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Democracy under Siege

Democratic Solidarity between Global Crisis and Cosmopolitan Hope

Abstract For almost half a century (between 1940 and 1990) the democratic and social state has solved the twofold problem of growth *and* social exclusion *through social inclusion* within the borders of the national state. This solution since the 1970s came under threat of multiple crises of the environment, secular stagnation, under-consumption, legitimization and constitutionalization. There might be a social solution of present crisis possible through massive redistribution plus decent basic income (on the level of tuition-costs) plus green growth. However, after globalization of capital there are no longer national social alternatives available. Therefore, there is no alternative to transnational democratic state-formation. But are there actors relevant, strong and motivated enough to do that?

Keywords: growth, environment, secular stagnation, under-consumption, legitimization crisis, global capitalism, transnational democracy

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The first part of the paper is a brief diagnosis of modern society under conditions of global crisis (7 theses), and the second part draws some political conclusions (related to four fundamental problems of the global system of functional differentiation, in particular the globalized capitalist economy).

I

The basic problem of modern democracy can be defined as follows. Modern democracy must solve the *societal problems produced by functional differentiation in the environment of social systems, in particular in the social and natural environment of the economic system, which cannot be solved by functional differentiated systems alone*, and it must solve these problems democratically. This means through the political, social, economic and cultural *inclusion of the other as the subject of self-legislation* (Brunkhorst 2005: 81--101). To be a subject of self-legislation therefore is based on the constitutional norm that all affected must equally participate in the legislative procedure that is not restricted to one organ (e. g. parliament) but includes all organs of a democratic legal community (e. g. Art 20 II of the German Constitution).

For the societal basic problem of functional differentiation, Marx's analysis of modern capitalism is still paradigmatic. Marx has shown in *Capital*

that the self-referential closure of the economy can solve *all* problems of *exchange-value* and *dead labor* (capital) through the expanded reproduction of exchange value and dead labor – but cannot solve the problems, which its own reproduction causes in an environment that is a social life-world where *use-value* and *living labor* matter. Simply, modern capitalism relies on the solution of environmental problems, which capitalism generates but cannot solve, therefore a *political solution* is needed.

218 As it seems, democracy is as minimally dependent on capitalist relations of production as capitalist relations of production are dependent on democracy. Consequently, there is no modern, inclusive democracy beyond functional differentiation. However, functionally differentiated societies cannot preserve themselves without *growth*, and growth comes regularly together with *enlargement*, transgressing borders and boundaries.¹ Moreover, as Durkheim, Parsons and Luhmann illuminated, it is not only the efficiency and viability of the economy (regardless of capitalist or non-capitalist), but also the efficiency and viability of all important social systems that is *dependent on growth* – such as medicine, science, education, political power and law (but also art, sports and so on).²

Furthermore, the dependence of functional differentiation on growth is not only due to *factual* reasons but also to *normative* ones. There is at least one *ethical premise of good life* shared by all modern societies, and it is general and negative: *nobody* really wants to live *without* the five great inventions of electricity, running water, pharmaceuticals, mass-communication and mass-transportation, which all were made between 1870 and 1940.³

There is, as John Dewey rightly explained from an evolutionary perspective, an internal relation between *democratic solidarity and quantitative growth and enlargement*. On the road to the Great Community, *growth and enlargement are unqualified goods*, and they are unqualified because, for the sake of democracy, they must be kept open for democratically self-determined qualifications and revisions (democratic experimentalism) at any time.⁴ Therefore, my first thesis is:

1 I am thankful to Regina Kreide for a controversial discussion of this point.

2 By all means, the successful solution of problems, for example of health care, regularly has unplanned side-effects, causes succession-related problems, and also reflexive problems such as medically induced epidemics. The solution needs ever more medical and therapeutic technologies and inventions, and that means growth not only in medicine but also in other systems (in this case especially of science, economy, administrative power and traffic) – and vice versa, growth effects of other systems such as scientific inventions, industrial diseases, war injuries and car accidents stimulate medical growth and enlargement.

3 See Gordon 2016.

4 Dewey's idea of democratic solidarity is not legal but Aristotelian, targeting a concrete but (and this goes beyond Aristotle) indeterminate form of life.

