

Normative learning processes in evolutionary perspective: Remarks on Hauke Brunkhorst's *Critical Theory of Legal Revolutions*

Philosophy and Social Criticism

2015, Vol. 41(10) 1047–1051

© The Author(s) 2015

Reprints and permission:

sagepub.co.uk/journalsPermissions.nav

DOI: 10.1177/0191453715598553

psc.sagepub.com



Tilo Wesche

Institut für Philosophie, Justus-Liebig-Universität Giessen, Germany

Abstract

The basic thesis of this article is that with his book on legal revolution Brunkhorst rewrites a dialectic of enlightenment. According to Brunkhorst, learning processes, which lead to the revolutionary institutionalization of a new constitutional order, are triggered by negativity. This begs the following questions. What is the account of the belief in a concurrency of dialectics of enlightenment and the learning process? Why do extreme forms of exploitation and oppression still lead to the learning process?

Keywords

Hauke Brunkhorst, dialectic of enlightenment, learning process, negativity, Michael Theunissen

I shall make an attempt to present – at least in my view – three salient points of Hauke Brunkhorst's *Critical Theory of Legal Revolutions*. Following each point I will pose a question. Throughout his book Brunkhorst returns to the idea of a dialectic of enlightenment. Horkheimer's and Adorno's *Dialectic of Enlightenment* 'is a book on revolution' (Brunkhorst, 2014: 463). My basic thesis which actually derives from a rather sympathetic reading is that with his book on legal revolution Brunkhorst rewrites a dialectic of enlightenment. My first and second questions both concern his idea of negativity.

Brunkhorst's starting point is the distinction between two types of evolutionary change: an *adaptation* of the social system to its environment is distinguished from a

Corresponding author:

Tilo Wesche, Brühler Herrenberg 32, Erfurt, 99092, Germany.

Email: Tilo.Wesche@unibas.ch

revolutionary change that leads to normative constraints, particular legal constraints of constitutional law. Hauke opposes the common view that economics, legislation and politics are able to change only incrementally and cumulatively, a 'revolution' or major shift in their outlook appears impossible. However, he elucidates the framework of revolutionary change by reconstructing the underlying set of learning processes.

A crisis of legitimization is the trigger of (progressive or regressive) normative learning processes of the respective society as a whole. In the extreme case a crisis of legitimization can cause revolutionary change. The great legal and constitutional revolutions therefore are the paradigmatic cases of collective learning that is normative. They are not the result of *gradual and incremental change* that leads to the improvement and growth of the adaptive capacity of the society, but of *rapid, catalytic or revolutionary change* that leads to a new constitutional order. The constitutional order is path-disclosing and path-directing because it constrains social selection normatively. (Brunkhorst, 2014: 59)

The major feature that distinguishes revolution from adaptation is the capacity to create a normative perspective in a learning process. Whereas the adaptive capacities are restricted to a blind and uncontrollable process that is *external* to our normative perspective, revolutionary change is a normative issue that is *internal* to our perspective. An adaptation type of evolution is committed to an economic, political, or legal concept that lacks any capacity to critically observe its own foundations. These would require further epistemological and sociological arguments that are usually located outside of economics, legislation and politics itself. In contrast, revolutionary change is inextricably linked with a normative perspective to learn from crisis. It is crucial for Brunkhorst's approach that the emancipatory power – what he calls 'the abstract emancipatory potential of communicative use of symbolic gestures' – is inherent in social performances. 'Evolution is a transcendental fact that is *constitutive* for reflexive knowledge of the evolution that is itself part of evolution' (Brunkhorst, 2014: 11).

