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# Guarding the Gates with Two Faces: International Law and Political Reconstruction

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# Guarding the Gates with Two Faces: International Law and Political Reconstruction

SUSAN MARKS\*

For all its achievements during the Cold War years, international law was inevitably one of the casualties of superpower rivalry. With perhaps equal inevitability, the fall of communism was seen to herald a return to vigor, a new phase of disciplinary regeneration. International law—freed at last from the constraints which had “deformed” it, “ensured its ineffectiveness,”<sup>1</sup> and kept scholars on the defensive with respect to its “very existence”<sup>2</sup>—appeared set to take an active part in the building of a new post-Cold War world. Where before there was stasis, the prospect of an alliance with the forces of change now opened up.<sup>3</sup> One of the most acute analyses of this moment in international legal history can be found in a short article by David Kennedy, entitled “Turning to Market Democracy: A Tale of Two Architectures.”<sup>4</sup> The article deserves more attention than it has received.

In this article, Kennedy examines European economic relations in the early 1990s, contrasting the 1992 program of the European Community (EC) with Eastern European dealings post-1989, within the framework of the international trade regime. The choice of subject was intended to reflect the priority now being given to issues of legal-institutional design, international law’s “turn to policy.” But there was a rider: “My turn to policy here is

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\* Fellow, Emmanuel College, Cambridge. This Article draws on a Cambridge University Ph.D. dissertation, *The Riddle of All Constitutions: A Study of Democratic Ideas in International Law*. The author gratefully acknowledges the help and support of her supervisor, Professor James Crawford.

1. W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT’L L. 859, 860 (1990). “The need for international law after the Cold War will be more urgent than during the conflict. In many ways, what is expected of international law will be greater.” *Id.* at 866.

2. T. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995). Franck argues that international law has entered a “post-ontological” era. International lawyers no longer need to defend the very existence of international law. Thus emancipated from the constraints of defensive ontology, international lawyers are now free to undertake a critical assessment of its content.

3. See, e.g., Anne-Marie Burley, *Revolution of the Spirit*, 3 HARV. HUM. RTS. J. 1 (1990) (exemplifying this outlook).

4. David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT’L L.J. 373 (1991).

rooted in skepticism about the renewal movement.”<sup>5</sup> Explaining this, Kennedy observes that the supposed renewal was premised on a contrast between developments treated as breaks or novelties and other developments treated as points of continuity or perfection. In the European context, the 1992 program was understood as carrying forward an established project of integration, while the fall of the Berlin Wall was taken to call for a wholesale recasting of economic (and other) arrangements. The contrast served to signal that the Western European endeavor was “ahead” as compared to the situation of the Eastern nations, which were seen to stand at or near “square one.” Yet, Kennedy points out, the pattern might equally have been reversed. The demise of state communism might be viewed as a straightforward case of the expanding purchase of international modernism, raising questions about succession, alliance, and the like, that conventional doctrines have relatively little difficulty answering. On the other hand, the 1992 program might be seen to represent something quite novel, a supranationalist, technocratic ideal with which international law has yet to come to grips.

From this perspective the fact that it was 1992 that came to be figured as continuity and 1989 as disjuncture was highly significant. This fact sustained the idea, as “part of the background assumptions for renewalist commentary ... that East and West Europe confront the same systematic imperatives at different chronological stages, that the East ‘lags’ behind the West ...”<sup>6</sup> A geographical divide thus became also a chronological divide, separating points reached in a developmental or evolutionary progression. In this way it came to seem natural that the Eastern European countries should pass through the more “primitive” stage of international trade regime before being considered for membership in the EC. This points to “a darker side to the renewal story—a side in which relaxation of Western hesitance about allowing the East ‘in’ seems only possible once the conditions of chronological inequality have been stabilized.”<sup>7</sup> Kennedy indeed shows how the international trade regime helped to stabilize this inequality by encouraging, or at any rate ratifying, the adoption in Eastern Europe of crude, debilitating versions of

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5. *Id.* at 374.

6. *Id.*

7. *Id.* at 379.

capitalism, sharply contrasting with the economic practices of the EC and its Member States.<sup>8</sup>

This Article takes Kennedy's lead, following him both in his turn to policy and in his skepticism. But whereas his immediate focus is capitalism in Europe,<sup>9</sup> mine is democracy in the world at large. I seek to explore to what extent the policy choices and strategies which he discusses with respect to economic liberalization apply also with respect to political democratization. And insofar as those policy choices and strategies do also apply in the political domain, I seek to examine the implications for the fate of international legal renewal.

In the course of this inquiry, the following questions arise. What is the character of the changes likely to receive support in the renewalists' vision of universalizing market democracy? To what extent does that vision promote stable, competitive economies? To what extent does it contribute to the realization of effective popular control of public power on the basis of equal citizenship? Is international legal renewalism conducive to overcoming political and economic marginalization and exclusion? Or is it rather geared to entrenching prevailing positions in the international division of power, resources, and opportunities? Put differently, how much novelty is there in renewalism? Kennedy's study suggests the outline of a hypothesis. Does the contrast he draws between economic regimes in Western and Eastern Europe connect with related ideas about government? Does his claim that through this contrast international law helps to stabilize inequalities also hold for international legal norms concerning democracy? Are there, in other words, parallel notions of continuity and discontinuity, vanguard and rearguard, core and periphery, that inform international law's approach to democratic politics? And if the answer to these last questions is "yes," how might we begin to envision an alternative approach to international legal renewal, an approach dedicated not to stabilizing inequalities, but to destabilizing them?

## I. TRANSITION MARKET DEMOCRACY

It will be valuable to preface this inquiry by briefly recalling some pertinent themes in contemporary economic and political commentary. This

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8. See discussion *infra* Parts I.A, II.A.

9. Kennedy's remarks concerning capitalism in Europe appear, however, to be intended to raise issues relating to "transitions to market democracy" more generally.

section surveys two themes in particular. Though diverse in their scope, general perspective, and immediate preoccupations, they exemplify complementary thinking on policy issues with a common bearing on the character of post-Cold War reconstruction. The first joins Kennedy in addressing economic transformations in Eastern Europe since the 1980s; the contention is that the countries in question have abandoned “pseudo-socialism,” only to embrace “pseudo-capitalism” (Part I.A). The second concerns changes to political arrangements in Third World countries; the claim is that a distinct form of “low intensity democracy” is in evidence (Part I.B). At the end of Part I these themes are brought together under a larger category, to be called “transition market democracy” (Part I.C).

In discussing international law and international legal renewalism, later sections of this Article will take up these themes and categories. The presentation of Kennedy’s analysis of European economic law will recall arguments associated with pseudo-capitalism. The extension of Kennedy’s analysis to the international law concerning democracy will recall arguments associated with low intensity democracy. In this way, international law will be linked with both the economic and political, the market and democratic facets of transition market democracy. These links point to policy considerations which, I will argue, inform international legal understandings of democracy and international legal renewalism more generally.

#### *A. Pseudo-Capitalism*

If the fall of the Berlin Wall brought high hopes for economic growth in Eastern Europe, these hopes were quickly dashed. By the mid-1990s, the experience of most countries in the region was declining industrial output, high levels of wage-price inflation, rising unemployment, and, in some cases, near-economic collapse. Expressing a view that is gaining currency among commentators,<sup>10</sup> economists Alice Amsden, Jacek Kochanowicz, and Lance

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10. See, e.g., Robert A. Dahl, *Why All Democratic Countries Have Mixed Economies*, in *DEMOCRATIC COMMUNITY* 259 (John W. Chapman & Ian Shapiro eds., 1993); Robert A. Dahl, *Why Free Markets Are Not Enough*, in *CAPITALISM, SOCIALISM, AND DEMOCRACY REVISITED* 76 (L. Diamond & M. Plattner eds., 1993); A. Przeworski, *The Neoliberal Fallacy*, in *CAPITALISM, SOCIALISM, AND DEMOCRACY REVISITED*, *supra*.

Taylor attribute this state of affairs to two principal factors.<sup>11</sup> These factors are held to apply to some degree throughout the former Eastern bloc, for all the tremendous divergences in policies, circumstances, traditions, and demographics that prevail there.

The first factor is that the economic and social assets these countries already had were ignored and squandered. Viable state-owned enterprises were allowed to fold; world-class research and development institutions were permitted to decline; highly skilled workforces were underutilized and wasted; and social infrastructure was left without support. As Amsden and her associates put it, "the architects of Eastern Europe's transition to a market economy generally regarded socialism's legacies as uniform liabilities."<sup>12</sup> Patently, the command economies had profound deficiencies, which prevented them from flourishing. But, along with the failures, there were also some notable successes, especially in the areas of education, technical know-how, social security, and in some industrial sectors. Policymakers in the Eastern bloc countries largely turned their backs on these successes. In contrast to the pragmatic approach to reconstruction adopted after World War II by Germany, Italy, and Japan, in which whatever was economically valuable from the old regime was salvaged and mobilized, post-Cold War reconstruction was guided by an ideological approach admitting of no distinction between babies and bath water. "For ideological reasons ... policymakers rejected the entire socialist inheritance."<sup>13</sup>

The second factor that is said to account for economic under-performance in Eastern Europe arises from what was put in the place of this socialist inheritance. Creating free markets with limited institutionalized regulation, many countries embraced policies that recalled the *laissez-faire* theories of the eighteenth century. Capitalism's pioneers today have mixed economies, in which market activity is coordinated, constrained, and controlled to a significant degree by government intervention. But the Eastern European approach departs not only from the current economic practices of advanced industrial countries. Amsden and her colleagues point out that it also departs from the economic policies of most late-industrializing countries, including those of East Asia. These nations have sought neither to reproduce Western

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11. See ALICE H. AMSDEN ET AL., *THE MARKET MEETS ITS MATCH: RESTRUCTURING THE ECONOMIES OF EASTERN EUROPE* (1994).