(1) There is no modern society, and in particular no socially inclusive democratic society that is beyond *growth* and *enlargement*.

Bourgeois class rule was celebrated as the revolutionary subject of growth by Marx and Engels, and Marx's admiration for the achievements of modern capitalism never ended (Marx/Engels, internet).⁵ However, as the young Marx rightly observed, only the emergence of "true democracy" in the course of class struggles could solve the environmental, at least the social problems of capitalism (Marx 1972: 231–2).

In a reconstruction of the constitutional evolution in his long comment to the public law part of Hegel's *Philosophy of Right* from 1844, Marx explains the historical truth of democracy by means of an *immanent criticism* of the constitutional law of liberalism (as it is represented by Hegel's theory of constitutional monarchy) (Marx 1972: 230–2). All that is needed for this critique is already present within the *existing contradiction* of constitutional history between power-limiting and power-founding constitutions. As Marx has shown in his *18th Brumaire*, the basic constitutional contradiction between power-founding and power-limiting constitutions, between subjective property rights and popular sovereignty, between Rechtsstaat and democracy, appears in public class struggles *once the parliamentary constitution is completed by universal suffrage and decoupled from the monarchic constitution*.⁶ Together with its democratization, constitutional and public law overcomes – and here Marx anticipates Dewey and Kelsen – the old-European "dualism" of subjective and objective law, private and public law, subjective rights and democratic self-legislation, in other words: of power-limiting and power-founding constitutional law (Marx 1972: 232). Therefore, the "*real movement*" (Marx/Engels 1973: 35) of true democracy or communism (at that time, mid of the 1840s, the meaning of both terms was equal) is not beyond modern law, but is instead the *dynamic procedure of the existing contradiction of modern law* between a *law of domination that is civil law*, grounded in subjective rights, and *public law*, which is *emancipatory* because it enables the *self-determination of the addressees of law*. From Marx over Kelsen to Habermas, therefore, it is the procedural paradigm of egalitarian and inclusive democratic self-legislation (Kant's '*communio*', Marx' 'communism') that overcomes constitutional welfarism (and bureaucratic socialism) as well as liberal capitalism.⁷

True democracy that is socially inclusive, egalitarian and power-founding and, therefore, the *real movement* of communism, began in the mid-19th

5 For the late Marx see Marx 1953.

6 See Brunkhorst 2007b; Brunkhorst 2017.

7 See Habermas 1996, 388–445.

century. A century later democratization and democratic class struggle, reforms and revolutions (closely connected to the world wars, global and regional civil wars and the social revolutions of 20th century) had largely overcome, or at least curtailed and weakened bourgeois class rule, and transformed the constitutional state into egalitarian mass-democracy of power-founding constitutions.⁸ Thus, thesis no. 2 is:

(2) For almost half a century (between 1940 and 1990) the democratization of the constitutional state (more or less) solved the twofold problem of growth and social exclusion (resp. economic exploitation) through social inclusion.

However, from the beginning this solution suffered from two problems. The first is due to the *imperialist differentiation of the center and the periphery* that is a byproduct of the gloomy *heritage of Western colonialism*. Affirmative action of national welfarism was white, male and heterosexual (Katznelson 2005). Egalitarian democracy was realized only in a small global segment of rich and highly industrialized countries, all dominant factions in the prior world of global empires, and it halted at the color and the gender faultline. It is hardly surprising, therefore, that the revolutionary victory of democratic egalitarianism was largely at the expense of the formerly colonized world, and the vast majority of the world's population. Nevertheless, normatively the democratic nation state (which factually excluded the rest of the world) was bound to the "*exclusion of inequalities*" culturally and legally (Stichweh 2000: 52). The normative basic idea of the national state that is the exclusion of inequalities, does not only mean national exclusion of inequalities but also the universal exclusion of inequalities – from the *Declaration of Independence* from 1776 and Art. 16 of the French Declaration from August 1789 to the International Covenant on civic, political and social rights from 1966 and the Vienna Convention on the Law of the Treaties from 1969.⁹

Moreover, since the mid-19th century at the latest, world society factually is a single community of fate, and a community of fate, a *Schicksalsgemeinschaft* in the terminology of Right-Hegelian German *Staatsrechtis* a nation, at least in the state of latency (*status passivus*).¹⁰ Thesis 3 is:

8 See Thornhill 2011.

9 From the beginning, modern state formation had a cosmopolitan side that is constitutive. On the co-evolution thesis see: Brunkhorst2007a; Brunkhorst 2014b; Matthias 2005; Thornhill 2011.

