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Constitutional Fragments

Societal Constitutionalism and Globalization

GUNTHER TEUBNER

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Constitutional Fragments: Societal Constitutionalism and Globalization

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Preface

'. . . let thy company bind thee hand and foot to the mast'—Ulysses followed Circe's advice and was able to enjoy the sirenes' singing without falling for their deadly temptation. Freedom through self-restraint is Ulysses' constitutional message which has been echoed by political constitutions once they began to constrain the power of the nation state. In this book the message is applied to constitutions beyond the nation state, to the constitutions of transnational regimes which govern more and more our daily lives. Their expansive tendencies are in urgent need of being constrained by constitutional rules.[1]

This book grew out of the lively debates of the 'constitutionalists', a discussion group at the Wissenschaftskolleg zu Berlin. Petra Dobner, Dieter Grimm, Martin Loughlin, Fritz Scharpf, Alexander Somek, and Rainer Wahl had such powerful objections to the concept of 'constitutionalism beyond the nation state' that I thought I needed to write a book to deal with them adequately. I benefited from the institutional support and the intellectual climate of the Exzellenzcluster *'Normative Ordnungen'* in Frankfurt, the Hague Institute of International Law, and the International University College in Turin. In preparing this book I co-operated closely with Poul Kjaer, whose forthcoming monograph on 'The Structural Transformation of Democracy: Elements of a Theory of Transnational Constitutionalism' develops complementary analyses on transnational societal constitutionalism from the political sciences perspective. Anna Beckers and Soo-Hyun Oh supported the whole process from the beginning with substantive assistance and constructive critique. Last but not least, I should mention the discussions of the seminar on private law theory which I held in Frankfurt for several years together with Rudolf Wiethölter. His ideas on *Rechtsverfassungsrecht* inspired me more than the text can tell.

[1] Homer, *Odyssey* tr. by Samuel Butler (1900).

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Abbreviations

APEC	Asia Pacific Economic Co-operation
CBD	Convention on Biological Diversity
FAO	Food and Agriculture Organization of the United Nations
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSD	International Center for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
ILO	International Labour Organization
IPL	international private law
MERCOSUR	Mercado Común del Cono Sur
NAFTA	North American Free Trade Agreement
UNEP	United Nations Environment Programme
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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1

The New Constitutional Question

I. A CRISIS IN MODERN CONSTITUTIONALISM?

During the last few years, a series of public scandals has raised the 'new constitutional question'.[1] Multinational corporations have violated human rights; the World Trade Organization has made decisions that have endangered the environment or human health in the name of global free trade; there has been doping in sport and corruption in medicine and science; private intermediaries have threatened freedom of conscience on the Internet; there have been massive invasions of privacy through data collection by private organizations; and recently, with particular impact, global capital markets have unleashed catastrophic risks. Each of these scandals poses not just regulatory questions, but also constitutional problems in the strict sense. In the background is the question of the fundamental constitution of social dynamics, not simply of implementing state policies. Compared to the constitutional questions of the 18th and 19th centuries, the problems of today are different, but no less important. Then the concern was to release the energies of political power in nation states and at the same time to limit that power effectively. With the new constitutional question, the concern is to release quite different social energies—particularly visible in the economy, but also in science and technology, medicine and the new media—and to effectively limit their destructive effects.[2] Today, these energies—both productive and destructive—are being unleashed in social spheres beyond the nation state. The above scandals exceed the borders of the nation state in two ways. Constitutionalism beyond the nation state means two different things: constitutional problems arising outside the borders of the nation

[1] For the 'demonstration effects' of such scandals sparking public debates and political regulation, Mattli and Woods (2009) 'In Whose Benefit?'.

[2] Allott (2001) 'Emerging Universal Legal System', 16 goes so far as to describe the new constitutional question as 'the central challenge faced by international philosophers in the 21st century'.

state in transnational political processes, and at the same time outside the institutionalized political sector, in the 'private' sectors of global society.

