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**The Changing Nature of Power and the Erosion of Democracy in the Age of Technology:
Challenges to the Philosophy of Law in the 21st Century**

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(I)

Technical civilization and its implications for the status of man as citizen

Philosophers, particularly in the Western world, have persistently tried to define the essence of *democracy* by relating it to the taming of state power as fundamental goal of any polity – according to rules commonly agreed upon by all citizens. From the time of ancient Greece, the very idea of the rule of law has been rooted in the search for methods of “civilizing” power as a means not only of preserving public order, but of ensuring the human dignity of all members of a community *as citizens*. This goal is in turn based on the commitment of individuals to the overall aim of transcending a state of mere private existence towards one of public life, oriented towards the *bonum commune*, i. e. of citizenship in the genuine sense.

In the political thinking of modernity, Immanuel Kant’s notion of the *separation of powers*¹ has incorporated this age-old tendency towards making power compatible with law by regulating its exercise on the basis of interdependence, thus ensuring that the *autonomy* of the individual is not contradicted by his participation in the life of the polity, i.e. his obligations as a citizen. This is indeed the essence of the modern idea of constitutional “checks and balances.”

In spite of the efforts of the thinkers of the Enlightenment and the political and legal philosophers of the twentieth century, the basic question as to the role of power in the constitutional set-up of the modern nation-state has remained unresolved. It is related to what may be described as the “*paradox of the rule of law*” – whereby law can only be enforced² on the basis of a resort to methods that may lead to its very negation. The crucial question is indeed whether the *ambiguity* of power – as a tool of as well as an obstacle to the rule of law – can be reconciled with the requirements of a *constitutional order*, i.e. the rule of law? Can what we have called the “dialectic of

¹ According to Kant, the separation of executive and legislative powers is the constitutive principle of “republicanism” as embodiment of the rule of law. See his “First Definitive Article for Perpetual Peace” in Section II of *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795). English translation: Immanuel Kant, *Perpetual Peace and other essays on politics, history, and morals*. Translated, with Introduction, by Ted Humphrey. Indianapolis/Cambridge: Hackett Publishing Company, 1983.

² According to Kelsen’s theory of law (which we subscribe to) the *differentia specifica* between legal and moral norms lies exactly in the enforceability of the norms by coercive measures. See Hans Kelsen, *Pure Theory of Law*. Translated from the second (revised and enlarged) German edition by Max Knight. Union, NJ: Lawbook Exchange, 2000.

power and law”³ be implemented in, or applied to, the state’s affairs in such a way as to avoid inconsistencies in the theory of the state and prevent the political system from being de-legitimized? More specifically: How can the exercise of (political) power be confined to the democratic realm when that very power, first of all, is required to enable (“empower”) the people to express – and effectuate – their sovereign will (whether directly or by means of representation)? State power has proven to be a necessary, though not sufficient, condition for the articulation of people’s power – that in turn legitimizes state power.

The “*paradox of the rule of law*” runs somewhat parallel to the “*paradox of democracy*” – whereby people’s rule can only be realized on the basis of socio-political conditions that are in themselves *democratic* and have to be in place *beforehand*. Only such conditions will “empower” the people to make their own independent decisions, notwithstanding the fact that only the latter are supposed to be the normative foundation of democracy.⁴ The question remains as to whether this interdependence is to be explained as a *circulus vitiosus* or in the sense of a “hermeneutical circle.”

Apart from these doctrinary problems which the philosophy of the state has not yet been able to resolve, state power, traditionally, was more or less clearly defined in the framework of systems of representation, whether democratic or autocratic.⁵ In the constitutional systems of the West, state power was circumscribed by the interplay of forces within the scheme of the “separation of powers” laid out in the respective constitution. In conformity with conventional wisdom, political and international relations theory prided itself in defining parameters – or “elements” – for the “measurement” of state power.⁶

³ The author has introduced this notion in the analysis of international law. See “The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order,” in: *Chinese Journal of International Law*, Vol. 5, No. 2 (2006), pp. 323-340.

⁴ On this paradox see also Rajab Budabbus who particularly refers to the problem of a democratic *circulus vitiosus*: “Le monde unipolaire et la démocratie,” in : Hans Köchler (ed.), *Democracy after the End of the East-West Conflict*. Vienna: International Progress Organization, 1994, pp. 19ff. There exists indeed an interdependent relationship between democracy as a system of decision-making rules on the one hand and democracy as a socio-economic framework enabling the people to exercise their rights on the basis of equality, on the other.

⁵ On the theory of representation in Western political thinking, especially as regards its idealistic ontological assumptions, see e. g. Gerhard Leibholz, *Das Wesen der Repräsentation und der Gestaltwandel der Demokratie im 20. Jahrhundert*. 3rd, enlarged edition. Berlin: de Gruyter, 1966. For a critique of the notion see the author’s article: “Die Repräsentationslehre. Zum Problem des Idealismus in der politischen Theorie,” in: Hans Köchler, *Philosophie – Recht – Politik. Abhandlungen zur politischen Philosophie und zur Rechtsphilosophie*. Vienna/New York: Springer-Verlag, 1985, pp. 27-45.