10 Osterhammel and Petersson 2003: 63. On the *Staatsrecht* side of *Schicksalsgemeinschaft* see Böckenförde 1991.

(3) The exclusion of the majority of world population from democratic welfarism poses a serious problem of legitimization that is internal to all members of the rich and (more or less) democratic family of national states.

Philosophically speaking, a regime that cannot solve the (factually and normatively) universal problem of democratic legitimization *should* not exist.

The name of the second problem is *secular stagnation*. To take only one number which is significant because it is of a country with presumably higher growth than others, between 2000 and 2016 (after already 30 years of stagnation) despite of the celebrated “structural reforms” of the Schröder government, *real investment* in Germany decreased by 20% (Offe 2016). The great electronic inventions of the present, the internet, the mobile phone and the personal computer, are all at best *low-growth inventions* with (probably dramatically) *negative effects on the future of employment* (Crafts 2015, Gordon 2016).¹¹ Thesis no. 4 is:

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(4) *Secular stagnation* is a challenge modern society never had to face before. Secular stagnation is due first and foremost to the (temporary) finalization of the great industrial inventions in 1940, and secondly to the secular increase of inequality since the late 1970s.

Sociologically speaking, a complex society that cannot solve the problem of secular stagnation *cannot* exist. The bicycle stops, the bicycle falls.

The secular growth of inequality was the result of, first, a critical situation of democratic welfarism at the *end of the great push of technological, infrastructural and industrial growth, enabled by the Great Inventions* (1870–1940),¹² and second, and not in all instances (Chile, Argentina) *democratic decisions of world politics*, triggered by the United States and Great Britain, and driven by the religious fundamentalism of free but virtual markets. The relations of dependency were turned upside down. First the *tax state* that (as democratic legislator) takes the money away from the rich, was replaced by the *debt state* that is dependent on the generosity of the investors. Then the same happened to the working class, they lost their right to strike and blackmail the owners of productive forces factually, and in exchange got credits unlimited at the expense of a new form of debt slavery. After 40 years of politically implemented neoliberal globalization, capitalist world economy has itself dissolved from state-control and turned *state embedded markets* into *market-embedded states*.¹³

11 See Gordon 2012, internet; Gordon 2014, internet. With emphasis on the more utopian aspects of a post-capitalist transformation of unemployment see Mason 2015.

12 See Gordon 2016.

13 Streeck 2005; see Streeck 2013.

No wonder that in nearly all OECD-countries we now have an extension of social differences that mirrors exactly that of 1900 (Piketty 2014). Within the neoliberal political-economic regime high profit rates can be maintained only at the expense of growing social differentiation. But increasing inequality has strong negative effects on growth rates. This gives Paul Sweezy's theory of under-consumption surprising actuality (Baran/Sweezy 1966: 76–111). It was carved out for monopoly capitalism of the 1960s that was dominated by car-industry. Sweezy predicted in 1966 the coming stagnation of monopolistic capitalism because it "tends to generate ever more surplus, yet it fails to provide the consumption and investment outlets required for the absorption of a rising surplus, . . . , it follows that the *normal* state of monopoly capitalist economy is stagnation." (Baran/Sweezy^{1966: 108}) Under conditions of a neoliberally *monopolized* world economy *market competition becomes largely virtual*.¹⁴ Prices are decoupled from markets, profits are stable, their increase rates are predictable and can be planned, the cyclic (sinusoid-like) fall and rise of profits suddenly comes to an end, and the profit margins of the 500 biggest US-firms remain consistently high since 2008 – to the horror of Goldman & Sachs.¹⁵ Today, the social class at the top holds nearly all assets, and the lower and middle classes at the bottom do not have enough money to buy the most urgent consumer goods, including in particular education (tuition), private health care, decent housing, and so on. The result is a crisis of under-consumption, as Marx had already written in *Capital*: "The ultimate reason for all real crises always remains the poverty and restricted consumption of the masses as opposed to the drive of capitalist production to develop the productive forces as though only the absolute consuming power of society constituted their limit." (Marx 1968: 501)¹⁶

For capitalist economy after the end of the Great Inventions and under neoliberal conditions of increasing social differentiation, it follows – thesis 5 – that

(5) Secular stagnation with high profit rates and increasing social differentiation causes a global crisis of under-consumption (Paul Sweezy).