1. *Nation-state constitution versus global constitution*

These scandals have sparked a debate that diagnoses a crisis of modern constitutions, with transnationalization and privatization of the political to blame. Arguments rage about a transnational constitutionalism, whose status—whether constitutional doctrine, sociological theory, political manifesto, or social utopia—remains unclear. Broadly speaking, the terms of the debate are as follows. One side heralds the decline of constitutionalism.[3] Its historically fully-developed form, so the argument goes, was taken in the political constitutions of the nation state. However, its foundations were being eroded, on the one hand by European integration and the emergence of transnational regimes and, on the other, by the transfer of political power to private collective actors. Alternative forms to national constitutions cannot be found in the transnational space. They are even said—because transnational politics suffers from chronic deficits, for example the non-existence of a demos, cultural homogeneity, political founding myths, a public sphere, political parties—to be structurally impossible. If this double crisis of constitutionalism can be counteracted at all, then it will be at most through re-nationalization and re-politicization, that is, constitutional institutions of the nation state (constitutional courts, parliaments, the public sphere) would need to be fully restored.

The opposing side in the debate juxtaposes a similar story of decline with the demand for a compensatory constitutionalization of world society itself.[4] Here too, globalization and privatization are blamed for the weakening of national constitutions. However, a new democratic constitutionalism could have a compensatory effect if it brought the unbridled dynamics of global capitalism under the domesticating power of a global polity. A constitution for international law; a deliberative global public sphere; regulatory policies formulated on a global scale; a transnational system of negotiation between global collective actors; a restriction of

[3] Especially: Grimm (2010) 'The Achievement of Constitutionalism'; Loughlin (2010) 'What Is Constitutionalisation?', 63 ff.; Fried (2000) 'Constitutionalism, Privatization, and Globalization'.

[4] Especially: Habermas (2006) 'Does the Constitutionalisation of International Law Still Have a Chance?'; Höffe (2001) *Königliche Völker*. In international law, Frowein (2000) 'Konstitutionalisierung des Völkerrechts'; de Wet (2006) 'International Constitutional Order'; Peters (2006) 'Compensatory Constitutionalism'.

society's power through global political processes: each of these, it is said, will potentially lead to a new democratic constitutionalism in global society.

2. Impulses from constitutional sociology

However, the constitution is too important to be left to constitutional lawyers and political philosophers alone. In opposition to the two sides of the debate, a third position must be staked out—and not just a middle position—that casts doubt on the premises of the first two and formulates the new constitutional question in a different way. The main problem is to overcome the obstinate state-and-politics-centricity of these positions. A sociological theory of societal constitutionalism that has so far remained unheard in the constitutional debate will be able to do that. It is based on four different variants of sociological theory. Primarily, it draws on general theories of social differentiation that move the internal constitutions of social subsystems to the centre of attention.[5] It is also based on the newly established constitutional sociology,[6] further, on the theory of private government[7] and, finally, on the concept of societal constitutionalism.[8] Constitutional sociology moreover promises to link historical and empirical analyses of the constitutional phenomenon with normative perspectives.[9] 'With its assistance, the law becomes sensitive to the polyphonic articulation of social autonomy, which it not only sets free but also constitutionalizes by generating environmental responsibilities in the autonomies themselves.'[10]

What makes constitutional sociology so different? It projects the constitutional question not only onto the relationship between politics and law, but also onto all areas of society:

> The claim that contemporary societies have an informal constitutionality that is neither normatively nor directively centred on states and that contain

[5] General sociological theories of social differentiation in the tradition of Emile Durkheim, Georg Simmel, Max Weber, Talcott Parsons, Pierre Bourdieu, and Niklas Luhmann give a different direction to the question of whether the state constitution can serve as a constitution for society as a whole, or whether social sub-areas have their own particular constitutions.

[6] Thornhill (2011) *A Sociology of Constitutions*; Thornhill (2010) 'Re-Conceiving Rights Revolutions'; Thornhill (2008) 'Towards a Historical Sociology'.