⁶ As regards external state power see e.g. Hans J. Morgenthau, *Politics Among Nations. The Struggle for Power and Peace*. 5th, revised edition. New York: Knopf, 1978, Chapter 9: “The Elements of Power,” pp. 117ff.; Gottfried-Karl Kindermann, “Zur Methode der Analyse zwischenstaatlicher Politik,” in: Gottfried-Karl Kindermann (ed.), *Grundelemente der Weltpolitik. Eine Einführung*. Munich/Zurich: R. Piper & Co., 1977, esp. pp. 63ff. On the economic parameters of power see esp. Daniel S. Papp, *Contemporary International Relations. Frameworks for Understanding*. 2nd edition. New York: Macmillan; London: Collier Macmillan, 1988, Chapter 14, pp. 374ff.

There appears to be a consensus among contemporary political thinkers that power, in order to conform to the rule of law, is to be exercised through different forms of *representation* – an assumption that is philosophically questionable not only in view of Rousseau’s earlier critique, but also as regards fundamental normative and psychological aspects. Although the notion of representation is based on an ontological as well as a normative fiction,⁷ the relationship between the people (acting not merely as [private] individuals, but as *citizens*) on the one hand and their representative(s) (i. e. the political functionaries with specific authority) on the other is operationally defined on the basis of principles and mechanisms laid out in the respective constitution and further specified by law. Though representation, admittedly, is not a genuine element of democracy⁸ – something which also has been made clear by Kant in his outline of a Republican system⁹ –, as an organizational tool it helps avoiding anarchy that would otherwise prevail, should the political will be expressed in an uncoordinated and individualistic (or “private”) manner – provided the representative function is exercised in a framework of a separation of powers, i. e. of constitutional checks and balances.

However, modern society has witnessed a profound, qualitative, change as far as the nature of power, expressed in representative forms of decision-making, is concerned. In terms of state structures, the practice of representation requires a clearly identifiable relationship between delegating and delegated power. In the context of the ever more complex socio-cultural and economic conditions of our rapidly advancing *technical civilization*, the relationship between the people (as citizens) and those who exercise power on their behalf is not only becoming more and more vague, but is gradually lost. This process has led to a profound *delegitimization* of the entire political system and an erosion of the very concept of the rule of law – particularly on the level of international relations.¹⁰

In view of the apparent change of paradigms – from a model of representation based on the sovereignty of the *delegating* citizen to one based on the functioning of a complex technical system that is to be ensured by the power of the *delegate* –, the question put before philosophy is exactly what forms of representation, if any, can (1) be identified and (2) be justified (in terms of the rule of

⁷ On the fictional character of representation see the author’s analysis: “Die Repräsentationslehre. Zum Problem des Idealismus in der politischen Theorie,” loc. cit., pp. 27ff.

⁸ See Hans Kelsen, *Vom Wesen und Wert der Demokratie*. Reprint of the 2nd ed. (1929). Aalen: Scientia-Verlag, 1963, esp. pp. 30ff. He makes unmistakably clear that representation is not compatible with popular sovereignty.

⁹ Immanuel Kant, *On Perpetual Peace*, Section II, First Definitive Article for Perpetual Peace: “The Civil Constitution of Every State Should Be Republican.”

¹⁰ See the author’s “Opening statement” in: Hans Köchler (ed.), *The United Nations and International Democracy*. Vienna: Jamahir Society for Culture and Philosophy, 1995, pp. 9ff.

law) in the framework of technology (technical civilization)? Does the ever more complex division of labor, necessitated by technology, eventually warrant essentially new forms of representation?

It is an undeniable fact that, with the development of modern technology and the rapid transformation of social life towards what is called a “technical society,” state power has gradually become more diffuse – a process that is made obvious, even to the most cautious observer, by the dynamic of what nowadays is called “globalization”¹¹ in which technology, combined with an unrestrained economic drive of the individual, freed from the limitations and restrictions of the nation-state, has culminated.

Due to these developments, it has become more difficult to objectively analyze existing power structures, whether in the domestic or transnational realm. Human subjectivity, with *autonomy* as its normative characteristic,¹² is being absorbed by a complex web of dependencies in terms of an environment – or “life-world” – which is of man’s own making; this social environment is being constantly reshaped in the course of a rapidly advancing technological remaking of the natural environment and as a result of the ever more refined technologies of social engineering. The latter processes have been analyzed in great detail by Walter Lippmann under the aspect of the “manufacture of consent”¹³ – with a view of streamlining public opinion in a system of representation that uses the notion of “democracy” almost exclusively for purposes of legitimation.

This state of affairs may render the autonomy of the citizen – i.e. the status of the individual as a subject that, in ontological terms, *cannot* and, in normative terms, *must not* be “objectified” – increasingly fragile, if not obsolete. In a deeper philosophical sense, we witness a kind of self-manipulation of the human race that appears to go beyond the scope of the individual’s reflective capacity.

¹¹ On the implications of globalization for political and legal philosophy see the author’s paper: “Philosophical Aspects of Globalization – Basic Theses on the Interrelation of Economics, Politics, Morals and Metaphysics in a Globalized World,” in: Hans Köchler (ed.), *Globality versus Democracy? The Changing Nature of International Relations in the Era of Globalization*. Studies in International Relations, XXV. Vienna: International Progress Organization, 2000, pp. 3-18.