12. *Id.* at 1.

13. *Id.* at 1-2.

economies nor to revive Adam Smith. Instead, they have fashioned new models, adapted to the need to gain ground in the distinctive economic environment of the late twentieth century. A key dimension of all these models is institution-building. In the East Asian versions, for instance, state agencies of various kinds play an important role in shaping, directing, and implementing industrial and trade policy, and in distributing resources. Not so in Eastern Europe, where overriding faith has been placed in the market (as the critics' term "market fundamentalism" conveys), and institution-building has been largely confined to the legal systems, stock exchanges, and the like, needed to underwrite the market. Thus, for instance, privatization programs have transferred to the private sector the huge and vital tasks associated with economic restructuring.

Why this "moral crusade of market fundamentalism,"<sup>14</sup> as Amsden and her colleagues call it? In the first place, they argue, again, that ideology is ruling. While for East Asian policymakers the market mechanism has an instrumental value, for their Eastern European counterparts it has assumed an intrinsic significance that transcends considerations of utility or disutility. This highlights the extent to which this second factor affecting Eastern European economic performance is related to the first. The same logic which dictated that the communist legacy was *wholly* discredited and left *nothing* worth retaining also prescribed that the new was to be the opposite of the old. Where once there was the all-determining plan, the overblown bureaucracy, and the omnipotent state, now there was to be no macroeconomic planning, few large-scale institutions or enterprises of any kind (public or even private), and an emasculated state. With the absolute denigration of Eastern Europe's economic history came the caricatural idealization of Western Europe's.

In this account there is also another reason for the crusade of market fundamentalism. The World Bank and the International Monetary Fund (IMF) made loans to the countries concerned, with conditions attached that served to constrain the options open to Eastern European policymakers. The crusade on which the latter embarked was not, in other words, wholly their own initiative. The conditions imposed by the international financial institutions were to a significant degree shaped by the neoliberal economic outlook which prevailed in the United States at the time. This neoliberalism is widely linked to the sense of "declinism" and fall from hegemonic status of the United

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14. *Id.* at 4.

States, and to the economic challenges coming from relative newcomers to the ranks of the highly industrialized and technologically advanced countries.

According to Amsden and her colleagues, it was thus owing to “the United States’ crisis of self-confidence” that “[i]n reaction to the rise of the East Asian late-industrializers, American and hence Bretton Woods policies exaggerated the virtues of free markets ....”<sup>15</sup> Just as the eastern regions of Europe served during the sixteenth to eighteenth centuries as the agrarian base for the industrializing nations further west, so now these same regions were being encouraged to “specialize in low-end goods, despite equally gloomy prospects for success.”<sup>16</sup> Eastern Europe was to forswear advanced-industrial, let alone post-industrial, ambitions. These authors conclude that “Eastern Europe has ... been assigned a place in the international economy roughly comparable to what it occupied in earlier centuries: that of a poor cousin in the division of labour with the rest of Europe.”<sup>17</sup> Despite—or rather, in part because of—a perception that post-Cold War reconstruction called for a complete reversal of fortune, there was thus a sense in which fortunes were not to change at all.

Amsden and her associates refer to the post-Cold War economic systems established in Eastern Europe as “pseudo-capitalism.”<sup>18</sup> By this they mean that these systems, with their preference for small firms and weak states, fail to build the institutional framework necessary for long-term capitalist development. The transition has, according to these analysts, been one from “pseudo-socialism”—where an institutional framework conducive to sustained growth was likewise lacking, albeit in different respects—to “pseudo-capitalism.”<sup>19</sup> This points to another sense in which things have changed for Eastern Europe, only to remain the same.

“Pseudo-capitalism” patently presupposes that there are, or may be, other forms of capitalism that can better claim to be “real” or genuine. The economists who employ this term recognize, of course, that capitalism has many variants, and that it has no fixed, authentic essence. Their point is precisely that Eastern European policymakers need to develop their own economic models for their own conditions, rather than seeking to emulate the experience of a distant time and place. But the contrast implied in the term

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15. *Id.* at 5.

16. *Id.*

17. *Id.*

18. *Id.* at 2.

19. *Id.* at 4.



“pseudo-capitalism” is useful, for it brings into focus the central claim that Eastern Europe is not only erring in copying. It is compounding the error by copying “the wrong capitalist model,”<sup>20</sup> one which no Western nation, nor—perhaps more significantly—any of the successful late-industrializing nations, employs for itself.

### *B. Low Intensity Democracy*

The other theme to be noted here also posits that reconstruction is being pinned to the wrong model. In this case, however, the concern is principally with the political, rather than the economic, dimensions of reconstruction. Thus, the models in contention are models of democracy, rather than models of capitalism.<sup>21</sup> And in this case the focus of attention is Africa, Latin America, and Asia, rather than Eastern Europe.

In the years since 1989 more of the world’s population than ever before has had the “quintessentially liberal democratic experience of voting in free elections.”<sup>22</sup> This is clearly a development of enormous significance. But what are the prospects for realizing the aspirations it raised? After so many national conferences, new constitutions, and multiparty elections, supported by so many grassroots networks and armies of international consultants and observers, the democratic ideals of self-rule and equality appear (at least) as remote as they ever were in many Third World countries. Authoritarian political structures have remained notoriously undaunted.<sup>23</sup> No doubt a complex array of circumstances, variable for each polity, is responsible for this. According to some political analysts, however, one matter has commonly played a key part. Democratization has been informed by a signally undemanding and highly formal conception of democracy, in which the holding of periodic multiparty elections is taken largely to suffice, and more

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20. *Id.*

21. However, a central aspect of this theme is the relationship between these two dimensions, which will be discussed below.

22. Daniele Archibugi & David Held, *Editors' Introduction*, in *COSMOPOLITAN DEMOCRACY* 3 (Daniele Archibugi & David Held eds., 1995).

23. Barry Gills et al., *Low Intensity Democracy*, in *LOW INTENSITY DEMOCRACY: POLITICAL POWER IN THE NEW WORLD* 3, 22 (Barry Gills et al. eds., 1993).

far-reaching institutional changes are held to be optional extras.<sup>24</sup> It is unsurprising if little has been achieved regarding enhanced government accountability, civilian control of the military, respect for human rights, and social reform, for such a conception encourages little to be attempted.

This line of thought can be illustrated by reference to the work of a group of commentators who term the approach in question "low intensity democracy."<sup>25</sup> These commentators note that low intensity democracy is not geared to the reproduction of Western political practices and institutions. They observe that "[n]ot only have [these new democracies] not come close to operating a political structure modelled on actual Western liberal democracies, this is not part of a long-term agenda for the future."<sup>26</sup> But neither does low intensity democracy involve the establishment of new practices and institutions, designed to capitalize on the democratic possibilities offered by particular non-Western realities, traditions, and experience. Rather, low intensity democracy is a largely "cosmetic" model.<sup>27</sup> It provides some of the forms associated with modern democracy, but leaves established centers of power substantially intact. Thus, for instance, the military may continue to wield an effective veto over government decisionmaking after the advent of (civilian) low intensity democracy. In such cases, these commentators warn, democracy is "in danger of becoming a ... euphemism for sophisticated modern forms of neo-authoritarianism."<sup>28</sup>

How, then, are we to account for low intensity democracy's prevalence and respectability as a model for political reconstruction in the Third World? A major factor, according to these commentators, is that the drive toward democracy is a reflection of "a new stage of globalisation in the capitalist world economy."<sup>29</sup> Eastern Europe is not, of course, the only region in which vigorous programs of economic liberalization have been adopted; the pressures exerted on Third World countries by the international financial institutions and by other lenders and aid-donors in this regard are well known. The contention here is that market-oriented *economic* reconstruction is

24. Samir Amin, *The Issue Of Democracy in the Contemporary Third World*, in *LOW INTENSITY DEMOCRACY* 59, 59-60 (Barry Gills, et al. eds., 1993); Gills, *supra* note 23, at 21.

25. Gills, *supra* note 23, at 4. The claims are supported by case studies of Argentina, Guatemala, the Phillipines, and South Korea published in the same volume.

26. *Id.* at 3.

27. *Id.* at 21.

28. *Id.* at 5.

29. *Id.* at 4.

frequently what is uppermost in the minds of those who urge democratization as the objective of *political* reconstruction.

This helps explain why the outcome of the “drive toward democracy” is frequently low intensity democracy, for the market itself offers few incentives for an ambitious democratic agenda.<sup>30</sup> With its notion that people find their “natural” level in the process of exchange, the market is at best indifferent to many of the core democratic preoccupations. Redressing inequalities of political and economic power, and enhancing the accountability of power-holders to those affected by their decisions, are hardly economic liberalism’s priorities. Indeed, where neoliberal, “market fundamentalist” doctrines prevail, and the state’s institutionalized capacity for regulating the economy and allocating resources is strictly limited, not only is there little incentive for implementing an ambitious democratic agenda, there is also little possibility of doing so.

The lack of democratic incentives or possibilities that follows from an overriding commitment to economic liberalization is, then, one factor said to account for low intensity democracy. But, according to these analysts, there is also a further consideration. They contend that low intensity democracy finds wide favor because it is congenial to the (locally and transnationally based) interests of global capital in the Third World. It provides electoral participation, recognition in principle of human rights, and some political space for formulating demands and influencing decisionmaking, while preempting deep-rooted institutional change. At the same time, it confers greater legitimacy on government action and policy than is enjoyed by “pre-democratic” regimes. In this way it helps to demobilize resistance to debt servicing, austerity measures, structural adjustment, and other common elements of the painful “development” treatment. For these commentators, low intensity democracy “complemented the economic policy offensive managed principally by the IMF, one of the key goals of which was to break down political barriers to the further transnationalisation of capital.”<sup>31</sup>

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30. See e.g., Dahl, *Why All Democratic Countries Have Mixed Economies*, *supra* note 10; Dahl, *Why Free Markets Are Not Enough*, *supra* note 10; Przeworski, *supra* note 10; and ADAM PRZEWORSKI ET AL., *SUSTAINABLE DEMOCRACY* (1995).