For democracy dramatically increasing differences between social classes have disastrous causal effects (Schäfers 2015).¹⁷ Theses 6 is:

14 I thank Lisa Herzog for this hint.

15 Weisenthal internet; see the summary of the internal study of Goldman & Sachs in SZ Feb. 4, 2016 (Kapitalisten zweifeln am Kapitalismus). They should have read (and maybe they have) Baran/ Sweezy 1967: 63ff.

16 English translation quoted from <https://www.marxists.org/archive/marx/works/1894-c3/ch30.htm>

17 See Wilkinson and Pickett 2010; see Judt 2010.

(6) Increasing social inequality causes increasing political inequality.

Not absolute poverty but relative inequality *discourages* the people, resulting in a *crisis of motivation* that explains the dramatic decrease of the turnout for middle and underclasses down to 30% and less in nearly all OECD-countries.¹⁸ Leftist parties lose their voters and turn steadily farther right whereas right-wing parties stay where they are, until finally we are left with *no alternative to austerity* politics. Leaving at best, the gloomy alternative between *right parties* of market fundamentalism plus PC-culture and *far right parties* of market fundamentalism plus a neo-conservative cultural background that is nationalist, racist and religious fundamentalist (reaching from the German AfD to the American G.O.P.). However, there are already former democracies where factually only the far-right alternative is left (i.e. Hungary). *If societal facts are running out of alternatives, legal normativity becomes fiction* (Möllers 2015).

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At the same time, globalization powered by disembedded markets, supported by states and state combines, like the EU who have no alternative, and reinforced by the new media of dissemination and global cultural and environmental movements – which are partly critical of neoliberal globalization – have led to a global situation where no way back to the old system of state-embedded markets seems possible. The global community of fate that existed since the mid 19th century (Bright/Geyer 2011) is now no longer just functionally (or negatively) integrated but also culturally (global human rights culture, global memory culture) and normatively (global law). After a long social evolution, there is only one single society left, that is thoroughly modern everywhere and any time (Meyer 2005:144–181). Moreover, it already has a global legal and constitutional order (Brunkhorst 2012, Brunkhorst 2005). However, and this is thesis 7:

(7) The rise of global societal constitutionalism comes with a fall of global (and national) democracy. Civil law successively subverts and replaces international and national public law.

Different from public law that has inbuilt emancipatory potential, civil and private law is – in the old Roman empire as well as in modern capitalism – basically nothing other than a law of coordination of the interests of the ruling classes (Teubner 2012). The surprising but expectable effect of the publication of the Panama Papers was that most of the offshore companies and tricky money transactions were completely legal – thanks to civil and private law's legal construction.

18 The typology of crises in Habermas 1972 is still actual.

The final conclusion of our theses can only be that the project of nation-state-based democracy to exclude inequalities finally failed. It failed *normatively* because it was not able to globalize the exclusion of inequalities. It failed *factually* because it was not able to avoid secular stagnation. It failed *constitutionally* because global constitutionalism finally led to a regression from power-founding democratic to power-limiting liberal constitutions, which Martti Koskenniemi has described as a regression from the Kantian to the managerial legal mindset (Koskenniemi 2006: 9–36).¹⁹