¹² The notion of autonomy is interpreted here in the context of Kant’s transcendental philosophy. See esp. his *Critique of Practical Reason*, Book I, Chapter 1, § 8. According to Kant, autonomy is the “property of the will to be a law to itself.” (*Foundations of the Metaphysics of Morals and, What Is Enlightenment?* Trans. from German by Lewis White Beck. New York: Macmillan; London: Collier Macmillan, 1989, p. 65.) On the application of this notion to the theory of democracy see, *inter alia*, the author’s analysis: *Democracy and Human Rights. Do Human Rights Concur with Particular Democratic Systems?* Studies in International Relations, XV. Vienna: International Progress Organization, 1990.

¹³ Walter Lippmann, *Public Opinion. With a New Introduction by Michael Curtis*. Brunswick/London 1991, esp. Chapter 15: “Leaders and the Rank and File.” – See also: Noam Chomsky, *Deterring Democracy*. London/New York: Verso, 1991, Chapter 12: “Force and Opinion;” Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media*. With a new introduction by the authors. New York: Pantheon Books, 2002; Steven Poole, *Unspeak™*. London: Little, Brown, 2006.

Man's efforts at conquering nature – including his *conditio humana* – by means of technology had the, albeit unintended, consequence of his “recreating” himself in the process of the “social evolution”¹⁴ and have brought about an intrinsically *antagonistic* development that directly affects the polity of the 21st century: While the means for the exercise of socio-political power – aimed at the mastery of the human environment – are becoming ever more effective due to modern technology, directly impacting the citizen's perception of reality, the human being's capacity of self-determination (autonomy) is getting more limited. The citizen of the technical civilization exists in an environment which is characterized by a tendency towards a collective loss of self-awareness. This is not only the diagnosis of Martin Heidegger's philosophy of Being,¹⁵ but corresponds to a general assessment of the implications of mass culture in the era of globalization.¹⁶

The illusion of an ever more perfect control of nature, including man's mastery of his own psychophysical condition, is strangely juxtaposed with an increasing dependency upon an artificially created environment the parameters of which no individual is able to fully grasp. While the awareness of human dignity based on the subject's autonomy has constantly increased, particularly since the era of the Enlightenment, the human being as autonomous subject is more and more being “objectified” in the framework of a technical setup that is almost entirely beyond the individual's control. This confronts humanity with the question as to a possible redefinition of *subjectivity* in a context in which a clear conceptual distinction between “subject” and “object” has become impossible due to the all-encompassing nature of man's self-creation (or “re-invention” in the newspeak of the 21st century) through technology, obfuscating the traditional distinction between internal and external reality.

This diagnosis has serious implications in terms of the political system and the rule of law. The challenges faced by a polity that is committed to uphold the idea of *autonomy* and the principles resulting from it for the organization of the state, are enormous. We are indeed confronted with a gradual loss of *civil freedom* due to the increasing *pervasiveness* of political power that results from the rapid technological development, including information techniques, and makes it almost impossible for the citizen to hide from the sight – and control – of the state. As has become evident,

¹⁴ This notion has been specifically elaborated by Rupert Riedl in his contribution to evolutionary epistemology. See his *Biologie der Erkenntnis. Die stammesgeschichtlichen Grundlagen der Vernunft*. Munich: Deutscher Taschenbuch-Verlag, 1988.

¹⁵ See Martin Heidegger, *Die Technik und die Kehre*. 2nd edition. Pfullingen: Günther Neske, 1962. For a general analysis of Heidegger's critique of the technical civilization see the author's work: *Skepsis und Gesellschaftskritik im Denken Martin Heideggers*. Monographien zur philosophischen Forschung, Vol. 158. Meisenheim a. G.: Anton Hain, 1978.

¹⁶ On this aspect see, *inter alia*, Douglas Kellner, *Theorizing Globalization*. Online Paper, UCLA Graduate School of Education & Information Studies (GSE&IS), <http://www.gseis.ucla.edu/faculty/kellner/papers/theoryglob.htm>, last visited 18 July 2006.

for instance, in the way technology is used (at least in the Western world) for the “monitoring” of the citizen in the course of the events of September 11, 2001, the exercise of power by the institutions of the state is increasingly becoming arbitrary;¹⁷ it is not anymore conditioned by well established constitutional mechanisms of checks and balances such as those laid out in Kant’s treatise on Perpetual Peace. The lack of transparency of decision-making is contrasted with the fact of the citizen himself becoming ever more “transparent” vis-à-vis the institutions representing state power (with all that this entails for his daily life and eventual political preferences or ambitions). Thus, the citizen’s status as a political agent, i. e. a *subject* that actively takes part in the life of the polity – a process from which the state derives its very legitimacy –, is increasingly reduced to his status of being a mere *object* of state authority.