31. Gills, *supra* note 23, at 11.

In short, the contention is that “the new formal democratisation is the political corollary of economic liberalisation and internationalisation.”<sup>32</sup> Put differently, low intensity democracy is said to arise from the fact that the “campaign for democracy” and the crusade of market fundamentalism belong to the same holy war, the same “crusade for freedom.”<sup>33</sup> War indeed has a particular resonance here, for the phrase “low intensity democracy” alludes to the American strategy known as “low intensity conflict,” developed and institutionalized in the 1980s.<sup>34</sup> Another facet of these commentators’ argument is, accordingly, that low intensity democracy is oriented to many of the same policy objectives as the strategy of low intensity conflict, and is in some cases the latter’s consequence and successor. Thus, low intensity democracy signals a new approach to counter-revolutionary intervention and hegemonic control for a new democratic age. This approach is premised on the notion that elected governments will enjoy a legitimacy which itself will serve correspondingly to delegitimize revolutionary forces. At the same time the fact that established centers of power remain largely unaffected will ensure continuity of influence.

Low intensity democracy, like pseudo-capitalism, evokes a contrasting term; it is obviously posited in opposition to high intensity democracy. The analysts who coined this phrase are well aware that there are many more than two points on this scale. They certainly recognize, too, that intensity is only one possible criterion among many for measuring the quality of democratic life, and a vague one at that. More generally, they understand that measuring the quality of democratic life is, in any event, a problematic enterprise, since there is no privileged evaluative perspective. People differ profoundly in their ideas of what democratic life should be, and in their experiences of it. Democratic life is not a commodity and should not be treated as one.

Nonetheless, in these critics’ hands low intensity democracy is a hardworking and powerful critical tool. The scholars use it to highlight the limited and troubling character of democratic claims based on this model. One need not accept these analysts’ *Marxisant* explanation for the model’s

32. *Id.* at 4.

33. In an address to the British Parliament President Reagan called for “actions to assist the campaign for democracy,” and announced a “crusade for freedom that will engage the faith and fortitude of the next generation.” President’s Address to Members of the British Parliament, PUB. PAPERS 472, 745, 748 (June 8, 1982).

34. The strategy extends earlier approaches to counter-insurgency. On low intensity conflict, see *LOW INTENSITY WARFARE* (M. Klare & P. Kombluh eds., 1989).

currency to see the force of their concerns. Where “cosmetic” democracy differs little in substance from authoritarian rule, while enjoying significantly greater legitimacy, pressing questions arise as to the basis and consequences of that legitimacy. The account of low intensity democracy helps, furthermore, to focus critical attention on the application in this context of an evolutionary conception of modernization. It is, for instance, frequently held to be self-evident that the model described by these scholars corresponds to the most easily accomplished steps, and thus the initial stage to be passed through, on the way to fully developed democratic practices and institutions. Against this, low intensity democracy brings out the dangers, disingenuities, and mystifications of democracy’s supposed “first base.” Finally, this perspective simply, but crucially, serves to underscore the very possibility of democratic alternatives. Through the implicit contrast with high intensity democracy, low intensity democracy invites consideration of a bolder and more far-reaching approach to political reconstruction than that which has hitherto predominated. One of this group, Samir Amin, neatly draws together these three points:

The interpretation of democracy that is part of the analytical framework we offer here is very different from that of Anglo-American evolutionist philosophy. In our analysis, democracy becomes a destabiliser, the means by which concepts “ahead of their time” continue to progress and spur on social action and progress.<sup>35</sup>

### *C. Transition Market Democracy*

Though addressed to the case of different regions and time frames, intended as interventions in different disciplines and debates, and animated by different outlooks and traditions, these two themes—pseudo-capitalism and low intensity democracy—express a set of common concerns about the character and scope of change in the contemporary world. These may be summarized as follows.

In the first place, change is limited because efforts at reconstruction are frequently informed by unpromising and inappropriate models. Policymakers contribute to the use of such models to the extent that they employ blueprints

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35. Amin, *supra* note 24, at 78.

rather than developing reform strategies that address their own society's specific objectives and constraints, build on its specific historical experience, and learn from the experiences of a diversity of other societies.

Second, ideology in some cases plays a large part in the choice of unpromising and inappropriate models. This is evident, for instance, in the extent to which pseudo-capitalism draws support from the notion that capitalism is the opposite of socialism. Cold War propaganda thus transmutes into post-Cold War policy. A selective and idealized invocation of Western economic and political history helps to reinforce this.

Third, global capital also plays a part in the adoption of these models. Loans, aid, and trade constrain the options of Third World and former socialist countries. This applies not only in the realm of economic policy, but also to political life. The constraints encourage policy choices that do not disturb established positions in the international distribution of power, resources, and labor.

Fourth, a linear, evolutionary conception of modernization encourages policymakers to treat reconstruction as a matter of "transition" undertaken in defined stages. Western societies are held to exemplify the goals of this transition. Inasmuch as the first stages correspond to the inappropriate and unpromising models noted above, slow and painful progress towards these goals is, however, assured.

This indicates, finally, that while reconstruction appears to hold out the promise of "catching up" with the West, pseudo-capitalism and low intensity democracy are, on the contrary, "slowing down" models. While marketization and democratization appear to promise full participation in global markets and an end to global political marginalization, pseudo-capitalism and low intensity democracy ensure, on the contrary, continued exclusion and relegation to the periphery. Accordingly, much of what passes for political and economic reconstruction offers little real prospect of change.

The starting point for these two themes is the gap between aspiration and actuality in the political and economic reconstructions of the 1980s and 1990s; between free market growth and declining economic realities; between rights-respecting democracy and continued repression; between catching up with the West and staying behind. Those who make the case concerning pseudo-capitalism and low intensity democracy seek to highlight the way in which this gap is sustained by an approach to reconstruction that rests on a series of mystifications. The myth of the invisible hand, for instance, conceals the indispensability of institutions. The myth of democracy (of the cosmetic sort)

cloaks neo-authoritarian rule. The myth of the universal market hides the existence of systematic barriers within that market. The myth of the worldwide democratic revolution shields the enduring hold of hegemonic power. The various myths of origin underpinning the notion that progress is unilinear, and one must begin at the beginning, obscure the reality of beginners' economic and political models that countervail progress.

An approach to reconstruction that rests on these and other mystifications is, from this perspective, itself a mystification. It acts ideologically, depicting anachronistic and self-defeating models of market democracy as effective and competitive policies. In doing so, it masks the palest of imitations of Western political and economic forms as the latter's universalization. More than that, it masks the entrenchment of established divisions and hegemonies as the breaking down of barriers to participation in global political and economic life. In short, it masks continuity as change.

Many of these points echo ideas familiar from debates about development. The accounts of pseudo-capitalism and low intensity democracy suggest that, if market democracy is the current incarnation of development, the new avatar appears to remain as shrouded in myth as the old. The turn in development thinking to an approach centered on market economics and democratic government offers little real prospect of meeting many of development's critics' longstanding concerns.<sup>36</sup> Nigerian novelist Chinua Achebe puts this with memorable vividness, when he writes of "this second-class, hand-me-down capitalism, ludicrous and doomed."<sup>37</sup> Even more than that, Achebe decries what he sees to be the inauspicious, jejune democracy of many African countries: "the failure of our rulers to re-establish vital inner links with the poor and dispossessed."<sup>38</sup>

Before shifting the focus back to international law, it will be helpful to bring together the two themes discussed in this Part in a way that recognizes their interconnectedness and names their shared critical terrain. Taking their cue, one might propose an additional model, which could likewise be said to inform the process of reconstruction. However, this model would not be limited to any particular dimension of reconstruction or to any particular region of the world. Thus, it would include both pseudo-capitalism and low

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36. See *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER* (Wolfgang Sachs ed., 1992).

37. CHINUA ACHEBE, *ANTHILLS OF THE SAVANNAH* 141 (1987).

38. *Id.* My attention was drawn to this passage by BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* 290 (1992).

intensity democracy, while also leaving room for further factors that define and structure transitions to market democracy, wherever they take place. This overarching model might be called “transition market democracy.”

Once again, this category calls to mind an antithetical counterpart: established market democracy. The point of this contrast would obviously *not* be to capture the tremendous variety of economic and political systems that might fit under the broad umbrella of market democracy. This it cannot do. Rather, the point would be to concentrate critical attention on the processes associated with transition. Viewed in the light of the concerns (summarized above) arising in regard to at least certain of these processes, transition market democracy appears a profoundly ambiguous model. It advances, but also checks, transformation. It encourages faith in market democracy, but also reins in capitalist and democratic ambitions. It posits the objective of catching up, but also forecloses the possibility of actually doing so.

## II. INTERNATIONAL LAW AND TRANSITION MARKET DEMOCRACY

What role does international law play in relation to transition market democracy? Conversely, what role does transition market democracy play in relation to international legal renewalism? Since in addressing these questions this Article builds on work by David Kennedy, it will first be necessary to give a fuller account of his argument than that offered so far (Part II.A). I will then show how Kennedy’s claims, addressed primarily to market economics, find corroboration where democracy is concerned (Part II.B). While Kennedy’s claims evoke points developed in connection with pseudo-capitalism, this corroborative argument will take up points developed in connection with low intensity democracy. Pseudo-capitalism and low intensity democracy are aspects of what has been more generally characterized as transition market democracy. Insofar as the discussion which follows establishes that international law embraces transition market democracy, consideration will be given at the end to the implications of this, both for international law’s democratic agenda (Part II.C) and for international legal renewalism more generally (Part III).