This reflexive knowledge is described as follows:

Now on the contrary, the emancipatory power of the negative that presumably is inherent in social performances can be *recognized and used* as a concept of *emancipation* only from the retrospective point of view. Only from a much later perspective we can invent this power as a concrete category of emancipation that is the basis of *our* 'uncompleted project' of 'human emancipation'. The former's *historical existence* as an evolutionary universal depends completely on the later revolutionary invention and its *becoming* universal. From our perspective one can recognize easily that the abstract emancipatory potential of communicative use of symbolic gestures is a necessary precondition and implication of the *concrete* idea of egalitarian and universal mass-democracy. The point is that the *normative idea* of an unfinished project of modernity is nothing external to society but completely internal to it. First it is an internal concept as an *empirical theory of society* that operates within the society as a communicative endeavour, and *second*, it does so on the ground of the general assumption that the *people themselves* in their own communicative actions are oriented to such a project because they are themselves *constrained normatively* by certain standards of rational communication. Revolutionary transformations are retrospectively inventing evolutionary

universals that are normative. One of these evolutionary universals is the idea of cosmopolitan statehood. (Brunkhorst, 2014: 335)

This learning process is, in Brunkhorst's words, triggered by negativity. Crisis and class struggles are – he terms it – 'the power engine' of normative and moral learning processes which sometimes lead to the revolutionary institutionalization of a new constitutional order. Here, evolution takes the shape of a learning process that manifests the increasing capacity of a society to solve normative conflicts in mutual and rational agreement.

The take-off of the social evolution only can be explained by the exponential growth of communicative *negations*: contradiction, disagreement and dissent. In the beginning the growth of communicative negativity effectively could be repressed by segmented egalitarian societies. Yet, it is unleashed by the ideological and in particular religious reflexions of the cureless social relations of injustice, exploitation and oppression that are inherent to imperial and stratified societies during the Axe Age. (Brunkhorst, 2014: 56)

Now, the learning process is accompanied by an increasing risk of regression, devolution and moral catastrophes. This tendency of risk is described by Brunkhorst as a kind of dialectics of enlightenment. The revolution abolishes all class domination, but in – as he calls it – 'a backstroke' (2014: 76) it establishes new and even more stable formations of class domination. Here Brunkhorst quotes from Theunissen what is one of the mottoes of the book: 'Negativity is the price for the emancipation from the illusion of an unchangeable world' (ibid.: 337). He reconstructs the sequence of great revolutionary transformations as a kind of *progress in the consciousness of freedom* that could be specified as progress in the universalization, individualization, pluralization and realization of freedom. This progress of emancipation generates, and here the dialectic of enlightenment comes into play, *ever new formations of oppression, domination and class rule*. Both progress and regression go together. There remains a dialectical tension between progress of existing freedom and justice and *all forms of exploitation, injustice and suppression*. Establishing a new idea of freedom, the transformation turns into its opposite, a new form of domination. Hence, the concept of dialectics is twofold. On the one side, negativity triggers collective learning processes. It emancipates the reflexive capacity to overcome crisis. On the other side, negativity leads to a higher risk of moral catastrophe in case of failure at crisis-solving. This seems to entail following consequence: negativity triggers learning processes and likewise the potential of higher catastrophes. Since negativity triggers learning processes, it seems that even a higher catastrophe itself triggers learning processes.

The issue of negativity prompts two questions. First, it strikes me that negativity cuts both ways. The Janus-faced capacity of negativity to exacerbate and to overcome crisis is quite similar to what has been described by Adorno and Theunissen as the myth of Telephus: *trosas iasetai*: 'he that wounded shall heal', '*Der Speer, der die Wunde schlägt, heilt sie auch*'. This is similar to the phrase in Hölderlin's Patmos hymn: '*Wo aber Gefahr ist, wächst / Das Rettende auch*' [But where there is danger, / A rescuing element grows as well]. The claim that negativity is such a mysterious 'power engine' begs the

following question. What is the account of this dialectic, namely the belief in a concurrency of dialectics of enlightenment and learning process? Why do *extreme* forms of exploitation and oppression still lead to the learning process? Either one says that evolution decreases the risk of moral catastrophe or one says in terms of the dialectic of enlightenment that evolution simultaneously increases the risk of moral catastrophe. But the latter begs the question of the specific conditions for a revolutionary process in the light of extreme forms of exploitation and oppression. Hence, the emancipation of learning processes and the dialectic of enlightenment pull in different directions. There is no straightforward way to adjudicate the conflict by reference to an overarching telos of history. But how could this tension otherwise be resolved?