What Martin Heidegger has described as “oblivion of Being” (*Seinsvergessenheit*)¹⁸ – as characteristic of technical civilization, understood as extreme form of *metaphysics*¹⁹ –, may well be a symptom of this human tendency towards total control over nature and over fellow human beings, resulting in a fundamental loss of self-awareness. If applied to the realm of the polity, this development means an erosion of the status of the human being as *citizen*, i.e. as autonomous member of a community the collective will of which is derived from the genuine will of each individual. The process of self-objectivization which is apparent in those circumstances may in turn lead to a profound *delegitimation* of the political system; in such a framework, people are not at the origin, or do figure at least as indirect source, of decisions on behalf of the polity, but are “being dealt with” according to the pre-democratic maxim of *panem et circenses*. To a considerable extent,

¹⁷ See Nancy Chang, *Silencing Political Dissent*. [Nancy Chang and the Center for Constitutional Rights.] New York: Seven Stories Press, 2002. – See also the author’s paper: *The War on Terror, its Impact on the Sovereignty of States, and Its Implications for Human Rights and Civil Liberties*. I.P.O. Research Papers. Vienna: International Progress Organization, 2003, at www.i-p-o.org; James Gomez and Alan Smith, “September 11 and Political Freedom: Asian Perspectives,” in: Uwe Johannsen, Alan Smith, James Gomez (eds.), *September 11 & Political Freedom: Asian Perspectives*. Singapore: Select Publishing Pte Ltd, 2003, pp. xiii-xxxv.

¹⁸ This notion is understood in the sense of the forgetfulness of the “ontological difference,” i. e. the distinction between Being (*das Sein*) and beings (*das Seiende*). See esp. Martin Heidegger, *Sein und Zeit*. 11th edition. Tübingen: Max Niemeyer, 1967. For details see also Martin Heidegger, *On Time and Being*. Trans. by Joan Stambaugh. Chicago/London: University of Chicago Press, 1972, Chapter “Summary of a Seminar on the Lecture ‘Time and Being’,” pp. 25ff.

¹⁹ “Metaphysics” as used by Heidegger is not to be confused with the meaning of that concept in traditional academic philosophy. See esp. Martin Heidegger, *Nietzsche*. Vol. II. Pfullingen: Günther Neske, 1961, pp. 458ff (“Entwürfe zur Geschichte des Seins als Metaphysik”). On the specific meaning given to the term by Heidegger in his project of a critique of the Western perception of reality see the author’s works *Skepsis und Gesellschaftskritik im Denken Martin Heideggers*, esp. pp. 14ff, and *Philosophical Aspects of Globalization*, loc. cit., pp. 12ff. On the connection between “metaphysics” and “Seinsvergessenheit” see Martin Heidegger, “Summary of a Seminar on the Lecture ‘Time and Being’,” loc. cit., p. 41: “Metaphysics is the oblivion of Being, and that means the history of the concealment and withdrawal of that which gives Being.”

this reflects the reality of the industrialized nation-state in our era of “globality,”²⁰ irrespective of the particular socio-cultural environment of a given state.

(II)

The challenge to philosophy: reassessing the relationship between power and law

In a world the perception of which is continuously being reshaped as a result of the technological civilization’s creating new systems of reference, including the psycho-physical conditions of human self-realization, with all that this entails for the human being’s identity, philosophy is facing new challenges. The philosopher is confronted with entirely new questions as to the definition of commonly accepted criteria of a *legitimate* political system, and in particular an exercise of power that is compatible with what has been described as the rule of law on the basis of the idea, advanced in the period of Enlightenment, of the separation of powers.²¹

One of the basic questions to be addressed by philosophy will be: what is the meaning of human *self-determination* (individual as well as collective) under the conditions of a technical civilization? Technology’s tendentiously universal reshaping of the globe, including the natural as well as the human environment, thus rendering obsolete earlier conceptual distinctions between the “objective” and “subjective” worlds, has been highlighted by the consequences of what is commonly referred to as *globalization*.

From this problématique follows a further question: What are the *anthropological* implications of the *dialectical* process which is characterized, on the one hand, by a virtually unrestrained drive towards human self-realization and, on the other, by a gradual loss of individual and societal awareness (i. e. an increasing inability to define one’s position, as a subject and, thus, citizen, in view of the ever more complex interdependent relationship of man and world)? The illusion of the mastery of the world, nurtured by technology in its salient form of globalization, has

²⁰ On the concept of “globality” see, *inter alia*, Simon Dalby, “Globalizing Environment: Culture, Ontology and Critique,” in Hans Köchler (ed.), *Globality versus Democracy?*, pp. 165ff.

²¹ On obstacles to the implementation of this principle in the actual practice of Western democracy see the author’s paper “A Theoretical Examination of the Dichotomy between Democratic Constitutions and Political Reality,” in: Jean-Paul Harpes and Lukas K. Sosoe (eds.), *Demokratie im Focus / La Démocratie en Discussion / Democracy Reconsidered*. (Series “Neue Wege der Demokratie / Nouvelles Voies de la Démocratie,” Vol. 1.) Münster/Hamburg/Berlin/London: LIT-Verlag, 2001, pp. 48-57.

alienated man from his natural environment – a fact of our “life-world”²² which is almost inevitably coupled with a loss of societal identity.

Still another question imposes itself in view of this state of affairs: What does the resulting illusory self-perception mean in the realm of politics under the conditions of “globality”: for the nation-state as well as for relations *between* states, i. e. the international system?