*A. Kennedy's Tale of Two Architectures*

Kennedy presents a critique of international legal renewalism that proceeds from an analysis of the structure of renewalist arguments.<sup>39</sup> This structure is articulated, he observes, around two distinct ways of understanding change in international law: on the one hand, as continuity or perfection, and on the other hand, as discontinuity or rupture. Since all progress is understood in relation to a single project—international legal modernism—those changes that are understood as points of continuity or perfection are made to seem “advanced” with respect to those that are understood as points of discontinuity or rupture. Changes of the first sort are placed well down the road of international legal modernism, where there is little pressing need for further transformation. Changes of the second sort are located far behind, with a long transformative distance still to travel. It follows that how international legal renewalism understands a given change has profound consequences.

In order to explore further these consequences and the processes involved in producing them, Kennedy gives an example. As noted in the introductory remarks to this Article, he contrasts two economic “architectures” coexisting in Europe: the EC’s internal market and the international trade regime. The circumstances he particularly has in mind are, on the one hand, the EC’s 1992 program to complete the internal market and, on the other hand, the post-1989 economic relations between the EC and Eastern Europe within the framework of the international trade regime. The decision, reflected in these developments, that the former Eastern bloc countries should become full and active participants in the international trade system, but at least initially remain outside the EC’s internal market, drew support—he contends—from two notions. One is the idea that the Eastern European countries were “behind” their Western counterparts, and needed to go through various phased transitional stages (including the stage of the international trade regime) before becoming ready for the “mature” stage (embodied by the EC’s post-1992 internal market). The second is the idea that, until that “mature” stage was reached, the Eastern European countries were peripheral to the EC, and

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39. This section focuses on Kennedy, *supra* note 4. Kennedy’s general approach is perhaps best illustrated by his seminal study of the structure of international legal argument. See DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).

belonged to the (externally applying) international trade regime, rather than to the internal market.

Kennedy seeks to highlight that these notions do not refer to natural chronology and natural geographical boundaries. Rather, they are ideas constructed discursively for policy purposes. It was not, in other words, the chronology of market-oriented transition and the boundaries between West and East that occasioned the policies pursued with respect to European economic relations. It was the policies that occasioned the chronology and boundaries. International legal renewalism helped in the construction or reinforcement of these notions, by characterizing the EC's 1992 internal market program as continuity and the post-1989 EC-Eastern European international trade relations as rupture. That renewalists were making policy choices here is evident in the fact that grounds would also have existed for allocating the 1992 program to the category of rupture and the post-1989 developments to the category of continuity.<sup>40</sup> Supporting these choices was, in turn, a wider network of ideas, which, according to Kennedy, international law likewise helped to build and maintain.

In the first place, he contends, international trade law establishes the idea that (public) intervention to regulate trade is exceptional, while wholly "free" (private) trade is the norm. Thus, for instance, treaty-based rules against tariffs and quotas, procedures for mitigating swings in commodity prices, and provisions managing exchange rate fluctuations are all presented as exceptional measures which in normal conditions—characterized by stable and *self*-regulating trade, commodity exchange, and currency convertibility—would not be required. In like manner, General Agreement on Trade and Tariffs (GATT) provisions concerning developing states and IMF technical assistance programs are presented as special measures which normal societies—characterized by diversified, developed economies propelled by private commerce—do not need. The point is, of course, that the modern industrial societies which supposedly embody this norm have long since transcended it, if they ever adhered to it. In these societies, with their quangos, market-oriented civil services, and private joint ventures, private commerce and public regulation are harder than ever to disentangle. The

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40. See remarks concerning Kennedy's thesis at the beginning of this Article. It should perhaps be stressed that for present purposes what is important is not Kennedy's specific account of European economic relations and relevant international economic law (which will not be critically assessed here), but his analysis of international legal renewalism.

notion that the one is normal and the other exceptional depends, accordingly, on an outmoded distinction. Yet, Kennedy argues, this development has not been accompanied by any revision of the prevailing image of normality that structures international trade law. On the contrary, the disparity between economic relations within the West and the international trade regime serves to buttress both the sophistication of insiders and the primitivism of those outside. The former appear as those who, having mastered the rules, may now break them. The latter are those who “must undertake a long march not only through austerity but through formalism.”<sup>41</sup>

For the EC’s part, it is clear that freeing private agents to engage in economic activity has not simply been a matter of deregulation and the removal of legal impediments. Free movement of workers, goods, and capital, freedom of establishment, and freedom to provide services, all depend on an extensive regulatory framework, implemented through compulsory harmonization of national law, EC legal regimes, and common policies. In this context, Kennedy argues, a further disparity arises, reinforcing the line between the EC’s internal arrangements and the world outside, and between that which is understood as advanced and that which is taken to be for beginners. The EC puts forward as the normal premises of political life that administration is supplementary to politics; technical expertise is the servant of public decisionmaking; and executive power is subject to the popular will. Once again, however, the EC and its member states—states which supposedly reflect this—have long since left behind these democratic postulates. In the EC the technocratic character of the political regime has reached the point where concern is voiced about the “democratic deficit.”<sup>42</sup> As Kennedy points out, however, the debate about the democratic deficit only serves to accentuate the distance between, on the one side, the avant-garde vision of democratic administration—“democracy-as-management,” “[d]emocracy [as] a policy orientation”<sup>43</sup>—that applies internally and to “mature” democracies and, on the other side, the venerable ideals of democratic politics—popular sovereignty, government accountability, the separation of powers and the like—that are taken as the norm for democratizing outsiders. Again, far from leading to a

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41. Kennedy, *supra* note 4, at 381.

42. See D. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175 (1994); Karlheinz Neunreither, *The Democratic Deficit of the European Union: Towards Closer Cooperation Between the European Parliament and the National Parliaments*, 29 GOV'T & OPP'N 299 (1994).

43. Kennedy, *supra* note 4, at 385.

revision of the norm, this divergence occasions, in Kennedy's words, "an intriguing migration of democratic ideology and a preoccupation with human rights outward from the metropolis to the periphery. The internationalization of democratic rhetoric has accompanied a domestic displacement of democratic politics."<sup>44</sup>

This "tale of two architectures" is, then, a post-structuralist story about the construction of ideas. Kennedy turns to policy with a determination to scrape away the patina of naturalness that covers the ideas—especially ideas about chronologies and boundaries—structuring economic arrangements between and within Europe's East and West. In his account, international trade law and EC law help to fashion these structuring notions by defining what is to be taken as the norm. Historical processes are viewed in terms of transition from deviance to normalization to transcendence of the norm. Out of these historical processes a geographical ordering arises, dividing those in transition from those who have arrived.

International legal renewalism helped, in Kennedy's account, to determine how this chronology and this boundary would apply in the case of Europe. Through its contrasting characterizations of the changes associated with the EC and Eastern Europe, renewalism signaled that the former Eastern bloc countries were to be viewed as "behind" and "outside" with respect to the EC. It followed that the countries of Eastern Europe had first to submit to the logic of the international trade regime, in which public regulation is exceptional and unfettered commerce is the norm. Only then, having become normalized according to this logic, would they be able to transcend it by joining in the more "mature" economic life of the West (including the EC's internal market). At the same time, the Eastern bloc countries had first to democratize before being admitted to the EC. Only afterwards could they adjust their democratic aspirations to their normalized, market-driven condition.

The consequences of these ideas can be traced, Kennedy contends, in the economic policies adopted in Eastern Europe during the early 1990s. He observes that "[t]he particular vision of a market economy articulated in [these policies] is the familiar, if extreme, version of classic deregulated *laissez-faire*

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44. *Id.* at 384. See discussion *infra* Parts II.B, III.

economics more common to Western fantasy than practice.”<sup>45</sup> Kennedy concludes that a two-track approach is in play, at variance with the widely nurtured image of a unifying Europe. Eastern policymakers and Western advisers alike are “advocating a model of government and law for the East which Western states do not implement in their own internal market,”<sup>46</sup> a model which takes its bearings from the international trade regime but has little in common with the practice of the EC and its Member States. More specifically,

[j]ust as the economic model of the internal market, with its deep public-private partnerships [contrasts] with the ... regulatory abstinence demanded of outsiders, ... so also [the] vision of a technical industrial policy unmoored from more traditional forms of democratic participation contrasts sharply with the institutional reforms urged on the East.<sup>47</sup>

While the adequacy for the East of a vision of market democracy transcended by the West is open to serious question, Kennedy does not seek to argue that the EC’s internal market is a flawless exemplar either.<sup>48</sup> As will be discussed further below, he puts forward proposals which recognize that the problem lies not just in what are held to be the early stages of transition, but also in what is held to be mature market democracy—not just in what is located at the periphery, but also in what is located at the core.<sup>49</sup>

At the same time, Kennedy is quite aware that the two visions of market democracy counterposed here are not the only ones that might, and do, inform contemporary economic practice. Indeed, the failures of imagination in this sphere are perhaps his greatest concern, as they are perhaps the greatest concern of the critics of pseudo-capitalism and low intensity democracy. It is precisely with a view to clearing space and creating impetus for imaginative effort that he sharpens his focus, concentrating on two contrasting

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45. Kennedy, *supra* note 4, at 390.

46. *Id.* at 394-95.

47. *Id.* at 385.