[7] Selznick (1969) *Law, Society and Industrial Justice*.

[8] Sciulli (1992) *Theory of Societal Constitutionalism*.

[9] Thornhill (2008) 'Towards a Historical Sociology', 163 ff.

[10] Wielsch (2009) 'Iustitia Mediatrix', 397.

> multi-valent and multi-layered legal structures appears . . . to represent a key position in the legacy of the original sociological project of establishing a complex, non-naturalized and post-ontological conception of society and society's norms.[11]

This fundamentally alters the whole problematic. The question of constitutionalization arises not just for the state world of international politics and international law, but equally for other autonomous sectors of global society: in particular for the global economy, but also for science, technology, education, the new media, and the health service. In addition to limiting the expansionist tendencies of the political system, does a societal constitutionalism have the potential to stem the current—and no less problematic—expansionist tendencies of numerous other social subsystems when they endanger the integrity of individuals and institutions? Can constitutions effectively combat the centrifugal dynamics of subsystems in global society, thus contributing to social integration?[12] Sociological theories can give an impulse to these questions, which now have a new urgency in view of globalization and privatization. They question the basic assumptions of the contemporary debate on transnational constitutions and replace them with other assumptions which identify new problematics and suggest different practical consequences.[13]

[11] Thornhill (2011) 'Constitutional Law from the Perspective of Power', 244.

[12] First steps in the direction of a global societal constitutionalism, Teubner (2003) 'Global Private Regimes'; Teubner (2004) 'Societal Constitutionalism'; Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1014 ff.

[13] Today many authors have (with important differences of detail) registered such phenomena of transnational societal constitutionalism: Collins (2012) 'Flipping Wreck'; Collins (2011) 'The Constitutionalisation of European Private Law as a Path to Social Justice'; Holmes (2011) 'Rhetoric of Legal Fragmentation', 121 ff.; Viellechner (2011) 'Constitution of Transnational Governance Arrangements', 449 ff.; Steinhauer (2011) 'Medienverfassung'; Calliess and Zumbansen (2010) *Rough Consensus and Running Code*; Thornhill (2011) 'Constitutional Law from the Perspective of Power'; Thornhill (2010) 'Niklas Luhmann and the Sociology of Constitutions', 16 ff.; Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 532 f.; Lindahl (2010) 'A-Legality', 33 ff.; Prandini (2010) 'Morphogenesis of Constitutionalism', 316 ff.; Preuss (2010) 'Disconnecting Constitutions from Statehood', 40 ff.; Renner (2011) *Zwingendes transnationales Recht*, 229 ff.; Tuori (2010) 'Many Constitutions of Europe'; Anderson (2009) 'Corporate Constitutionalism'; Backer (2009) *Transnational Corporate Constitutionalism?*; Joerges and Rödl (2009) 'Funktionswandel des Kollisionsrechts II', 767, 775 ff.; Kuo (2009) 'Between Fragmentation and Unity', 456 ff.; Wielsch (2009) 'Epistemische Analyse des Rechts', 69 ff.; Buchanan (2008) 'Reconceptualizing Law and Politics'; Schneiderman (2008) *Constitutionalizing Economic Globalization*; Amstutz, et al. (2007) 'Civil Society Constitutionalism'; Brunkhorst (2007) 'Legitimationskrise der Weltgesellschaft', 68 ff.; Bieling (2007) 'Konstitutionalisierung der Weltwirtschaft'; Tully (2007) 'Imperialism of Modern Constitutional Democracy', 328 ff.; Karavas (2006) *Digitale Grundrechte*; Calliess (2006) *Grenzüberschreitende Verbraucherverträge*, 226 ff., 335 ff.; Koselleck (2006) 'Begriffsgeschichtliche Probleme', 369 ff.; Schepel (2005) *Constitution of Private Governance*, esp. 412 ff.; Walter (2001) 'Constitutionalizing (Inter)national Governance'.

