

The hidden (r)evolution: Commentary on Hauke Brunkhorst's book *Critical Theory of Legal Revolutions*

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Abstract

The article is a review of Hauke Brunkhorst's book on a *Critical Theory of Legal Revolutions*. The author addresses three points: (1) Hauke Brunkhorst's notion of history, and of what remains unseen; (2) the dialectics of evolution and revolution, and whether the approach is sufficiently dialectic, according to its own promise; and (3) the (too) implicit notion of critique.

Keywords

Critique, dialectics, normative standards, revolution, social evolution

Hauke Brunkhorst has written a fascinating book, a *magnum opus* on how legal revolutions have directed the inevitable social evolution of societies towards a more universal, equality- and freedom-based world society. Both developments, according to Brunkhorst, social evolution and (especially legal) revolutions, mutually influence one another. There is not one without the other, even though there is always social evolution and only sometimes revolution. Revolutions are part of social evolution, just as genetic mutations are part of natural evolution. Revolutions, and, with them, normative learning processes, steer social evolution, the functional differentiation of society, in a certain direction, they generate 'normative constraints'. Normative constraints function both as direction-givers and as ratchet-effects that hinder – at least to a certain degree – the normative practices, once established, from being overturned and forgotten. However, social evolution does not exclude the extinction of existing conceptions, especially not in the course of a revolution. The book, however, is not so much about forgetting existing conceptions, but about how new ones come into the world.

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Brunkhorst follows Jürgen Habermas' early writings on 'Legitimation Problems in Late Capitalism' and 'On the Reconstruction of Historical Materialism' when he argues both with and against Marx that development and the creation of new concepts and practices in the sphere of social integration *do* stem from material reproduction, but not from this alone. Rather, they have their own, independent logic. The social evolution of law (and not so much of morality as in Habermas) is the key to understanding the various forms of social integration.

In this very exciting and rich reconstruction of the triggering potential of legal revolutions that reach from the 12th-century Papal Revolution to the 16th-century Protestant Revolution over the so-called Atlantic Revolutions of the 18th century to the Egalitarian 20th-century Revolution, Brunkhorst depicts, in great detail, what the new notions of freedom, of constitutional law, new kinds of social differentiation, new ways of class struggle, forms of national and cosmopolitan statehood(s) and kinds of dialectics of enlightenment(s) that have been formed throughout the fight between evolution and revolution are, and how they manifested themselves.

This is far from being a boring story. To the contrary, the book is, in part, written like a thriller; for example, the author depicts how the Calvinist lawyer Christopher Love radically reinterpreted divine law and resorted to the ultimate authority of his conscience, *sola fide*, which he paid for with his life after a London High Court of Justice decision in 1651 (Brunkhorst, 2014: 166). But even a path-breaking book like this has its flaws. Different aspects of the long path of this historical-systematic reconstruction raise specific problems. I will concentrate on three points: (1) Hauke Brunkhorst's notion of history, and of what remains unseen; (2) the dialectics of evolution and revolution, and whether the approach is sufficiently dialectic, according to its own promise; and (3) the (too) implicit notion of critique.

I The notion of history

Brunkhorst's notion of history can, perhaps, be best described as a conglomerate of a Hegelian version and an evolutionary theory of history. With Hegel, Brunkhorst embraces a notion of a dialectically achieved progress through negation, without, however, relying on an idea of objective spirit. Instead, progress, on the one hand, is implicitly directed towards a more differentiated, more universalist law, and the development of an egalitarian and democratic society. On the other hand, progress is a result of implicit critique and, finally, of outbursts of revolution. Immanent critique is enriched through a Kantian notion of a 'historical sign' [*Geschichtszeichen*]. Hegel later formulated this in terms of an idea of 'existing concepts', that is, a sign or a concept that exists not only in science, but also for the social actors in daily practice (akin to equality), and which can never be collectively forgotten. It 'reminds' people not only of what equality, freedom, emancipation actually mean, but also what inequality, lack of freedom and suppressive law look like. So, Hegel is one source of information. A second source of information can be found in social theory, especially evolutionary theory of sociology, exemplified earlier by Marx, Spencer, Dewey, Durkheim, Luhmann, and, to a certain extent, by Habermas. Brunkhorst shares with Durkheim the assumption that evolutionary differentiation started with the three components of the social life-world: culture; the person; and