48. Nor does Kennedy argue that the Eastern states should have been admitted to membership of the European Community. Instead, the policy implication of his analysis appears to be that, in drafting association agreements with these countries, consideration should have been given to an association strategy informed, to a larger degree than was the case, by the logic of the internal market rather than by that of the international trade regime. *Id.* at 395.

49. See discussion *infra* Part III.

architectures in the sphere of European economic relations. What he illuminates is a wide gap between universalizing rhetoric and hegemonic reality.

*B. Corroborating the Tale: Democracy*

Kennedy's tale shows how international law provided support for a two-track approach to market economics in Europe in the early 1990s. His account of that approach has much in common with the policies captured in the notion of pseudo-capitalism. But what of the *democratic* side of transition market democracy? What is the pertinence of his critique of international legal renewalism for this? What is the bearing for international law of the policies captured in the notion of low intensity democracy? While Kennedy gives some indications, noted above, his main focus is on the economic, rather than the political, aspects of reconstruction. The democratic side of transition market democracy assumes secondary importance in the context of the two architectures around which his study revolves.

As a starting point for exploring this side of transition market democracy, one might look at the commonly drawn distinction between democratizing and democratic countries. The first category generally includes countries for which democracy is taken to be an objective, a problem, and a transformative agenda. The second category encompasses countries for which democracy is a given, a state of being, an historical legacy to be preserved. As in Kennedy's example, there is a chronology and a boundary associated with this distinction. Democratizing countries follow democratic countries in a phased transition in which the latter's present points to the former's future. At the same time, the accomplishment of this transition is taken as a precondition for democratizing countries overcoming their relative marginality compared to democratic countries. Once again, international law has played a significant role in constructing, or at any rate stabilizing, this chronology and this boundary. Its role can be examined through a consideration of two spheres that are key international legal contexts for the elaboration and expression of ideas about democracy: the sphere of doctrines and institutions concerned with arrangements for democratic government, and the sphere of doctrines and institutions concerned with the protection of human rights.

### 1. *Democratic Government*

A major dimension of the first sphere is the international law and practice of electoral assistance.<sup>50</sup> This assistance takes the form, most commonly, of advice about the organization of national elections, and monitoring with a view to certifying to what extent an election is free and fair. International and regional organizations, governments, and non-governmental organizations provide assistance of this kind. Assistance is given at the request of the government of the country concerned.<sup>51</sup> Generally, the normative basis for electoral assistance is the right of citizens to take part in the government of their country, and the obligation of states to implement that right. More specifically, electoral assistance is said to rest upon, buttress, and help to render effective, an international legal principle requiring periodic and genuine elections.<sup>52</sup>

Electoral assistance and the norms and principles associated with it put forward a notion of democratic politics that revolves around parliaments, elections, and political parties. In this notion, parliaments are where the most important public decisionmaking takes place. Legislators, being subject to periodic recall, are accountable to citizens. Elections, if genuine, are expressions of the popular will. Political parties mediate between citizens and the State.

Drawing on Kennedy's approach, one might say that international law here lays down a vision of "normal" democratic government. It is a very familiar vision, because it has long served, and continues to serve, as an archetype. But it is hardly an accurate account of political life in democratic

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50. For a detailed account of international law and practice in this field, see GUY S. GOODWIN-GILL, *FREE AND FAIR ELECTIONS: INTERNATIONAL LAW AND PRACTICE* (1994).

51. See *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Agenda Item 97(b), para. 53-62, U.N. Doc. A/47/668 (1992) (discussing the criteria employed by the United Nations in deciding whether to respond to a request for electoral verification) [hereinafter *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*].

52. That there is such a principle appears to be the assumption of a series of U.N. General Assembly resolutions on "enhancing the effectiveness of the principle of periodic and genuine elections." See G.A. Res. 190, U.N. GAOR, 49th Sess., pt. 1, 94th mtg. at 318, U.N. Doc. A/49/610/Add.2 (1994); G.A. Res. 131, U.N. GAOR, 48th Sess., pt. 1, 85th mtg. at 391, U.N. Doc. A/48/632/Add.2 (1993); G.A. Res. 130, U.N. GAOR, 47th Sess., 92d mtg. at 353, U.N. Doc. A/47/678/Add.2 (1992); G.A. Res. 137, U.N. GAOR, 46th Sess., 75th mtg. at 365, U.N. Doc. A/46/721/Add.1 (1991); G.A. Res. 150, U.N. GAOR, 45th Sess. 69th mtg. at 457, U.N. Doc. A/45/766 (1990); G.A. Res. 146, U.N. GAOR, 44th Sess., 82d mtg. at 442, U.N. Doc. A/44/828 & Corr. 1 (1989); G.A. Res. 157, U.N. GAOR, 43d Sess., 75th mtg. at 439, U.N. Doc. A/43/868 (1988).

countries. On the one hand, it fails to capture the widely recognized limits of official politics in these countries. As critics frequently remind us, parliamentary elections and debates have a highly staged quality; much of the activity of political parties is self-referential. Citizens are, moreover, profoundly affected by decisions taken outside national parliaments, by largely unaccountable bureaucrats and businesspeople.<sup>53</sup> The phenomenon of globalization, whatever precise significance should be attached to it, has undoubtedly served further to weaken the accountability of public power.<sup>54</sup> On the other hand, this vision also misses the importance of unofficial politics—what is sometimes referred to as “sub-politics”—in democratic countries. Outside the state, parliaments, and political parties, another significant sphere of agenda-setting, influence, and action concerning public affairs is acknowledged to exist in these countries. This is animated eclectically by individuals, pressure groups, and social movements from within informal settings and everyday life.<sup>55</sup>

As in Kennedy’s example, the norm’s transcendence in countries that supposedly exemplify it has not, however, led to a revision of what counts as normal. Rather, the resulting disparity reinforces the notion that a developmental gap separates democratic societies from those democratizing societies to which electoral assistance is addressed. Whereas the politics of democratic societies now strains modernity’s established lexicon and often drives analysts to the use of prefixes, qualifications, or neologisms (post-modernity, radicalized modernity, reflexive modernity, hyper-reality, etc.), democratizing societies are invited to proceed step-by-step, first aiming at the “simpler,” more easily grasped archetype of modern politics that finds expression in international law.

International law in this sphere further delineates chronology and boundaries as regards democratic and democratizing countries through another idea. This is the notion that those aspects of democracy ought to be put in place first which can most readily be verified by international observers. An alternative approach might hold, for instance, that those aspects of democracy

53. DANILO ZOLO, *DEMOCRACY AND COMPLEXITY* 115-29 (David McKie trans., 1992).

54. For a powerful account of the significance of globalization for democracy, see DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (Cambridge, Polity Press, 1995). See also Paul Hirst & Grahame Thompson, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* (1996) (challenging exaggerated claims concerning globalization).

55. See Ulrich Beck, *The Reinvention of Politics: Towards a Theory of Reflexive Modernization*, in *REFLEXIVE MODERNIZATION: POLITICS, TRADITION AND AESTHETICS IN THE MODERN SOCIAL ORDER* 1 (1994) (discussing the rise of “sub-politics”).



ought to be put in place first which can most readily be verified by reference to the experience of citizens. Or it might hold that those aspects of democracy ought to be put in place first which make the most difference to vulnerable or marginalized groups, irrespective of the extent to which empirical verification is possible. Or it might hold that democratic reconstruction defies ordering in this way. Nonetheless, norms and practices concerning election-monitoring help to establish a chronology that is determined by monitorability. Since elections are relatively straightforward to monitor,<sup>56</sup> democratizing countries are encouraged to treat these as the first transitional stage. This stage becomes the precondition for eventually moving out of the international election-monitors' gaze, and joining democratic countries in more sophisticated and complex epistemological terrain. In that terrain, knowledge about democracy is far more multidimensional, plural, perspectival, context-dependent, and ambiguous, than the criterion of monitorability allows. Democratic progress is not considered susceptible to verification by election observers.

Commentators, as well as election-monitoring agencies, are quite aware of the dangers of an approach that appears to privilege elections over other important dimensions of democratization. That elections have priority is frequently and vehemently denied.<sup>57</sup> Yet, since no one seeks to defend the refuted proposition, those who deny it protest too much. They thereby confirm that it is the logic of election-monitoring itself which signals this order of events. One practical suggestion for overcoming this is that not only democratizing countries, but democratic countries too, should have the free, fair, and genuine character of their elections verified by international observers.<sup>58</sup> If the problem lies in designating election-monitoring the beginners' track, then, commentators propose it should be made to apply universally.

Electoral procedures in countries deemed democratic are, of course, open to wide-ranging criticism, and could certainly benefit from international

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56. Gregory H. Fox, *The Right To Political Participation in International Law*, 86 AM. SOC'Y INT'L PROC. 249, 270 (1992). This is not, of course, to underestimate the difficulties associated with election monitoring and evaluation.

57. *See id.*

58. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 85-87 (1992).

scrutiny.<sup>59</sup> The suspicion is hard to escape, however, that, where democratic countries are concerned, election-monitoring would be largely a display. It might be compared to the case of a boss who joins the workers on the factory floor for a day. She may insist on being corrected when she mishandles the machines, but the primary object of the exercise is to show solidarity and understanding. Where democratizing countries are concerned, by contrast, election-monitoring is about certifying the facts concerning elections. For the governments of these countries, the object of the exercise is to gain valuable democratic credentials. A wide gap separates election-monitoring as *noblesse oblige* from election-monitoring as legitimizer; election-monitoring as gesture from election-monitoring as truth-determinant. While the proposal for universalizing election-monitoring could contribute to a general improvement in electoral fairness, it thus does not displace the two-track logic that is in play here. Rather, through this gap, it reinforces the distance between democracies and democratizers.

