contention and Democracy in Europe, 1650–2000. Cambridge: Cambridge University Press.
Trox, E., 1990: Militärischer Konservatismus. Kriegervereine und „Militärpartei" in Preußen zwischen 1815 und 1848/49. Stuttgart: Franz Steiner.
Vergne, A., 2006: La notion de constitution d'après les cours et assemblées à la fin de l'ancien régime (1750–1789). Paris: De Boccard.
Vierhaus, R., 1990: Staaten und Stände. Vom Westfälischen Frieden bis zum Hubertusburger Frieden 1648 bis 1763. Frankfurt am Main: Ullstein.
Weber, M., 1921/22: Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie. Tübingen: Mohr.
Weihnacht, P.-L., 1994: Nation als Integral moderner Gesellschaften. S. 102–22 in: J. Gebhardt & R. Schmalz-Bruns (Hrsg.), Demokratie, Verfassung und Nation. Die politische Integration moderner Gesellschaften. Baden-Baden: Nomos.
Wienfort, M., 2001: Patrimonialgerichte in Preussen. Ländliche Gesellschaft und bürgerliches Recht 1770–1848/49. Göttingen: Vandenhoeck & Ruprecht.
Willems, E., 1984: Der preußisch-deutsche Militarismus. Ein Kulturkomplex im sozialen Wandel. Köln: Verlag Wissenschaft und Politik.
Winter, M., 2005: Untertanengeist durch Militärpflicht? Das preußische Kantonsystem in brandenburgischen Städten im 18. Jahrhundert. Bielefeld: Verlag für Regionalgeschichte.

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Chris Thornhill, geb. 1966 in Bradford, GB. Studium der Philosophie, Germanistik und Romanistik in Cambridge, GB. Promotion 1994 über Frankfurter Schule in Cambridge. Von 1993–1995 Lecturer an der Universität Sussex. Von 1995–2006, Lecturer, später Reader (2003) und Professor (2004) am Kings College London. Von 2006–2013 Professor für Politikwissenschaft an der Universität Glasgow. Seit 2013 Professor für öffentliches Recht und Rechtssoziologie an der Universität Manchester. 2012, 2015 Gastprofessor (Politikwissenschaft) an der Universidad Adolfo Ibañez (Santiago de Chile); 2014, 2017 Gastprofessor (Rechtswissenschaft) an Unisinos (Porto Alegre); 2016 CAPES Brazilian Government Senior Visiting Professor (Rechtswissenschaft) an der Universidade de Brasília; 2018 Gastprofessor (Rechtswissenschaft) an der Pontifícia Universidade Católica de São Paulo; 2018 Niklas-Luhmann-Gastprofessor an der Universität Bielefeld. 2011 Wolfgang-Kaupen-Preis; 2014 ERC Advanced Grant; 2018 Humboldt-Forschungspreis.

Forschungsschwerpunkte: Rechtssoziologie; Verfassungsrecht; Rechtstheorie und politische Theorie; Menschenrechte; Demokratieforschung.

Neuere Publikationen: The Sociology of Law and the Global Transformation of Democracy, Cambridge, 2018 (Portugiesisch 2018); A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure, Cambridge, 2016 (Chinesisch 2019); A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective, Cambridge, 2011 (Chinesisch 2019; Portugiesisch 2019); (mit Maria Smirnova), Litigation and Political Transformation: The Case of Russia, in: Theory and Society, 2018; (mit Carina Calabria et al), Legal Pluralism? Indigenous Rights as Legal Constructs, in: University of Toronto Law Journal, 2018; The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy, in: Journal of Law and Society, 2018; The Sociology of Constitutions, in: Annual Review of Law and Social Science, 2017; The Mutation of International Law: Thinking Sociologically about Political Constitutionalism, in: The Modern Law Review, 2016; Legal Revolutions and the Sociology of Law, in: Social & Legal Studies, 2014; Guilt and the Origins of Modern Law, in: Economy and Society, 2014; Rights and Constituent Power in the Global Constitution, in: International Journal of Law in Context, 2014;