This confronts philosophy with the problem as to how to redefine the autonomy of the human being in the universal (i.e. global) context of technology. Specific questions to be asked in relation to this overall problem are, *inter alia*:

- Is *democracy* (in the sense of genuine participation of the citizen in public affairs, i. e. beyond *representation* as a mere instrument for creating public order) at all possible under the conditions of a globalized technological civilization?²³
- What are the implications of the “absorption” of the subject (meaning the loss of genuine *autonomy* of the citizen) – by processes of the technical re-creation, or “reinvention,” of the life-world – for the constitutional system of the state and in particular for the concept of the rule of law? Is the rule of law eventually to be redefined in deference to the “objectivization” of the life-world in all its aspects, as brought about by globalization?
- Is the subject’s gradual loss of autonomy a process that goes parallel with the gradual “absorption” of the independence (or sovereignty) of the nation-state, resulting from the dynamics of globalization?²⁴
- How is “subjectivity” to be interpreted under such conditions and how is it related to the Kantian notion of “autonomy” in the context of the global polity?
- Is the present global unipolarity – or the absence of a balance of power²⁵ – to be interpreted as a mere corollary of technology (in the sense of technological civilization) or

²² “Life-world” is understood here in the sense as defined by Edmund Husserl in his treatise on the crisis of European science (Edmund Husserl, *Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie. Eine Einleitung in die transzendente Phänomenologie*. Ed. Elisabeth Ströker. 3rd edition. Hamburg: Meiner, 1996) and as implied in Martin Heidegger’s notion of *In-der-Welt-sein* (“being-in-the-world”) (described in *Sein und Zeit* [Being and Time]).

²³ On the general philosophical questions as to the compatibility of democratic norms with representation at the domestic and power politics at the transnational level see Hans Köchler, *Democracy and the International Rule of Law. Propositions for an Alternative World Order. Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations*. Vienna/New York: Springer, 1995.

²⁴ See also Andrew Hurrell and Ngaire Woods (ed.), *Inequality, Globalization, and World Politics*. Oxford/New York: Oxford University Press, 1999; esp. the article by Ngaire Woods, “Order, Globalization, and Inequality in World Politics,” pp. 8ff. – For a more positive evaluation of the prospects of globalization in relation to democracy see George Monbiot, “A Global Democratic Revolution. The Case Against Hopeless Realism,” in: *The Age of Consent. A Manifesto for a New World Order*. London: Flamingo, 2003, pp. 51-66.

is it to be seen as a transitory phase of inter-state relations, due to the sudden and unforeseen end of the bipolar order?²⁶

- How can the power structures which are inherent in a globalized world (where state sovereignty has itself been eroded and the individual's freedom of decision is increasingly limited also at the domestic level) be made transparent so as to enable man to regain his autonomy as a citizen – and indeed assume his responsibility as “citizen of the world”?²⁷

These questions make us again aware – and demonstrate the relevance in terms of man's self-definition in the 21st century – of *classical apories* of legal as well as political philosophy, such as:

- how does power relate to law?;
- can law be conceived of independently of power?;
- is the relationship between the two essentially *dialectical* (something which would imply a redefinition of the very rule of law)?;²⁸
- how is a democratic constitution, embodying – in our Western understanding – the very essence of the rule of law, to be conceived in view of the potential dichotomy (or antagonism) between power and law?

Those questions have become ever more urgent with the rapid progress of our technical civilization. This demonstrates the need for a *comprehensive* approach that integrates philosophical anthropology with philosophy of law and political philosophy on the one hand and reflections on the rule of law at the level of the nation-state with an analysis of the international rule of law, i.e. the rules governing the relations between sovereign states, on the other.

In particular, philosophy is left with the task of (a) rethinking the role of power at the *domestic* level, where the exercise of power is first and foremost situated in the domain of representation, and (b) reassessing the normative status, and impact, of power politics at the

²⁵ For details see the author's analysis: “The Precarious Nature of International Law in the Absence of a Balance of Power,” in: Hans Köchler (ed.), *The Use of Force in International Relations. Challenges to Collective Security*. Studies in International Relations, XXIX. Vienna: International Progress Organization, 2006, pp. 11-19.

²⁶ For an assessment of the actual status of the United States as global imperial power see Niall Ferguson, *Colossus. The Rise and Fall of the American Empire*. London/New York et al.: Penguin Group, 2005. – For a general analysis see also Robert Cooper, *The Breaking of Nations. Order and Chaos in the Twenty-first Century*. London: Atlantic Books, 2004.

²⁷ See the author's considerations in: “Philosophical Aspects of Globalization,” loc. cit., esp. pp. 14ff.

²⁸ On the dialectical relationship of power and law in the context of international relations see the author's article: *The Dialectic of Power and Law. The United Nations and the Future of World Order*. Occasional Papers Series, No. 8. Vienna: International Progress Organization, 2004.

transnational level where the unexpected collapse of the bipolar balance of power²⁹ has led to an unprecedented erosion of international law,³⁰ jeopardizing what has been achieved – in the course of the 20th century – in terms of taming state power and especially of challenging its foremost traditional attribute, the right to wage war (*jus ad bellum*) (by confining it to the right of individual or collective self-defense and to measures of collective security under Chapter VII of the United Nations Charter).³¹

(a) Rethinking the role of power at the level of the nation-state:

As far as the domestic system of law is concerned, the creation of norms is almost exclusively (with few exceptions in countries such as Switzerland) achieved through forms of representation. With the authority of decision-making being delegated to privileged individuals or groups of individuals, representation has essentially become a tool for the legitimation of power.³² According to established state doctrine, power is delegated, for a given period of time, to elected representatives; in reality, however, the decision of the electorate is not based on informed opinion, achieved in the course of open, democratic debate, but conditioned by means of techniques that Walter Lippmann has characterized as “manufacture of consent.”³³ In philosophical terms, “representation” is being justified by virtue of an *ontological fiction*³⁴ according to which the “collective will” of the people – i. e. the totality of the people – is an entity *sui generis*, requiring a