## 2. Human Rights

The second sphere that is a particular focus for the elaboration and expression of ideas relevant to democracy is human rights. During the Cold War, human rights instruments and monitoring organs largely avoided explicitly connecting their concerns with democracy.<sup>60</sup> Since the demise of the Soviet bloc, however, it has become widely accepted that democracy is, and was always, to be read between the lines of human rights commitments,<sup>61</sup> just as it has come to be recognized that human rights are an implicit part of a commitment to democracy.<sup>62</sup> That said, international human rights law does not relate all human rights to democracy in the same way.

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59. International scrutiny already exists under human rights treaties, though a wide "margin of appreciation" is generally applied. See Susan Marks, *The European Convention on Human Rights and its "Democratic Society,"* 66 BRIT. Y.B. INT'L L. 209 (1995) (discussing relevant cases under the European Convention on Human Rights).

60. The European and Inter-American regional human rights systems were notable exceptions.

61. See JAMES CRAWFORD, *DEMOCRACY AND INTERNATIONAL LAW* 4-5 (1993); and Christina M. Cerna, *Universal Democracy: An International Legal Dream or Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289, 294-95 (1995).

62. See DAVID BEETHAM, *HUMAN RIGHTS AND DEMOCRACY: A MULTIFACETED RELATIONSHIP* (1995) (examining the relationship between human rights and democracy). Though Beetham is not specifically concerned, as I am here, with international human rights law's perspective on this issue, the discussion that follows is heavily indebted to his analysis.

Some human rights are acknowledged to be democratic rights, in the sense that they are intrinsic elements in a democratic order, or at any rate rights that democracy requires, presupposes, and helps to justify.<sup>63</sup> These include, in the first place, the right to take part in public affairs (the right that, as noted above, underpins international and regional electoral assistance). These also include a set of further rights and freedoms upon which the effectiveness of the right to take part in public affairs depends. In this set are freedoms of expression, association, assembly, and movement; the right to life and physical integrity, freedom from slavery, and freedom from arbitrary arrest and detention; and the right of access to legal remedies, administered by an independent judiciary. Other human rights are held to be essential complements to these democratic rights, or at least invariable correlates of a democratic political order, if not strictly democratic rights themselves. These include certain liberal rights and freedoms upon which agency in private life and individual decisionmaking (as distinct from public life and collective decisionmaking) partly depends. These include the right to privacy and freedoms of thought, conscience, and religion.

The human rights mentioned so far are civil and political rights. What of economic, social, and cultural rights? Almost from the moment it began to distinguish between civil and political rights on the one hand and economic, social, and cultural rights on the other, international human rights law has asserted the indivisibility of these two categories.<sup>64</sup> That the rights involved are mutually reinforcing and, more than that, mutually dependent has become a commonplace of human rights commentary, though it is also a commonplace that a hierarchical separation between these two categories of human rights nonetheless subsists. This is reflected in softer normative formulations and weaker enforcement procedures where economic, social, and cultural rights are concerned. Rights to education, housing, work, food, and health care might well be deemed necessary to make effective the right to take part in public affairs, and to maintain the capacity for reasoned choice and purposive action in private affairs. However, international human rights law holds these

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63. See *Final Report on Cases 9768, 9780, and 9828 of Mexico*, 1990 INTER-AM. Y.B. HUM. RTS. 74, 90 para. 41. For corresponding statements within the framework of the European Convention on Human Rights, see Marks, *supra* note 59.

64. The distinction began to take shape in the course of the debates that led to the two International Covenants on Human Rights. For a relatively early statement of the indivisibility thesis, see *Final Act of the International Conference of Human Rights*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. A/Conf.32/41 at 4 para. 13 (1968).

rights to stand in a looser, more contingent relation with democracy than civil and political rights. While economic, social and cultural rights are viewed as an integral—if (depending on one's assessment) a neglected or subsidiary—part of a *human rights* agenda, they are not generally viewed as forming an integral part of a distinctively *democratic*, or liberal-democratic, agenda. Rather, they are mostly viewed as extrinsic and supplementary to such an agenda.

This brings into focus one of the ways in which international law in this sphere helps to establish a chronology and boundaries as regards democratizing and democratic countries. A notion of democracy is put forward of which civil and political rights, but not economic, social and cultural rights, are considered constitutive. Once again, this scarcely corresponds with the reality of countries in which democracy is taken to be an already achieved condition. All these are not just political democracies, but to varying degrees and in varying shapes social democracies as well. In these countries the questions, "How much economic deprivation and social marginalisation are compatible with democracy?"<sup>65</sup> and "What are the consequences of inequality for the citizenship of particular individuals, as well as for the political life of the society as a whole?" are never very far from public policymaking.<sup>66</sup> Insofar as international human rights law depicts democracy in terms only of political democracy, democratizing countries are thus again invited to pursue a track not followed by those characterized as democratic.

This suggests a chronology in which at the elementary stage—that confronted by democratizing countries—the question is *whether* there is democracy. Either certain institutions and civil and political rights are in place, in which case there is democracy, or they are not, in which case there is dictatorship, totalitarianism, authoritarian government, or some other alternative. Democracy is a matter of either-or classification of forms of government. Only once democratizing countries have embraced this conception do they reach the more "advanced" stage, exemplified by democratic countries. At this stage the question is rephrased to ask *how democratic* are the processes by which decisions affecting people's lives are

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65. This formulation is adapted from one in Beetham's helpful discussion. BEETHAM, *supra* note 62, at 11.

66. Concerning the character of Western countries as not just political, but social democracies, see Claude Ake, *Devaluing Democracy*, in CAPITALISM, SOCIALISM, AND DEMOCRACY REVISITED, *supra* note 10, at 26, 30.

made. As soon as democracy becomes a matter of degree, issues arise about the distribution of political power and about the relevance of this to the distribution of economic and social goods. At this point, too, democracy comes to be approached as a matter of lived experience. To view democracy ontologically is inevitably to raise qualitative questions—questions about the quality of individual and collective life and about the scope and character of citizens' possibilities for participation in it.

In this connection, it is worth pausing to recall that international human rights law does not act in isolation in developing ideas about democracy's relation with human rights. The chronology described here finds reinforcement, for instance, in the context of financial assistance to democratizing countries. Whether in conditions attached to loans or aid, or via understandings of desirable economic practice, governments of recipient countries have frequently been encouraged to view economic growth in largely aggregative terms. To this extent, policies have been confirmed or promoted in which the question of how the fruits of that growth are deployed and divided—the question to which economic, social, and cultural rights demand attention—is put to one side or, at any rate, treated as the business of the market, rather than the state.

International human rights law's democratic chronology also receives support at the level of ideology. As noted earlier, reconstruction in some countries appears to be informed by the claim that the future should be a reversal of the past, and that market democracy should be the opposite of state socialism.<sup>67</sup> Since many of the democratizing countries were those which during the Cold War were linked with the espousal of economic, social, and cultural rights against the Western emphasis on civil and political rights, this same ideological perspective helps to establish the post-Cold War preeminence of civil and political rights. Given that the Western emphasis on civil and political rights understated the degree to which social and economic rights also received attention in Western societies, this seems again to be a case of vindicating a stance which during the Cold War was a mythic product of ideology, rather than an accurate portrait of life in the West. It is as if for democratizing societies the welfare state's propagandists were correct: civil and political rights are indeed all that count.

As well as ordering democracy by reference to a distinction between civil and political rights on the one hand and economic, social and cultural rights

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67. See *supra* Part I.A, I.C.

on the other, international human rights law also builds a chronology and boundaries around another distinction. This is a distinction between individual rights and minority or group rights. The right of members of minority and other subaltern groups to practice their traditions and to reproduce their cultures receives a degree of recognition in human rights law.<sup>68</sup> This right is acknowledged to be of particular importance in the case of some democratizing countries where political transformations have been accompanied by inter-communal conflict and identity politics. Perhaps most notably in Eastern Europe the need for renewed efforts to protect minority rights is frequently emphasized.<sup>69</sup> These efforts are, however, compromised by a conception of democracy for which relative national homogeneity is the norm. International human rights law tends to imagine democratic politics unfolding in the “normal” course as if the only relevant differences between people were contingent differences of individual interest, belief, and opinion. The law tends to presuppose, to borrow Beetham’s phrase, that the “national question has been resolved.”<sup>70</sup> Thus, democracy is depicted in terms of citizens voting in national elections, political parties competing for power, parliaments reaching decisions, and courts upholding the rule of law, on the footing that identity and culture are not in issue. Democratic processes are taken to assume national identity, not to be forums for determining it. Elections are held to legitimate government on the basis that governments—though elected only by some—act in the interests of all, and do not seek to identify the polity with any particular group or groups. The setting for democracy is, accordingly, portrayed as one in which the hyphen between nation and state is settled and unproblematic.

In this account of democratic normalcy, there is no need for group-oriented protection. Rights geared to undifferentiated individuals generally suffice. And, insofar as they do not, nondiscrimination provisions ensure that residual diversities are ruled out of account. Thus, everyone is the same in

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68. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 27, 999 U.N.T.S. 171, 179; U.N. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/35 (1992); Council of Europe Framework Convention for the Protection of National Minorities, Feb. 1, 1995, 34 I.L.M. 351; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (concerning the rights specifically of indigenous peoples).

69. See, e.g., Max Van der Stoep, *OSCE Commissioner on National Minorities*, 3 OSCE ODIHR BULL. 40 (1995). See also PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991) (surveying history of minority rights protection in Europe).