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Under conditions of the threefold crisis of *under-consumption, motivation and legitimization* plus a growing migration of excluded surplus-populations, reinforced by ecological devastation, the still existing global hegemony of neoliberalism makes an *authoritarian solution* to the cumulating crises and problems ever more likely. There is strong evidence that neoliberal hegemony can prevail only as *authoritarian* or *fascist liberalism* (Heller 2015:295–301).²⁰ Already in the 1970s the political project of neoliberalism (Thatcher, Reagan) began with the bloody authoritarian experiments in Chile and Argentina. We are now approaching a new kind of a hypermodern double state.²¹ Without reduction of inequality and exclusion, high rates of profit can be maintained only by *constitutional regression* from normative to nominal constitutions: *over-integration of the ruling classes* (they appear only as plaintiffs before court) and *under-integration of the lower classes and excluded populations* (they appear only as defendants before court, if they appear at all).²² Prerogative law and the declared or undeclared state of siege are becoming unavoidable: the war on terror at home and abroad, the legal construction of the public enemy – where in cases of any doubt, the option remains to send in the marines and re-create the state of siege repeatedly exists (as now in France). Last but not least, there is the emergence of smart and flexible border regimes, which – as in Australia, the US and Europe – consist of *bracketing the constitutional rights of all citizens living within the border region*. In the US, this affects already two third of the entire population (Coast Region and Great Lakes).²³ Finally, mass-incarceration may not remain an American exception (Murakawa 2014, Harcourt 2011). Europe is already experimenting

19 See also: Koskenniemi2002; Koskenniemi1995: 325–348; Brunkhorst2014a; Brunkhorst 2014b.

20 See Wallerstein 2013. Still actual: Marcuse 1965: 17–55.

21 The double state is a mix of (inclusive) norm-state (or *Rechtsstaat*) and (exclusive) prerogative state (or police-state), and there are more formations of the double state than pre-war fascist regimes. On the paradigm case of the latter see Fraenkel 1969.

22 Still paradigmatic: Neves 1992; see Neves 1999: 557–577.

23 See Shachar 2015: 12, 32–35.

with detention camps for illegal refugees. AfD, Front National, Victor Orban and Donald Trump are the *logical consequence of market fundamentalism impermanent crisis*. To avoid expenses for the solution of ecological problems *science must be silenced*, whilst concurrently the pressure on science by religious market fundamentalists is already enormous, at least in the US.²⁴ Finally the global double state is stabilized through the complete subsumption of constitutional and public law under the priority of civil and private law. In case of doubt private *contract law derogates parliamentary legislation*.

In this situation, only the almost impossible, the *cosmopolitan project of democratic socialism* can save egalitarian mass-democracy.²⁵ This could lead to a new formation of socialism or a mixed economy that saves capitalism from itself. Facing the nearly unresolvable cumulation and reciprocal reinforcement of problems, the question if their democratic solution finally will save capitalism from itself or transform it into socialism is subsidiary.

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- (1) To save growth and democracy in times of secular stagnation, *massive redistribution of wealth to the lower and middle classes is the only hopeful perspective*. Only massive redistribution in favor of the middle- and lower-classes can *keep growth running* because only lower- and middle-classes buy masses of consumer goods, and growth in post-industrial societies *based on industry* (electricity, pharmacy, mass-transportation etc.) still comes from *mass-consumption*. The solution of the problem of social differentiation would kill both birds with one stone, the problem of growth, *and* the problem of social and political inequality. Unfortunately, there are much more birds in the air over Bodega Bay.
- (2) For the inclusion of the dramatically growing national and regional periphery of excluded populations and countries (Greek) – national exclusion rates since 2000 rose by 22% and 40% (Offe 2016) – *massive investments in educational and socialization agencies of all kind are needed together with a decent basic income*.²⁶ Everything else will not work. If the following problem (3) could be solved, even a solution for the global, in particular the African problem of exclusion (and migration) could become possible.

24 Again, the American Republican Party is the model. There is not a single Republican member of Congress who recognizes publicly the scientific evidence that man-made climate change is a real danger - even if privately ninety percent of them accept these facts - because they are completely dependent on right wing billionaire benefactors and voters with strong bounds to religious fundamentalism, see Tomasky2016:4.

25 With concern to the first three points, I follow here in diagnosis and therapy broadly Offe 2016.

26 Here well calculated models are available: Ackerman/Alstott 2001. Grözinger / Maschke/ Offe 2006.

- (3) The only realistic solution for the environmental problems (if there is any) is *green growth*. The enormous proportions of the problem come to the fore once we take into account only the problem of CO₂-reduction through carbon capture and storage, because this is possible only with *far reaching public infringements of land ownership worldwide*, which are widely entangled with the results of post-colonial landgrabbing.²⁷

