Introduction

Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. “It is possible,” says the doorkeeper, “but not at the moment.”

- Franz Kafka, Before the Law

These lines introduce a theme that repeats itself throughout Kafka's parable: the man from the country asks admittance to the law, demonstrating his desire through obedience and submission and patience, even going so far as to bribe the doorkeeper. Yet, the man is repeatedly told that he cannot enter—perhaps tomorrow, but not today. The man dies waiting and the last thing he sees is the door of the Law being closed. The easiest way to interpret this parable is to lament the cruel fate of man from the country and to empathize with his feelings and actions towards the law: ‘the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper...he decides that it is better to wait until he gets permission to enter.’ Joyce Carol Oates writes that it is a typical Kafkan irony, ‘the gateway is the means of salvation, yet it is also inaccessible’ (Oates 1983, xii). Cornelia Vismann (2008) makes a similar remark on this irony, ‘lured by a law that is unreadable, delayed by a judgment that fails to appear—this is how entry to the law appears (Vismann 2008, 15). But Vismann goes further, recognizing that Kafka's parable is a forceful reminder that prior to anything resembling rights or norms, ‘questions of law are reduced to questions of access’ (Vismann 2008, 16). Only a privileged few know the law in any way other than inaccessibility.

Hauke Brunkhorst's Critical Theory of Legal Revolutions (2014) is a less pessimistic take on Kafka's parable. In the tradition of critical theorists like Max Horkheimer, Herbert Marcuse, and Jürgen Habermas, Brunkhorst's theory is critical in its contention that legal concepts such as human rights or equality can be used to negate existing reality in light of realistic and rational potentials. Brunkhorst certainly recognizes that the law, for many people, is nothing more than endless administration built on promises of rights and dignities that are routinely denied, despite the willing supplication of those who wish to have access the law. But he argues that this bureaucratic nightmare is inseparable from the emancipatory potentials of the law. Both legalized oppression and legalized emancipation from oppression co-exist in a dialectical unity, bounded by constitutions that all humans and institutions are subject to. Brunkhorst's critical history of legal revolutions theory traces this dialectical tension between the law as emancipation and the everyday administrative activities of legal practice. He defines this as a dialectic between the ‘Kantian mindset’ (emancipation) and the ‘managerial mindset’ (differentiation and instrumentalization) and he presents examples of these mindsets that correspond with what he identifies as the great legal revolutions that make up modernity: the Papal revolution (1074-1170), the Protestant revolution (1517-1650), the Atlantic World revolution (1750-1830), and the Egalitarian World revolution.
Legalized differentiation and rationalization became possible in the eleventh century and after this point the law could be interpreted and administered in such a way that it enabled the formation of autonomous institutions that were bound by legal codes (universities, guilds, cities).

As a sociologically inclined critical theorist, lineages can be identified between Brunkhorst and like minded theorists, most notably Jürgen Habermas. There are also resonances with Max Weber (it is inevitable that any theorist who writes about the Protestant revolution will be compared with Weber), Martin Heidegger, and first-generation Frankfurt School writers like Herbert Marcuse and Max Horkheimer. However, I found that the closest comparison with Brunkhorst’s work does not come from the pantheon of great German social theorists, but rather from the American philosopher and historian of science Thomas Kuhn. The legal revolutions that Brunkhorst describes have affinities with Kuhn's (1962) scientific revolutions. Both the law and science, in the work of these writers, are subject to the similar processes of stability and revolutionary change. For Kuhn, scientists work within paradigms that provide them with a worldview; paradigms define what the world consists of and the questions that can be asked of this world. Over time, anomalies appear that problematize the fundamental assumptions of paradigms, which can lead to crisis, revolution, and the development of a new paradigm. Compare this with Brunkhorst's description of the crisis that precipitated the revolutionary spirit of the late eighteenth and early nineteenth centuries: 