70. BEETHAM, *supra* note 62, at 28.

law, if not in fact. Minority or other group rights are exceptional measures for “abnormal” pockets of resistant heterogeneity. What distinguishes these pockets is that diversities, and the group affiliations that are their sociological context, do not bear ruling out of account. Yet again, this image of normal democratic politics stands somewhat removed from the politics of those societies which supposedly exemplify the norm. In many of these societies, there is increasing acceptance that democracy must embrace, rather than wish away, group difference. National identity is being recast as multiple, diffuse, and subject to constant renegotiation. At the same time, it is widely accepted that systematic disparities of access to power, wealth, and resources are correlated to group affiliations. These disparities are understood to undercut both democratic rights and governmental legitimacy, though the extent and character of the arrangements made to redress them, and to share political power among groups, remain, of course, extremely variable and highly contested. This pluralistic conception of democracy finds little reflection in international human rights law’s vision of democratic normalcy.

Democratizing countries are, thus, again encouraged to normalize by reference to ideas concerning democracy (and the nation-state) that many democratic countries have, to varying extents, left behind. In this way, a conception of democracy that is premised on national homogeneity becomes the modernizing medicine for “primitive” societies facing “identity politics,” “tribalism,” communalism, inter-ethnic rivalries, and the like. Citizenship and right-holding abstracted from membership of particular communities are what is prescribed for transitions to modern democracy. A phase of formalism in which group difference is masked becomes the precondition for a later “developed” phase in which group difference is faced, and norms and procedures are elaborated to deal with its political implications.<sup>71</sup> Those at the democratizing periphery, located in this vision one step away from a chaos of internecine strife and reflex repression, appear to have a long way to travel

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71. “One of the axioms of modernity is that democratization [must first] go through a stage of nationalism.” Yoshikazu Sakamoto, *Introduction: The Global Context of Democratization*, 16 ALTERNATIVES 119, 126 (1991).

before they reach the democratic center and become secure or mature enough to experiment with the "politics of difference"<sup>72</sup> and of "recognition."<sup>73</sup>

### 3. *International Legal Renewalism*

This discussion of electoral assistance and human rights has called attention to some of the ways in which international law establishes chronologies and boundaries with respect to democracy. A two-track approach has been highlighted, in which a distinction is drawn between a beginner's track and an advanced track, an outside track and an inside track, a track for democratizers and a track for democracies. It remains to consider the bearing of international legal renewalism for this two-track approach.

As will be recalled, Kennedy contends that renewalist commentary presents international law as a narrative in which points of discontinuity or rupture coexist with elements of continuity or perfection. In this way, international law can be seen to be at once responsive to will and interest (the side often linked with positivism) and possessed of self-propelling normative force (the side often linked with natural law).<sup>74</sup> How, then, does renewalist commentary understand international legal developments concerning democracy? How, in particular, does it understand developments with respect to democratic government and human rights, the two spheres of international law's engagement with democracy that have been examined in this Article? If international law is a narrative in which responsiveness to will and interest coexists with self-propelling normative force, modern democracy is a narrative in which the institutional arrangements of democratic government coexist with the protection of rights. It is well recognized that both are needed to ensure popular control over public decisionmaking on the basis of equality among citizens. But, where international legal developments in these two spheres are concerned, which counts as rupture and which as continuity?

The most important international legal developments concerning the institutions associated with democratic government relate, as noted earlier, to electoral assistance. This seems the more likely candidate for the category of rupture. References to the "principle of periodic and genuine elections" only

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72. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

73. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994).

74. Concerning these two dimensions and their role in international legal modernism, see KENNEDY, *supra* note 39 and MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (1989).



began to appear in United Nations (UN) General Assembly resolutions in 1988.<sup>75</sup> Requests for international election-monitoring and electoral assistance increased exponentially in the early 1990s.<sup>76</sup> The UN, Organization of American States (OAS), and Organization for Security and Cooperation in Europe (OSCE) took the step of establishing special institutions to coordinate and direct their activities in this sphere at around the same time.<sup>77</sup> Electoral assistance thus appears to be a novel departure, a phenomenon of the years since the fall of the Berlin Wall. The international protection of human rights, by contrast, goes back at least to the Universal Declaration of Human Rights.<sup>78</sup> It is a system—or rather, a network of systems—of law and institutions that has been steadily expanding since then. Human rights appears the more likely candidate to count as continuity.

Or does it? Electoral assistance draws on and extends a much older body of practice relating to the international supervision and observation of plebiscites, dating back to the activities of the League of Nations (among minority communities in defeated States after World War I) and the UN (in non-self-governing and trust territories after World War II).<sup>79</sup> This highlights that election-monitoring can be seen to carry forward the venerable project of self-determination.<sup>80</sup> the assertion of national independence against imperial rule, autonomy against heteronomy. At the same time, electoral assistance is consistent with established doctrines concerning the sovereignty of states. Electoral assistance and election-monitoring are provided by the UN only with

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75. G.A. Res. 157, U.N. GAOR, 43rd Sess., Supp. No. 49, at 226, U.N. Doc. A/43/49 (1988).

76. See *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, *supra* note 51, at 3 para. 3.

77. In addition, the OAS established a Unit for Democratic Development in 1990; the OSCE established an Office of Free Elections 1991 (later renamed Office for Democratic Institutions and Human Rights); and the United Nations established an Electoral Assistance Unit in 1991.

78. See David Weissbrodt, *Human Rights: An Historical Perspective*, in HUMAN RIGHTS 1 (P. Davies ed., 1988).

79. See SARAH WAMBAUGH, PLEBISCITES SINCE THE WORLD WAR (1933) (examining interwar supervision by the League of Nations of plebiscites among European minority communities) and UN DEPARTMENT OF POLITICAL AFFAIRS, TRUSTEESHIP, AND DECOLONIZATION, DECOLONIZATION, DECOLONIZATION: FIFTEEN YEARS OF THE UNITED NATIONS DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES (1975) (examining post-World War II supervision by the United Nations of plebiscites in connection with decolonization).

80. See Michelle Evans & Darilyn T. Oridge, *What Can the Past Teach the Future? Lessons from Internationally Supervised Self-Determination Elections 1920-1990*, 24 N.Y.U. J. INT'L L. & POL. 1711 (1992) (discussing internationally supervised elections, 1920-1990).

the consent of the national government concerned.<sup>81</sup> Election monitors indeed assist governments that are deemed to have been democratically elected by strengthening their legitimacy. Human rights, on the other hand, are often understood to challenge accepted doctrines of state sovereignty and non-interference in domestic affairs in a quite decisive way. Provision is made for individuals to obtain redress against their own governments for violations of human rights: Some procedures for reviewing states' performance in the field of human rights are not conditional on state consent.<sup>82</sup> Even in the case of those that are so conditional, supervisory organs have in certain cases developed far-reaching and independent approaches, both to the interpretation and application of norms and to the processes of calling governments to account. Non-governmental organizations, moreover, play a central role in all aspects of the international protection of human rights. Viewed in this light, human rights can be seen to manifest an embryonic international public sphere or civil society. More generally, it can be seen to evince the beginnings of a new, more complex global order than is allowed by traditional international legal doctrines, anchored in a simple distinction between national and international planes. These considerations suggest a different narrative, in which electoral assistance appears as continuity and human rights as rupture.

It is widely noted by international legal renewalists that election-monitoring builds on prior norms and practices concerning self-determination (and human rights). They also recognize that the international protection of human rights remains (according to one's perspective) an unsettling break with cherished certainties or a glorious revolution-in-progress.<sup>83</sup> Nonetheless, it is largely the first of the two versions of the story sketched above which finds expression in renewalist commentary. In Franck's seminal account, for instance, electoral assistance appears as the youngest "generation," the newest "building stone." With it a democratic entitlement is now "aborning" or "emerging." Human rights, on the other hand, appears as the preceding "generation," one of the foundation stones on which the democratic

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81. See *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, *supra* note 51, para. 53, 57.

82. E.g. the procedure authorized by UN ECOSOC Res. 1235 (XLII). For a discussion of this and related procedures, see Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 126 (Philip Alston ed., 1992).

83. The 1992 World Conference on Human Rights was one focus for such efforts. See, e.g., *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. GAOR, 48th Sess., at 3-7, U.N. Doc. A/Conf.157/ASRM/8 (1993).

entitlement rests.<sup>84</sup> If the international law and practice concerning the institutions of democratic government are understood as novelties, and the international law and practice concerning human rights as the honing of an established project, then the latter of the two spheres is made to seem “ahead” with respect to the former.

Mapped onto this is the distinction between democratizing and democratic societies, a distinction drawn on the basis that democratization entails rupture and democracy continuity. While this rendering is wholly plausible, it again represents a choice, for one might alternatively emphasize the dimensions of constancy as regards democratizers and transformation as regards democracies. Some of these dimensions were highlighted earlier in this Article. The upshot, in any event, is that, while both the procedures and institutions of democratic government and the protection of human rights are considered indispensable, a chronology is established in which democratizing countries are invited to treat as elementary the procedures and institutions of democratic government, including especially elections, and as advanced the protection of human rights. A phase in which democracy is understood in localized and political terms as a form of government comes, in this way, to be seen as the first step towards a later phase in which democracy can be approached also in universal and legal terms as a matter of human rights. A preoccupation with governance, state, and sovereignty comes to be seen as the natural precursor of attendance to individual agency, society, and the consequences of globalization.

International legal renewalism thus serves to reinforce the two-track approach to democracy noted above. In speaking of two tracks, it is obvious that each is consistent with a wide diversity of actual political arrangements and traditions. It is perhaps worth underlining that these tracks are not intended to correspond to ‘models’ in the sense of accounts of the political system in particular countries. Insofar as they correspond to models, this is only in the sense of sets of family resemblances as regards assumptions, principles, and priorities. Nor is it claimed that these tracks are opposed or divergent on all, or even most, scores. Clearly there is much overlap between what have been characterized as the democratizers’ track and the democracies’ track, and in some areas (as will be discussed below) the two tracks may be converging rather than diverging. Nor, finally, is it suggested that these are the only existent or possible visions of democracy. On the contrary, as in the

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84. See Franck, *supra* note 58, *passim*.

work of Kennedy and the other theorists considered above, the aim is precisely to underscore the possibility of alternatives. The point of reducing the multiplicity, variety, and complexity of democratic practices in the world to “two tracks” is to put in question international law’s role in conferring self-evidence on a limited range of ideas concerning democracy and democratic reconstruction.