²⁹ On the concept of the balance of power see esp. Hedley Bull, *The Anarchical Society. A Study of Order in World Politics*. Third Edition. Houndmills (UK)/New York: Palgrave, 2002, pp. 97ff. The concept was originally defined by Emer de Vattel in his work *Droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des souverains* [1758]. De Vattel describes balance of power as “une disposition des choses au moyen de laquelle aucune puissance ne se trouve en état de prédominer absolument et de faire la loi aux autres ...” (Book III, Chapter 2, section 47.)

³⁰ This erosion is mirrored in the realist theory of international relations which, at the beginning of the 21st century, is experiencing a remarkable revival. The most outspoken skeptics concerning the binding nature of international rules appear to be Jack L. Goldsmith and Eric A. Posner who quite frankly dismiss calls for respect for the rule of law as “international rhetoric” and largely situate the domain of international law in the area of mere moral obligations: *The Limits of International Law*. Oxford/New York et al.: Oxford University Press, 2005, esp. Part 3: “Rhetoric, Morality, and International Law.” – For a critical assessment see Philippe Sands, *Lawless World. America and the Making and Breaking of Global Rules*. London/New York et al.: Penguin Group, 2005.

³¹ On the details of the paradigm change concerning the *jus ad bellum* see, *inter alia*, the author’s paper: “The Precarious Nature of International Law in the Absence of a Balance of Power,” loc. cit.

³² The author has exemplified this problem in an analysis of the Western parliamentary system. See e. g. “Demokratie im Spannungsfeld von Theorie und Wirklichkeit,” in: Helmut Reinalter (ed.), *Die Zukunft der Demokratie*. (Interdisziplinäre Forschungen, No. 12.) Innsbruck/Vienna/Munich/Bozen: Studien-Verlag, 2002, pp. 35-49.

³³ Walter Lippmann, op. cit. – For a critique of this state of affairs in the make-up of the contemporary hegemonial system see Noam Chomsky, *Deterring Democracy*. London/New York etc.: Verso, 1991.

³⁴ On the fictitious character of representation (in ontological, normative and psychological terms) see the Hans Köchler, *Neue Wege der Demokratie. Demokratie im globalen Spannungsfeld von Machtpolitik und Rechtsstaatlichkeit*. Vienna/New York: Springer, 1998, pp. 23ff.

chosen individual (or group of individuals) in order to make itself “visible” and be able to articulate itself.³⁵

Thus, representation is based on a structural relationship of power and subordination, whereby – parallel to the development and increased refinement of social techniques in the service of the making of public opinion – the citizen (as the subject subordinated to his “representative[s]” in the course of the political process) is made more and more oblivious of the interests that drive – or “motivate” – those who compete for political office. In this regard, modern technology – in particular information technology in tandem with “social engineering” – has brought about a *qualitative change* in democratic decision-making insofar as the individual members of the polity have lost the capacity of independent evaluation of the facts (that are presented to them by the media in tandem with the political élite) and, at the same time, the ability to clearly distinguish between facts underlying a specific decision and norms in the sense of specific preferences that are supposedly to be made by the citizens themselves, not by the competitors for political power.³⁶ It will be the special task of philosophy – and a major challenge in the context of the technologically ever more refined, and less penetrable, web of political and economic interests – to analyze this structural relationship of power and subordination *sine ira et studio* and demonstrate that norms, in order not only to be *legally* binding, but *legitimate* in terms of their democratic creation, need to be rooted in the autonomous will of the citizens, not in the power-driven interests of those who “officially” (i. e. according to the formal procedures of the constitution) represent the polity, nor in the business-driven interests of those whose economic power, in turn, informs the decisions of the office holders (“representatives”).

³⁵ For this interpretation of the concept of representation – which puts it in an essentially idealistic context – see esp. Carl Schmitt, *Verfassungslehre*. Berlin: Duncker & Humblot, 1954, pp. 205ff. For a further development of this idealistic-ontological concept see Gerhard Leibholz, *Das Wesen der Repräsentation und der Gestaltwandel der Demokratie im 20. Jahrhundert*. As regards the idealistic fiction of the popular will as an entity *per se* see Erich Kaufmann, “Zur Problematik des Volkswillens (1931),” in: Erich Kaufmann, *Rechtsidee und Recht. Rechtsphilosophische und ideengeschichtliche Bemühungen aus fünf Jahrzehnten*. Gesammelte Schriften, Vol. III. Göttingen: Schwartz, 1960, pp. 272-282.

³⁶ Much earlier, George Orwell has undertaken a masterful analysis of the mechanisms by which the political process in a modern industrialized society obfuscates realities – with the aim of winning the support of the people and imposing the solutions of the political élites: “Politics and the English Language,” in: George Orwell, *Essays*. Edited and introduced by John Carey. New York: Alfred A. Knopf, 2002, pp. 954-967.