Here is my second question. Brunkhorst's analysis of negativity begs the question whether it can accommodate a concept of alienation. He describes negativity as the experience of injustice, disrespect, humiliation and suffering caused by domination. Theunissen, to whom he appeals, additionally describes negativity in terms of alienation. Alienation consists in a sort of indifference [*Gleichgültigkeit*] and prevents negativity from being experienced as such (Theunissen, 1980: 359–63). Domination harms the oppressed and at the same time conceals the harm it causes. Alienation challenges learning processes more seriously. It demands high standards of critique that must be capable of disclosing injustice, suffering, humiliation and disrespect. Domination, in other words, entails ideological delusions. These are false beliefs and may also involve irrational values. These values we would not espouse were we fully aware of why we hold them, or were it not for certain psychological needs that press upon us and subject us to special strains characteristic of those in our social role. So, my question is how Brunkhorst could accommodate the relation between domination and alienation or ideology. I know that, of course, he could, but I ask for more clarification on this issue.

I now will turn to my third question. Brunkhorst distinguishes 4 great legal revolutions that established path-breaking normative constraints and implemented them constitutionally. Each of these revolutions had the unplanned and contingent side effect of the functional differentiation and self-referential closure of the 4 most important subsystems of modern society. First, the *Papal Revolution* in the 12th century had the effect of the functional differentiation of the legal system. Second, the *Protestant Revolution* in the 16th century had the side effect of the functional differentiation of the *political system*. Third, the *Constitutional Revolution* of the 18th century had the side effect of the functional differentiation of the *economic system*. Fourth, the *Egalitarian Revolution* of the 20th century had the side effect of the functional differentiation of the global *educational system*. Along these lines Brunkhorst spells out his concept of the dialectic of enlightenment according to which a new formation of freedom in a backstroke establishes new social class conflicts. First, the functional differentiation of the *legal system* causes a structural social class conflict between the *wielders of the normative power* of definition of true faith and the *heretic associations* of religious denomination. Second, the functional differentiation of the *political system* causes a conflict between the *wielders of coercive power* and the *people*. Third, the functional differentiation of the *economic system* causes a class conflict between *capital* and *labor*. And finally, fourth, the functional differentiation of the *educational system* causes a social class conflict between *the transnational establishment* and *the precariat*.

In a further move, Brunkhorst reconstructs 10 major features of all 4 cases of legal revolutions. These features are identical components that are characteristic for the two-fold process of emancipation and oppression. The components are the following ones: first, a kind of ratchet effect at the epistemic core of the revolution; second, a class contest and the emergence of a new ruling class; third, a struggle for human rights; fourth, the emergence of a new idea of freedom; fifth, one or more legal documents which mean a new foundation of the society; sixth, a radicalization of modernity in the form of modernism; seventh, a respectively new formation of the co-evolution of cosmopolitan and 'national' statehood; eighth, a new system of constitutional law; ninth, a respectively further move from transcendence to immanence; tenth, a specific dialectic of enlightenment that is due to the formation of newly prevailing class interests and further steps in the functional differentiation of modern society.

Last but not least, this is my third question or rather remark. It concerns the tenth feature, namely the specific dialectic of enlightenment. In my view Brunkhorst uses two different notions of dialectics: a weak notion of ambivalence and a strong notion of collapse or catastrophe. The weak notion of ambivalence relates to the way that progress and regression go hand in hand. Every progress is accompanied by new conflicts. Thus the economic emancipation of individuals in the 18th century entails domination caused by establishing property rights. This weaker notion of ambivalence does include a priority of progression, while the stronger notion of dialectic does not. In the long run or from a universal perspective the process of legal revolution described by Brunkhorst tends to progression although without a final end. In contrast, the dialectic described by Adorno and Horkheimer does not tend to any progress. For example, the regression to conflicts caused by property rights is different from the harder case of regression to fascism. With the moral catastrophe of fascism Adorno and Horkheimer, at least in my view, indicate that the process of rationalization might be without any progression at all. In fact, my third remark is not a question but rather a proposal that one should take into account this distinction.

References

- Brunkhorst, Hauke (2014) *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. New York and London: Bloomsbury.
- Theunissen, Michael (1980) *Sein und Schein. Die kritische Funktion der Hegelschen Logik* [Being and Illusory Being: The Function of Critique in Hegel's Logic]. Frankfurt am Main: Suhrkamp.