Among the ideas in this range are tenets of liberal democratic theory which might be regarded as deeply problematic. In the first place, there is the notion that democratization entails a phased transition in which initially democracy is relatively formal and statist. Against this, it can be observed that “cosmetic” democracy risks legitimizing repression. There is, additionally, the supposition that democracy is in some countries an accomplished fact. Against this, it can be argued that the limitations of democracy everywhere make it imperative to keep open the channels of criticism and transformation. At the same time, there is the recourse to expertise in defining and guiding the processes associated with democratic transitions. Against this, one might insist on the highly attenuated character of technocratic democracy. Finally, there is the assumption that the focus of democratization is properly national; that democracy at the level of each nation-state will produce global democracy. Against this, it can be pointed out that globalization has intensified to the stage where national democratic government cannot produce global democracy, if it ever could have done so. Democratization must include efforts to bring democracy to other centers of decisionmaking as well.

Calling attention to the two-track approach helps clarify *how* international law confers self-evidence on these ideas, and correspondingly weakens the force of critical counterpoints. It also sheds some light on *why* international law does this, or at any rate what policy choices are entailed. To the extent that the foregoing discussion echoes the earlier account of low intensity democracy, certain commitments are put into relief. The possibility is raised that international law’s ideas about democracy may be as much about economic liberalization as they are about popular government and human rights.

### *C. International Law and Transition Market Democracy*

Both the economic and the political facets of transition market democracy—both pseudo-capitalism and low intensity democracy—appear, then, to find significant support in international law. It may be valuable at this

point to bring together, and summarize, the main conclusions that can be drawn about international law's role in relation to this vision of market democracy, geared as it is to encouraging, but also checking, market democratic ambitions.

In the first place, international law routinely appears to understand modernization in terms of an initial stage of formalism. In the international legal phasing of transitions to market democracy, for instance, abstract individual rights precede rights that recognize group difference; parliamentary politics precedes subpolitics; a separation of market and state precedes the intertwining of public and private in economic life. Modernizing societies are first to put in place the conditions of formal market democracy.<sup>85</sup> In this way, international law upholds an evolutionary view of modernization in which more promising substance comes only—or most quickly—to the fittest survivors of formalism.

Second, formalism is frequently presented in an ambiguous fashion. On the one side, international law insists that human rights are indivisible and interdependent; on the other, it conveys the notion that civil and political rights have preeminence in a democratic agenda. On the one side, it accepts that elections underdetermine democracy; on the other, it signals that elections and other institutions of democratic government have a certain priority where democratizing countries are concerned. On the one side, it recognizes that minority rights require protection; on the other, it considers group difference legally irrelevant. Janus-like, international law appears to guard the gates of market democracy with two faces.

Third, this ambiguity sometimes serves as mystification. The chronologies that international law associates with transition, and the boundaries that international law takes to separate those who have reached market democracy from those who have not, are made to seem natural or necessary. These chronologies and boundaries are, however, neither natural nor necessary. Rather, they are ideas in the service of policies. International law implants its ideas, while also covering its tracks, through a number of mutually reinforcing argumentative strategies, including the following three.

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85. This is the case even if they already had in place some elements of "substantive" market democracy. Indeed, according to some ideological perspectives, oriented toward a reversal of prevailing realities, this is the case precisely *because* they already had in place some elements of substantive market democracy. Where, for instance, subpolitics and the recognition of group difference are already established dimensions of political-legal life, formalism appears a kind of shock tactic, the international legal equivalent of economic austerity and regulatory restraint.

One turns on a distinction between normality and abnormality. Thus, for instance, the notion that in market democracy unfettered trade is the norm, and regulation the exception, confirms that a phase of market fundamentalism is the precondition for pursuing an industrial policy, as well as for quitting the margins of the global economy. Another argumentative structure turns on a distinction between continuity and rupture. Thus, the idea that the 1992 program is to be understood in terms of continuity, while the transformations of 1989 denote rupture, carries the implication that, where the EC is concerned, little further change is needed, whereas in the case of post-socialist societies everything must change. A final, related argumentative structure turns on the distinction between simplicity and complexity. Thus, for example, the notion that those aspects of democracy which can be monitored by international observers are simpler than those which cannot helps to attach a certain priority to elections in transitions to market democracy. This argumentative structure is also congenial to the idea that transition entails a simple inversion, a simple relationship of contrariety between market democracy and state socialism.

### III. TOWARD AN ALTERNATIVE APPROACH TO INTERNATIONAL LEGAL RENEWAL

If the conclusions set out above bear on international law's role in relation to transition market democracy, what of transition market democracy's role in relation to international legal renewalism? This Article has shown how a two-track vision of modernization, which justifies and sustains transition market democracy, appears to animate international legal renewalism.<sup>86</sup> Just as the accounts of pseudo-capitalism and low intensity democracy put in question influential approaches to post-Cold War reconstruction, so the present discussion puts in question leading visions of international legal renewal. The significance of David Kennedy's work in this regard goes well beyond his specific analysis of European economic law and relations in the late 1980s and 1990s. Even if that analysis is not accepted (and it is not put forward as incontrovertible), the main point drawn from his work here is much

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86. For the complementary claim that a key strand of international legal scholarship concerning democracy is informed by what I call 'liberal millenarianism,' see Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT'L L. 449 (1997).

more far-reaching. What he indicates are the possibility and outlines of an alternative approach to international legal renewal.

The starting point for this alternative approach is Kennedy's "turn to policy," with "skepticism about the renewal movement."<sup>87</sup> The grounds for skepticism can be traced to four principal disjunctures between renewalist rhetoric and policy reality, highlighted in this Article. One disjuncture, from which the others follow, is that between the rhetoric of instrumentalism and the reality of goal-setting. Renewalism conceives reconstruction in terms of transition, a technical process with a fixed order of phases and stages. Yet what are at stake are not just means, but ends. At issue, Kennedy observes, are "choices and political struggles more than natural transitions."<sup>88</sup> A second disjuncture is that between the rhetoric of a universalizing market and the reality of enduring oligopoly. Renewalism masks the extent to which a two-track approach is in play where market economics are concerned. Transition market democracy entails a "second-class, hand-me-down capitalism" that to varying degrees and in varying respects appears "ludicrous and doomed."<sup>89</sup> Third, there is a disjuncture between the rhetoric of universalizing democracy and the reality of oligarchic power. Renewalism masks the extent to which a two-track approach is also in play where democracy is concerned. Transition market democracy entails political democracy that is seriously weakened by its failure adequately to pursue also social and pluralistic democracy. Finally, and in consequence, a disjuncture arises between the rhetoric of renewal and the reality of stabilization.

This suggests the beginnings of an alternative to prevailing renewalism. To turn to policy, with skepticism, is to examine these interrelated disjunctures and to search in their interstices for footholds, from which renewal might proceed. But Kennedy goes further in evoking an alternative to mainstream renewalism. For it is not only transition market democracy, but also established market democracy—not only the modernizers' track, but also the moderns' track—that is problematic. In the case of his example, he observes that the international trade system's "free market" and the EC's

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87. Kennedy, *supra* note 4, at 374.

88. *Id.* at 379. This point is also compellingly argued in Karl Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U. BRIT. COLUM. L. REV. 69 (1991).

89. Achebe, *supra* note 37, at 141. See *supra* Part I.C.

technocratic regime are “unhappy alternatives.”<sup>90</sup> Renewalism’s evolutionary logic signals that established liberal democracies already “have” liberal democracy, and that liberal democracy is a problem for others. In this way the “internationalization of democratic rhetoric” engenders in established liberal democracies “a domestic displacement of democratic politics.”<sup>91</sup> “Thus is occasioned an ‘intriguing migration of’—rather than a dynamic and self-critical engagement with—“democratic ideology.”<sup>92</sup> This migration is rendered all the more consequential by the way in which the two tracks interrelate. Ideas from the modernizing track slip into the modern track, as, for instance, the increasing pressure on social and pluralistic democracy in Western liberal democracies attests.

Kennedy’s tale of two architectures ends, like Dickens’s tale to which it alludes, with a vision of a “far, far better thing” than what has gone before.<sup>93</sup> “My suggestion,” Kennedy writes, “is that these two tracks be brought together, and that both sides experience the shock of the new.”<sup>94</sup> Against an evolutionary renewalism, he evokes an approach that opens discussion concerning the limits and further possibilities of democracy, *both* in societies engaged in reconstruction *and* in Western liberal democracies. Democracy as “destabilizer” was Amin’s counter-vision to low intensity democracy.<sup>95</sup> Could this also be an element in such an alternative? Could it help in administering the shock of the new to international law’s approach to democracy? Whatever the answers, it is clear that, as long as international law continues to attend only to democracy’s *stabilizing* potential, reports of the end of disciplinary stagnation and an alliance with the forces of change will remain greatly exaggerated.

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90. Kennedy, *supra* note 4, at 394.

91. *Id.* at 384.

92. *Id.*; see *supra* Part II.A.

93. CHARLES DICKENS, *A TALE OF TWO CITIES* 404 (1970).

94. Kennedy, *supra* note 4, at 395-96.

95. Amin, *supra* note 24, at 78; see *supra* Part I.B.