society. These elements of society are then differentiated into functional systems and their environment(s).¹ And, like Luhmann, he assumes that society consists not only of social integration but also of mechanisms of functional stabilization. The take-off of social evolution is caused by communication that rejects communicative propositions. It is, first and foremost, a reciprocally observed double contingency that leads to the functional differentiation, completely decoupled from the personal system, from reciprocal processes of understanding and referral to truth claims in language. For Brunkhorst, both parts of social evolution, the dialectical and the functional, belong together. Through this view, he combines critical theory with systems theory. Societal change, he rightly thinks, needs both contradicting *and* stabilizing factors.

Both sources have an inherent notion of social progress. However, social progress is no longer defined as an affirmative concept that is internally related to a substantial form of life. Nor is social progress directed teleologically, as there is no such thing as an end of history.² Rather, it is a growth of systemic complexity, and there can be crises of productive and systemic growth that hinder a linear development of differentiation and learning processes. The crises of complexities, and this is Brunkhorst's important point, come into focus through normative constraints that begin with the negative: the articulation of a sense of injustice, of exclusion and of disrespect. These normative constraints are part of evolutionary adaptation, too. They embody themselves in new constitutions and new legal orders of society. Seen from this point of view, history is social evolution, interrupted through normative changes of direction.

The advantages of this way of understanding history are obvious. What we obtain from this approach is an explanation of the history of the changes of species, both human and non-human, of changes in thinking and acting, of the development of productive forces and the formation of society. We learn which historical processes have borne mankind, albeit with some backlashes and delays, towards a universalized world society, and how. All this is *not* nothing. But there is at least one problem with this view.

Something remains hidden, invisible. And this is the precise conditions of these developments and the condition of the very discourses about these processes. What is meant by this may become clearer when we ask ourselves about what remains unanswered: What are the conditions of the singular appearances of events, of former or parallel discursive or non-discursive occurrences? Or, in other words: What is the structure of the production of knowledge about these events? And how were alternative narrations neglected, tranquillized, silenced? One can also put it in Habermasian terms: What are the communication and action blockades that hinder alternative knowledge, public debates, different interpretations and worldviews?

Let us take, for example, the struggles for human rights. From Olympe de Gouges up to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), from the early workers' revolts to the current recognition of trade unions in eastern Europe, Latin America and Asia, from the struggle for religious toleration in the 17th century to the protests against discrimination on the grounds of skin colour or national or religious affiliation today, from the resistance against despotism and the murder of one's 'own' people, to the camps in 'extra-legal zones': all of these struggles exhibit an internal relationship between experiences of injustice and rights.³ But these were not clear-cut, one-way developments.

There were structural and power conditions that silenced experiences of injustice, that covered up new readings of human rights such as Olympe de Gouges' rights for women. This was caused partly by a hegemonic, male discourse, both at that time and now. Moreover, it depended on a discourse of science that depicted women as non-reasonable beings, more on the sentimental than on the rational side of life. And it was a discourse of law which neglected gender equality, and was accessible only for wealthy white men of the right religious background.

Or take the Haitian Revolution. The latest studies show that the Haitian Revolution is not just a repetition of those in non-European regions.⁴ It does not fit into the overall narration of the Atlantic Revolutions. The Haitian Revolution (1791–1804) was the first successful revolution of enslaved and colonized people. It stands as a beacon for anti-colonial and anti-racist liberation movements throughout the world. But this remarkable event has been silenced in former slaveholding nations and dismissed completely from the canon of political theory. A reconstruction of the grammar of the Haitian Revolution, as Buck-Morss or Ehrmann perform it, shows that one can situate it between the legal, epistemic and economic order of the plantation and white masculine bourgeois republicanism.⁵ Silenced for a long time, the conception of freedom developed by the Haitian revolutionaries constitutes a deconstruction of the dominant nexus of freedom, masculinity, property and whiteness that underlies both the American and the French Revolutions. It is the Haitian Revolution that offers a critique of central concepts of political modernity and a rethinking of a radical universalism.