(b) Reassessing the normative status of power politics at the transnational level

(aa) While power, at the level of the *nation-state*, has become ever more *pervasive* and *diffuse* at the same time (due to the instrumentalization of representation in the framework of technological civilization), thus eroding the rule of law domestically as well as in regard to the state's role as an international agent, power relations at the *transnational level* have gone beyond the confines of earlier multipolarity and recent bipolarity of the global system. In the absence of mutual checks and balances between rivals for global hegemony, the system of norms regulating the relations between states is gradually being superseded by rules that are proclaimed and effectuated *unilaterally*, i. e. according to the “national interests” of the most powerful international actor. This process has not only undermined the United Nations Organization as guarantor of the international rule of law³⁷ and disillusioned those who may have harbored “moralistic illusions” about man's collective behaviour;³⁸ it has effectively reversed the development, initiated at the end of the 19th century, towards a “common space of law” which was meant to ensure peaceful co-existence among all nations and steady progress in terms of the development of technology, serving mankind as a whole.

The lack of effective legal constraints on the exercise of power by those who are “more powerful,” already painfully felt in the era of bipolarity due to the special voting privilege accorded to a small number of United Nations member states,³⁹ has become the major predicament of the international order in the era of globalization. The meaning of the “rule of law” is lost in a context where the validity of legal norms is measured in terms of the “national interest” alone⁴⁰ and where the most powerful international actor has chosen to

³⁷ For an assessment of the long-term impact of this development on the United Nations Organization see the author's paper “The United Nations and Global Power Politics: The Antagonism between Power and Law and the Future of World Order,” loc. cit.

³⁸ In his 1932 analysis of politics, which has become one of the most influential works of political realism, Reinhold Niebuhr has spoken of those idealistic illusions about human nature; however, his realist approach, unlike that of Goldsmith and Posner, is not cynical but intended, in Niebuhr's words, to serve the aim of “achieving an ethical social goal for society”: *Moral Man and Immoral Society: A Study in Ethics and Politics*. New York: Scribners, 1932, “Introduction,” p. xxv.

³⁹ For details see the author's treatise *The Voting Procedure in the United Nations Security Council. Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, XVII. Vienna: International Progress Organization, 1991.

⁴⁰ On the concept of the “national interest” in the framework of the realist theory of international relations see esp. Hans Morgenthau, *Politics among Nations. The Struggle for Power and Peace*; and: *In Defense of the National Interest. A Critical Examination of American Foreign Policy. With a new introduction by Kenneth W. Thompson*. Washington, D.C.: University Press of America, 1982. – For a 21st century version of “realism,” which is rather cynical in its acceptance of U.S. imperial power as *fait accompli*, see Jack L. Goldsmith and Eric A. Posner, op. cit., esp. the chapter “Conventional Wisdom,” pp. 170ff.

systematically oppose, with utmost vigour, all initiatives aimed at creating a *supranational* system of law enforcement – such as the International Criminal Court⁴¹ – which would bolster up the still fragile idea of the *universality* of the law, as embodied in the doctrine of the international rule of law.⁴² Not surprisingly, for the advocates of this kind of blunt realism “[t]he appeal to law is simply the denial of self-interest.”⁴³ It is up to philosophy to demonstrate why a system in which legal norms are almost exclusively defined according to criteria of power politics is not only tantamount to *global anarchy*, but incompatible with human dignity.

(bb) The extreme form of “representation” at the global level, which is obvious in the norm-setting claim of a hegemonial power on behalf of what is conveniently called “the international community” (but what, in actual fact, is nothing more than a coalition of the “willing” or coerced), has to be exposed as what it really is, namely a *regress* to the era of what German state theory has aptly described as *Souveränitätsanarchie* (i.e. a state of anarchy among sovereign states, resulting from their claim to an unrestricted exercise of their very sovereignty). What is required, under these circumstances, is not a new ontological fiction, an artificial understanding of the “nation-state” as supreme entity to which all other such entities would be subordinated (a notion that is structurally similar to the fiction of representation, according to which the collective will of the people is an entity *sui generis*),⁴⁴ but an application of the Kantian notion of autonomy to the relations between states – with the mutual recognition of rights as consequence. This requires nothing less than taking the principle of the sovereign equality of states seriously, a norm that has been enshrined in the Charter of the United Nations Organization (Art. 2[1]).

Thus, the questions philosophy of law – in tandem with political philosophy – has to tackle in the 21st century are of a more complex nature than traditional questions as to the *legality* versus *legitimacy* of state power – or the validity of legal norms in regard either to their material

⁴¹ On the implications of universal jurisdiction for international legality and peace see Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*. Vienna/New York: Springer, 2003, chapter I/6, pp. 261ff. – For a general assessment of the potential of the International Criminal Court see William A. Schabas, *An Introduction to the International Criminal Court*. 2nd edition. Cambridge etc.: Cambridge University Press, 2004.

⁴² On the notion of the rule of law see esp. Sienho Yee, *Towards an International Law of Co-progressiveness*. Developments in International Law, Vol. 47. Leiden/Boston: Martinus Nijhoff Publishers, 2004, Chapter 3: “The Perfect Rule of Law.”

⁴³ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, p. 184. For the authors, it is an established fact that when “states cooperate in their self-interest, they naturally use moralistic language of obligation rather than the strategic language of interest.” (Ibid.)