“The constitutional revolution was caused by the global crisis of the eighteenth century, which lasted from 1720 to 1820...Everywhere in Eurasia and America, a need for reform and ‘modernization’ arose, due to the growing financial pressure on government which primarily was caused by bigger and better trained armies and more expensive military technologies. At the same time, economic productivity could not balance the steadily growing costs anywhere...The fiscal crisis of government became structural. It finally resulted in a crisis of motivation. The reluctance of the landed
gentry, merchants, and common men to pay taxes and duties and to give away their sons as soldiers was answered with more oppression and despotism which, in a vicious circle, caused growing disloyalty, popular riots, peasant insurgencies, civil wars, and finally, revolution...Growing protest was intellectually shaped by the successive global dissemination of egalitarian ideologies. In particular, in societies with a legal system that already included universal subjective private and political rights of a certain degree, the exacerbation of the fiscal, motivational and rationality crises increased the likelihood of a legitimation crisis of the whole societal system of old Eurasia dramatically” (Brunkhorst 2014, 238).

In Burnkhorst’s history, the legal paradigm that had ordered the socio-cultural-economic world had begun to become unraveled by inevitable and unpredictable instabilities (anomalies) that led to crises that, in turn, led to the Atlantic World legal revolution. Just as ‘good science’ necessarily follows the path of paradigm-normal science-anomaly-crisis-revolution, for the law to be modern it has to undergo periodic revolutionary punctuations that open up new articulations of what can be legal rights and norms. However, the similarities between these two theorists of revolutionary change end if we consider their attitudes towards revolutionary change and evolutionary change. For Kuhn, paradigms are incommensurable with each other, both historically and across different scientific disciplines. Paradigms are discrete entities that can be studied and examined as worlds unto themselves. There is no continuity. For Brunkhorst, the history of legal revolutions is evolutionary; legal revolutions open up different iterations of evolutionary universals that, although not identical, can be found across the different epochs of modern law. Constitutionalism is one such evolutionary universal. Constitutionalism is the legal core of the normative constraints established by legal revolutions and implemented in the legal and constitutional systems of modern society. Thus, constitutionalism is the universal through which the dialect of modern law is expressed; for law to be modern, meaning that it contains the contradictory unity of managerial and Kantian mindsets, it has to be constitutional (Brunkhorst 2014, 57).

Legal revolutions also trigger ‘evolutionary universals’ that work as normative universals within specific constitutional mindsets. These normative universals provide a conceptual framework and direction through which the Kantian and managerial mindsets can be realized. Brunkhorst identifies cosmopolitanism as one of these normative evolutionary universals. Cosmopolitanism, as a normative universal, predates the creation of modern law by more 1000 years. Brunkhorst writes the during Axial Age (800 BC – 200 BC), monotheistic religions endowed the Greek idea of cosmopolis ‘with the norm of universal individual equality and equal freedom for each human being,’ which ‘allowed even early Axial age cosmopolitanism to offer a radical criticism of the existing political order’ (Brunkhorst 2014, 69). This transcendent realm of egalitarianism was internalized and projected as an immanent reality against which lived reality could be critiqued. Thus, an idea of cosmopolitanism provides the conditions through which communicative negation and normative learning processes can occur.

For Brunkhorst, a Kantian notion of cosmopolitanism serves as a critical concept against which existing ideas of universalism (global capitalism, for example) can be critiqued. His evolutionary history of the legalization of cosmopolitanism reveals a dialectical tension between the universalization of human rights and the reification of abstract universal entities like property, imperialism, and capital. During the Papal Revolution, universal monotheistic cosmopolitan ideals were expressed in the ‘unique legal implementation of the most basic theological assumption of Christianity, namely that all human beings are created equally and equipped with equal and unalienable dignity’ (Brunkhorst 2014, 103). During the protestant revolution, cosmopolitan ideas of equality were extended beyond Europe to account for all people. The egalitarian idea that all humans have the right to have rights enabled a radical critical perspective, ‘the political and social radicalization of the
The materiality of the law & a cosmopolitan critical theory of technology