The important question – for my point here – is not so much that Brunkhorst's reconstruction is Eurocentric (this critique has been posed already⁶) but that a critical theory approach would need to reveal both how and why alternative readings were cut off from major discourses in the wake of power-relations and hegemonic ways of knowledge production and communicative processes. Social evolution theory cannot offer this view. It *describes* the ongoing development, but fails to *explain* why some readings have been silenced while others became dominant. Nor can Hegel's negation approach perform this work completely. Revealing immanent contradictions through negation allows us to declare *that* injustice has happened, but it does not offer any explanation or analyses of *how* it happened. For this, one needs a discourse analysis that focuses on power and knowledge production, an analysis of the obstacles to action and communication. This is not possible without a social theory that allows for an in-depth analysis of how alternative readings of history were thrown out of the dominant historical narrations.

Why would this be important for Brunkhorst's project? It would allow us to discover why certain revolutions were successful and had a lasting effect on social evolution (such as the Papal Revolution) while others were not, and why especially those revolutions that were in the very interest of the oppressed (like the Haitian Revolution) tended so often not to be successful and were neglected for ages by the political and academic communities. According to Walter Benjamin, the rise of any form of totalitarianism is a testimony to a failed revolution. It refers to the fact that not only serious materialist and political interests but also the needs of people were carelessly neglected. This is still true today, in times of neo-liberalism where the danger of right-wing and religious fundamentalism is peering around every corner. But how was the revolutionary potential

suppressed and why did hardly anybody notice it? This is the question a critical theory of revolution needs to provide an answer to.

II Dialectics

This leads me to my second point and the question of whether Brunkhorst's project is sufficiently dialectical according to its own standards.

In the book, Brunkhorst distinguishes between the *Kantian* and the *Managerial mindset*. The Kantian mindset is described as the driving force towards individual autonomy and public self-determination, as ongoing emancipation from existing law. The Managerial mindset, in contradistinction, is based upon autonomous, professional experts who implement and concretize legal work. This force adheres to present routines and structures. Whereas the first is the revolutionary push factor, the second is more the evolutionary 'routine factor'. Cristina Lafont and others have already made the criticism that this might be too dualistic a view. It is difficult, the critique goes, to locate historical events 'squarely on either side of such a dichotomy. Whether social changes are gradual or abrupt has nothing to do with whether they are either intentional or unintentional, blind or norm guided and whether they can be evaluated from a normative or merely from a functionalist perspective.'⁷ Brunkhorst has reacted to this critique. He admitted that moral intentions are important as contributions to the variation pool of evolution and gives an example: the abolition of slavery was possible only because the moral protest against it engendered sufficient variation that made intentional and unintended legal selection unavoidable. And it finally led to a re-establishing of slavery.⁸ But this is only one part of the problem here.

A different problem seems to be that the Kantian mindset has its 'problematical' side as well, just as the Managerial mindset has its 'good' sides. Both are dialectic in themselves. Both can create emancipatory and suppressive effects. Take the claim of universal ideas. More than once, universal ideas have stood and still stand for the legitimation of colonization, for religious oppression, for disciplining human beings on grounds of values and norms. A short glance at some scholarly critique on human rights may underpin this: Olympe de Gouges, to cite her again, sees in the French Declaration of the Rights of Man and Citizen an instrument of unwarranted male domination that contradicts the principle of equal freedom to be found in the Declaration.⁹ For Marx, human rights are civil rights that serve, in the first instance, to preserve the existing structure of ownership of the bourgeoisie.¹⁰ Spivak claims that those who refer to human rights always know in advance what is right and wrong, and this knowledge is just used to tell others paternalistically what to do.¹¹ And Alain Badiou argues that human rights obscure the fact that barbarism and misery are political conditions that call for 'a political practice-thinking', and not ethical judgement that immediately defines who is the victim and who is the perpetrator.¹²