In principle, all of this is feasible by parliamentary legislation. However, it seems illusionary that such radical changes (that must be enforced against the national, regional and globally organized power of money, connected power-elites and the hegemonic managerial mindset) could be realized through coordinated intergovernmental action. This is absolutely impossible at the level of the G20, and not even possible at the level of such a highly integrated political system as that of the EU's mix of institutionalized inter-governmentalism and supplementary supra-governmentalism (parliamentary legislative procedure). On the contrary, this system seems to be designed to exclude any radical change of economic, political, and even environmental politics (Dawson and De Witte: 2015). Therefore,

- (4) To keep the tremendously grown blackmailing power of global capitalism at bay, there is no alternative but transferring real power – still known by the outdated term 'sovereignty' – to *democratically legitimated and controlled transnational governmental structures* on regional and global levels. Intergovernmental governance without government is over. Governance is the cure that makes the ailment worth, in particular if we take not only capitalist economy but also the closely related private law and structures of (ever more informal) political hegemony into account, not to talk about the anti-democratic side effects of many other functional systems (for instance the globalized sport-system, global media and cultural industries).

Nobody knows if there is any possible democratic solution to the cumulating problems, and one has to face the gloomy perspective that 1989 was not the advent but the decay of global constitutionalism.²⁸ But nothing will work without the thrust of a *real movement* towards cosmopolitan democracy, and (as Marx and Engels) by 'real movements' I mean not only movements of social groups and people in streets and halls but also emerging organizations and institutions, in particular those of public law. There are already some important international organizations which are bodies of public law and not of civil law, encompassing the UN General Assembly and the European

27 See: Edenhofer et al. 2012, 34–50; Von Bernstorff 2012; Prien 2014.

28 See Brunkhorst 2016; Koskeniemi 1995.

Parliament including their many commissions, whilst there is also growing number of Courts of international public law, such as the old international and the new criminal court in The Hague, a couple of Inter-American courts, and the courts of the EU and the Council of Europe (Bogdandy²⁰¹², Bogdandy/Venzke 2014). Insufficient, decoupled from democratic legislation, and often mentally conforming to the interests of the global ruling and propertied classes as they (or at least some of them sometimes) are, *they are there*, and they can be converted into institutions of true democracy.

Even if transnational social movements are still marginal, there is already a real movement of an emerging global civil society (with hundreds and thousands of INGO's), which represents 99% of the world population, compared to the 1% of the Wall Street and Davos communities of the world, and there are at least beginnings of transnational social and ecological movements and organizations of workers (international trade unions) and excluded populations. Social movements today are ever more movements of superfluous academics. In a world society where between 20% and 50% of the younger generation have academic training, individualistic and universalistic orientations, post-conventional lifestyles and use-value oriented practices are spreading rapidly, and they are already a serious alternative to neo-conservative lifestyle-reforms – which have also spread globally splitting the new academic class-formations. Together with ever more people growing up with the internet, nothing seems more predictable than the end of narrow national bounds and nationalist mentalities – on the left but also on the right (global fundamentalism). Finally, when Marx and Engels in 1848 referred to the real movements of true democracy and communism, they referred to a concept, whose existence was not much further (probably even less) developed than that of cosmopolitan democracy today.

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Hauke Brunkhorst

Demokratija pod opsadom

Demokratska solidarnost između globalne krize i kosmopolitske nade

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Apstrakt

Skoro polovinu veka (između 1940. i 1990.) demokratska i socijalna država je rešavala dvostruki problem rasta i socijalne ekskluzije *putem socijalne inkluzije* unutar granica nacionalnih država. Ovo rešenje se od 1970ih našlo pod pretnjom višestrukih kriza životne sredine, sekularne stagnacije, niske potrošnje, legitimizacije i konstitucionalizacije. Možda bi postojalo društveno rešenje postojeće krize putem masovne redistribucije uz pristojan osnovni prihod (na nivou troškova školarine) i uz zeleni razvoj. Međutim, nakon globalizacije kapitala više nisu dostupne nacionalne alternative. Prema tome, nema druge alternative do formiranja transnacionalne demokratske državne formacije. Ali, ima li relevantnih aktera, dovoljno snažnih i motivisanih da to izvedu?

Ključne reči: razvoj, životna sredina, sekularna stagnacija, niska potrošnja, kriza legitimizacije, globalni kapitalizam, transnacionalna demokratija