The ‘significant’ issues that Brunkhorst describes in his book are immaterial: rights, norms, emancipation, managerial and Kantian mindsets, etc. All of these are considered to be distinct from material objects. The most notable technology that is referred to is the printing press, which is presented as an important tool for encouraging and disseminating the ideas of the Protestant revolution. ‘The polemic against scholasticism was reinforced by the unleashing of the communicative power of the printing press’ (Brunkhorst 2014, 160); “the reformation...was an urban movement, and based on the communicative use of the printing press. The Protestants were the party of the new media” (Brunkhorst 2014, 175). At worst, this take on the printing press can be interpreted as an all too familiar triumphant history in which communication media leads social progress (the empty rhetoric that digital media, for example, are spreading democracy is a variation of this deterministic history). At best, Brunkhorst’s take on the printing press is an avoidance of the deeply intertwined nature of media of communication and legal revolutions by assuming that the printing press is a neutral medium. Against this, one could argue that the printing press was not merely a neutral medium in the service of legal revolutions, but rather that the Protestant/legal revolution was a consequence of the uniformity, repeatability, and the individualized fixed point of view that emerged alongside the printing press. To put it another way, Protestantism, as the basis of a total legal revolution, was a media phenomenon, impossible without the printing press.

An attention to media of communication as an integral dimension of the legal history that Brunkhorst explores can highlight how, a priori, the law is media. This is the perspective taken by media historian Harold Innis (1894-1952). If, for Brunkhorst, the law is everything, for Innis media of communication are everything; it is impossible to think or write or communicate from a position outside of media. Innis developed his media history through a re-thinking of the history of the great empires that make up world history (like Brunkhorst, Innis’s ambitions are not bounded to a single case study). By concentrating on the relationship between the institutions of an empire (government, religion, education, law) and the dominant media used by these institutions, Innis was able to explain how empires are able to endure. Innis
explained this by arguing that media are biased towards the dissemination of knowledge through time or across space. Empires are able to endure across time through the use of durable media like stone or architecture and they are able to spread across space through lighter (and more ephemeral) media like paper or digital code. Empires emerge and expand when a balance has been struck between space and time biased media:

“Concentration on a medium of communication implies a bias in the cultural development of the civilization concerned either towards an emphasis on space and political organization or an emphasis on time and religious organization. Introduction of a second medium tends to check the bias of the first and creates conditions suited to the growth of empire” (Innis 1972 [1950], 170).

Innis uses the two Christian empires that followed the decline Roman Empire as examples of this. In the East,

“The Byzantine Empire developed on the basis of a compromise between organization reflecting the bias of different media: that of papyrus in the development of an imperial bureaucracy in relation to a vast area and that of parchment in the development of an ecclesiastical hierarchy in relation to time” (Innis 1972 [1950], 115).

And in the West, the growth of monasticism ensured that the spatial monopoly of the Roman Empire was checked by the temporal bias of the parchment codex:

“The bureaucratic development of the Roman Empire and success in solving problems of administration over vast areas were dependent on supplies of papyrus...the problem of the Roman Empire in relation to time was solved by the support of religion in the Christian church. The cumulative bias of papyrus in relation to bureaucratic administration was offset by an appeal to parchment as a medium for a powerful religious organization” (Innis 1991 [1951], 48-49).

The Christian empire that endured from the fall of the Roman Empire until Protestantism was the result of a successful balance between space-biased media (papyrus) and time biased media (parchment codex), a balance that was well suited to the demands of organization and control across space and time.

Following Brunkhorst, the Christian empire that developed out of the Papal revolution was, in part, the result of an infrastructure of monasteries in Western Europe that enabled the administration of this legal revolution. These monasteries, foremost amongst them the monasteries of the Cluny, were reform minded, “obsessed by the idea of law, the idea of justice, the reform of this world and salvation through law” (Brunkhorst 2014, 110). This mission could only be justified through law, which led reform-minded monks to frantically search for a specific text, “a copy of Justinian’s Corpus Juris Romani - a collection of Roman civil law arranged according to certain groups of legal textbooks... They finally found a copy in a library in Pisa in 1050, 25 years before the outbreak of the revolution” (Brunkhorst 2014, 111). For Brunkhorst, it is the content of this book that contributed to a legal revolution and its subsequent empire. He says nothing concerning the form of this text and how this form contributed to the revolutions that he attributes to its content. Following Innis, we can assume that the form of this text was parchment codex, and as such was uniquely suited to interpretation and legal revolutions. “The durability of parchment and the convenience of the codex for reference made it particularly suitable for the large books typical of scripture and legal works. In turn the difficulties of copying a large book limited the numbers produced. Small libraries with a small number of large books could be established over large areas” (Innis 1991 [1951], 48). The parchment codex was replaced by paper and the printing press, which because of its spatial bias, enabled a different type of legal revolution to take hold.