These critiques shed light on the ambivalent side of universal principles and ideas. They highlight the fact that an alleged emancipatory concept may produce, either as an intended, or, more importantly here, as an unintended effect, its own opposite. Human rights can be both emancipatory and repressive at the same time. And this is not so much a question of wrong realization, or bad politics. Rather, it is concept-inherent. The

conception of human rights bears its own negation. Similarly, the Managerial mindset may lead to the implementation of legal rules which, in the end, help people to free themselves from oppression. Think about the juridification of a societal sphere of private life, which, at some point, helped to condemn rape in marriage. Brunkhorst's notion of dialectics is between norms and principles, on the one hand, and functionalist differentiation, on the other. The Kantian mindset bears the power of emancipation, whereas the Managerial mindset bears the one of domination. However, the problem is more complex, as dialectics runs through both elements of evolution. Clearly, both the Kantian and the Managerial mindset can work in both directions. Dialectics, understood in the Hegelian or old critical theory notion, needs to bear dialectics in *all kinds* of societal processes in mind. The concept of 'Holocaust denial' also exists, as a concept which, from the point of view of the extreme right wing, contradicts the telling of a story which, they maintain, is untrue.

III Critique

This leads me to my third point. When, one may now ask, can we speak of an 'emancipatory' potential of a certain practice, and when can we speak of an 'oppressive' one? How does critique come into the picture in Brunkhorst's book? Of course, one may say, through the Hegelian notion of negation and the 'existing concepts'. But how far does this lead us?

Whereas idealist theory – as well as political liberalism – strengthens some notions of justice, equality, or freedom, both critical social theory and Brunkhorst resort to the generalizing power of negation. It does not find its point of departure in the *legitimation* of principles, but obtains it, instead, from a sense of injustice which appears through the exploited classes, the suppressed peoples and the excluded parts of the population.¹³

Brunkhorst shows that Kant uses the reflexive dynamic of negation when he speaks of the violation of rights that can be felt in every place on earth by everyone; Jean Piaget identified the role of the experience of injustice for the development of a consciousness of justice, and, one can add, Judith Shklar stresses the universality of a sense of injustice for the formation of a just order.¹⁴ Negative feelings, as Adorno and later Habermas claimed, have a cognitive content, which lies in their inter-subjectivity. When, as Barrington Moore says, exploited workers or suppressed people bring about their rejection of suffering and oppression, then they proclaim something like 'I can't stand it any longer!' or 'Workers of the world, unite!'¹⁵ They use the universalism of negation, without which the theoretical knowledge of society would be impossible.¹⁶

But how far does this lead us, especially if we take the radical dialectics of the Kantian and the Managerial mindsets seriously, which means that all developments have their 'dark side'? I think that it is not enough simply to adhere to a notion of negation. We need to have some 'positive' theory criteria that allow us to judge what counts as injustice, as inequality, as exploitation, and what does not. Is it, for example, unjust to deny human rights to great/big apes? Is it unjust to restrict immigration to Europe, even though there are many protests in the streets against further immigration? Is it unjust to force people receiving subsidies to work even though they are not responsible for their unemployment, just because international rules demand such an economic regulation? There

are many more hard questions like this that can be framed with a view to Brunkhorst's reconstruction of the 20th-century Egalitarian Revolution. What is important here is that one needs normative criteria that help us to identify both what the emancipatory driving forces and the oppressive ones are, and whether there were alternative narrations which were neglected and oppressed but which can nonetheless be called emancipatory.

I would argue, with reference to Habermas, that the criteria for identifying are the better argument. Or it could be a legitimized notion of equality or freedom, both of which are conceptions that Brunkhorst uses in his book, as an anchor for his Kantian mindset tale. Or one could also think about criteria that allow us to identify 'colonization processes' on a global scale, by which Managerial mindset elements intrude into the realm of the life-world with some pathological effects such as disintegration or alienation. Still, just using conceptions such as equality and freedom does not mean 'I have reached bed-rock and my spine is turned'. One would like to hear more about how far his theory allows us to distinguish good arguments from bad ones in the wake of dialectics of social evolution and revolution. Why, to come back to the second paragraph of my article, is the 'Holocaust denial' not a normative constraint (of course, it *is* a normative constraint) which is *emancipatory* (which, of course, it is not). It is this question that Brunkhorst's work on evolution and revolution does not yet have an answer for.

Notes

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