⁴⁴ See e. g. Erich Kaufmann, “Zur Problematik des Volkswillens (1931),” loc. cit.

“effectiveness” or formal consistency within the framework of a given constitutional system.⁴⁵ Philosophy of law and political philosophy have increasingly to be conducted in an integrated manner and not as separate disciplines. Similarly, we have to acknowledge the interconnectedness of the doctrines of domestic (constitutional) law and international (including supranational) law.

In a global order where (a) the autonomy of the citizen is absorbed, to a considerable extent, by power structures that transcend the nation-state and organizational dependencies that precede, albeit unnoticed by the citizen, his exercise of political freedom in a representative system, and where (b) the rules that govern the behaviour of states in their relations among each other are subordinated not to the general norms of *jus cogens*, but to the facticity of the – constantly fluctuating – national interests of the most, not merely the more, powerful state(s), the *dialectic relationship of power and law* attains an entirely new quality and, thus, has to be addressed by the philosopher in a novel fashion.

Traditionally, the antagonism between power and law has been bidirectional: According to this relationship, law restricts the exercise of power, taming it in the interest of the citizen’s autonomy, while, at the same time, power enforces the law,⁴⁶ albeit at the price of privileging, to the detriment of the citizens, those entrusted with the exercise of that very power. Both, power and law, are defined by way of an interdependent relationship.

However, under the conditions of what has been termed the “New World Order,”⁴⁷ this essentially dialectical relationship of power and law is being replaced by a unidirectional relationship in favour of state power (internationally) and of the informal power structures that are hidden behind the formal power of the state (domestically).⁴⁸ Both, the international and domestic aspect, are more and more intertwined as a result of what has been described as the dynamics of globalization, a

⁴⁵ On the latter questions see esp. Hans Kelsen, *Pure Theory of Law*. See also the author’s analysis: “Zur normenlogischen Konsistenz der Reinen Rechtslehre,” in: *Philosophie – Recht – Politik*, pp. 3-14.

⁴⁶ John Locke has pointed to the antagonistic relationship between power, in the sense of unrestrained action, and coercive power: “In all states and conditions, the true remedy of force without authority is to oppose force to it.” (*The Second Treatise of Government*. Ed., with an introduction, by Thomas P. Peardon. New York: Liberal Arts Press, 1952, p. 88.)

⁴⁷ On the implications of this notion in terms of political philosophy, in particular the theory of transnational power, see the author’s treatise: *Democracy and the New World Order*. Studies in International Relations, XIX. Vienna: International Progress Organization, 1993.

⁴⁸ These informal structures are obvious in the hidden role of lobbies and pressure groups that, to a large extent, define power at the domestic level of the modern industrialized state. For an exemplary analysis of the U.S. system in that particular regard see William B. Greider, *Who Will Tell the People. The Betrayal of American Democracy*. New York: Simon & Schuster, 1992.

process that not only erodes state sovereignty,⁴⁹ but privileges, in terms of power relations, the economically stronger polities in a potentially unrestricted competition for the resources of the globe.

The desideratum of contemporary philosophy: elaborating the anthropological dimension of the rule of law

It is up to the philosopher to demonstrate that even under the conditions of globality and of a world order that is characterized by the absence of a balance of power, the very nature of the rule of law remains to be rooted in the respect for the autonomy of the citizen as subject of the law⁵⁰ – which is tantamount to the recognition of the citizen’s dignity and inalienable human rights. Those form the basis of state sovereignty and, consequently, of the validity of the norms of international law.⁵¹ In a philosophical anthropology that defines man as the being that is at the origin of his actions, “power” – in the sense of public authority (whether domestic, international or supranational) – has no right *sui generis*, but is defined in an interdependent – not unidirectional – framework and in relation, or subordination, to the dignity and fundamental rights of the citizen. Instead of being seen primarily as an instrument of state authority, i. e. sovereignty in the traditional sense, state power must be defined as *instrumental* for, and thus *confined* to, the exercise of the sovereignty of the citizen.

In our analysis, this evaluation of power is in conformity with the insights of the *philosophia perennis* into the nature of the human subject. To explain how this truth can retain its relevance under the conditions of a globalized technological civilization in which “world order” is about to acquire the characteristics of a system of anarchical power, instead of law as a system of norms based on the equality of all nations, is, in our view, one of the main challenges of contemporary practical philosophy.

⁴⁹ For details see Geoffrey Parker, “Globalization and the Status of the Territorial State,” in: Hans Köchler, *Globality versus Democracy?*, pp. 79-92.

⁵⁰ This position is in conformity with the Kantian notion of autonomy as “die Eigenschaft des Willens, sich selbst ein Gesetz zu sein” (the property the will has of being a law unto itself) (*Grundlegung zur Metaphysik der Sitten*, Akademie-Ausgabe, Vol. IV, p. 447). On the related understanding of freedom in Kant’s transcendental philosophy see esp. *Kritik der praktischen Vernunft*, 1st edition 1788, p. 84 (freedom as “Vermögen absoluter Spontaneität” [“capacity of absolute spontaneity“]).

⁵¹ On the connection between the norms of domestic and international law and human rights, rooted in the autonomy of the subject (citizen) as common denominator, see Hans Köchler, “The Principles of International Law and Human Rights,” in: *Democracy and the International Rule of Law*, pp. 63ff.