The preceding was not meant to imply that Innis or any other media theorist should be used to re-interpret Brunkhorst’s legal revolutions as media-legal revolutions.
Rather, my intent is to highlight how an attention to media of communication can strengthen the historical narrative that Brunkhorst develops in his book. To conclude, I want to maintain my focus on materiality through an exploration of how ideas borrowed from Brunkhorst can open up new directions in the critical philosophy of technology.

The starting point for a serious critical philosophy of technology begins with Herbert Marcuse who examined how the technological infrastructure of modern industrial society produces the wants and needs of that society. The cost of maintaining and fulfilling these needs is quite high: unnecessary competition for dreary and unsatisfying jobs that provide us with the resources to buy things, a throw away culture premised on planned obsolescence and waste, and an attitude towards environmental degradation that is appalling. Marcuse’s solution to this problem was quite ambiguous—he hypothesized that the logic of art and aesthetics could serve the same purpose that the technocratic rationality of calculation and efficiency serve; a model premised on the Greek concept of techné. In the decades that have followed Marcuse, critical theorists have largely abandoned Marcuse’s more essentialist takes on technology and have argued that a critical theory of technology should aim towards the democratization of technical design (Bijker 1995; Feenberg 1999). The empirical study of technological design has revealed that design is culturally and historically contingent. Democracy, in this framework, is a concept through which the negation of technological society can occur by pointing to workable designs that better reflect humanistic and environmental goals instead of profit and exploitation. The democratization of technological design is a fruitful base from which a critical theory of technological society can be articulated. However, I think that democracy should not be limited to technical design. A focus on technological design is very much the privilege of an engineering culture largely located in the global West while outsourced manufacturing processes, not to mention outsourced disposal processes, tend to remain out of sight and out of mind. Design may be democratized, but production and consumption are not. As historian David Edgerton (2006) writes, a focus on design is part of an ‘innovation-centric’ theory that is very much the purview of a view of technology familiar from books written for ‘boys of all ages’ that fetishize invention and innovation at the expense of a more a more global view of technology that is not ideologically oriented towards the West’s fascination with innovation. A focus on design tends to reify innovation as a permanent part of technological society, regardless of the necessity of innovation.

Following Brunkhorst, dialectical cosmopolitanism could be used to better understand the universalizing tendencies of technological society. The dreams of a global technology that could enable, for example, a truly global sense of communication and community needs to be balanced with the reality of a global division of labour that enables the universalizing dreams of techno-enthusiasts to be limited to the global West. This is a sort-of democratic cosmopolitanism that would give equal value to the perspectives and needs of those who build our technologies as is given to those who design technology.

Articulating an idea of what Critical Theory is and what the task of Critical Theory is has been the impetus for many treatises, including Dialectic of Enlightenment, One-Dimensional Man, Negative Dialectics, and The Theory of Communicative Action. It would be premature to add Critical Theory of Legal Revolutions to this list, but it is written in the same spirit as these texts and as such contains the potential to make significant contributions to the development of Critical Theory in the twenty-first century. A good book is always the beginning of a conversation, not the end of one. Following this dictum, Brunkhorst has written a very good book. The turn to cosmopolitanism as a critical concept to better understand the history of modern law opens up interesting possibilities for other types of critical theory. In particular, a critical philosophy of technology informed by dialectical cosmopolitan opens up new potentials for a truly global critical philosophy of technology.
Notes

1] Compare this with the media theorist and legal scholar Cornelia Vissman (2008) who argues that the law begins with documents and files. As such, modern law begins with its codification (being written down) in ancient Babylonia and is as much modern during the Roman period (due to the amount of legal files that this law depended upon) as it is today.

References


Biographies

Darryl Cressman

Darryl Cressman is an assistant professor in the Philosophy Department at Maastricht University. He has published research on Herbert Marcuse's philosophy of technology, the history of Amsterdam's Concertgebouw, and Harold Innis's philosophy of media.

This work is licensed under the Creative Commons License (Attribution Noncommercial 3.0). See http://creativecommons.org/licenses/by-nc/3.0/nl/deed.en for more information.