What are the questionable premises that set the debate off in the wrong direction? With which assumptions should they be replaced?

II. FALSE PREMISES

1. Societal constitutionalism as a genuine problem of globalization?

The uncontrollable dynamic of global capital markets, the obvious power of transnational corporations, and the dominance of epistemic communities with their non-legitimized 'experts' in the largely law-free spaces of globality, lead both advocates and opponents of transnational constitutionalism to the false assumption that the constitutional deficiencies of transnational institutions can for the most part be explained with reference to globalization.[14] The weakness of international politics is said to be responsible for the disarray in global society. Three phenomena are prominent: (1) nation states are de-constitutionalized by the transfer of government functions to the transnational level and, at the same time, the partial assumption of these functions by non-state actors; (2) the extra-territorial effects of nation-state actions create a law without democratic legitimation; (3) there is no democratic mandate for transnational governance.[15]

In truth, what we are concerned with here is not a new compensation problem, but a basic deficiency of modern constitutionalism. Since the time of its nation-state beginnings, constitutionalism has been faced with the unresolved question of whether and how the constitution should also govern non-state areas of society. Are the economic, scientific, educational, medical, and other social activities to be subjected to the normative parameters of the state constitution? Or should social institutions develop their own constitutions autonomously? Since its very beginning, modern constitutional praxis has oscillated between these two poles. At the same time, the question arose in empirical analyses and in normative programmes: are social sub-constitutions intended to allow state regulation of social sub-areas, or to protect their autonomy? Or to assimilate social decision-making processes with those of politics? Or to render social institutions politically independent?

It is at this point that the above-mentioned sociological theories intervene, placing the origin of the constitutional question in processes of societal differentiation. The problematic of societal constitutionalism

[14] Representative views in the volume edited by Dunoff and Trachtman (2008) *Ruling the World?*

[15] Peters (2006) 'Compensatory Constitutionalism', 591.

was not caused by globalization, but earlier by the fragmentations of the social whole and the autonomization of the fragments during the heyday of the nation state. This has now been considerably aggravated by globalization. Analysing various concepts of societal constitutionalism can help to explain why it is that, in the nation state, institutional solutions to the problematic remained in a singular condition of latency.[16] In light of the enormous draw of the state constitution, social sub-constitutions always appeared in a strange twilight, although for very different reasons. Liberal constitutions could conceal the question in the shadow of constitutionally-protected individual freedoms. In sharp contrast, the totalitarian political systems of the 20th century attempted to eliminate the autonomy of social sub-areas completely, thus concealing the question of independent societal constitutions by subjecting all areas of society to the state's authority. The welfare states of the late 20th century, in turn, never officially recognized autonomous sub-constitutions due to their political claim to rule. At the same time, however, they achieved a peculiar balance between a state constitutionalism, which progressively extended its principles to social spheres, and a constitutional pluralism, in which the state in fact respected a certain autonomy of social sub-constitutions.

Globalization did not, then, create the problem of societal constitutionalism. But, by destroying its latency, it dramatically changed it. In light of the much weaker draw of transnational politics compared to the nation state, the acute constitutional problems of other sectors of global society now appear in a much harsher light. On what legitimating basis do transnational regimes regulate whole areas of social activity, right down to the details of daily life? What are the limits of global capital markets in their expansion into the real economy and other areas of society? Can fundamental rights claim validity in the state-free areas of global society, particularly in relation to transnational organizations? Contrary to the terms of the current debate, it is not the case that the emergence of global society has brought with it a wholly new constitutional problematic. In fact, the societal constitutionalism that has actually long existed in nation states today faces the question of whether and how it must transform itself under the conditions of globality. The continuity of the problematic stems from the functional differentiation of society that has expanded through transnationalization into the whole world. Its discontinuity can

[16] This is the subject of chapter 2.

on the other hand be attributed to the fact that global society has developed its own structures and has accelerated growth tendencies that are unknown to the nation state.

The normative question, then, is no longer how hitherto constitution-free social spheres of global society might be constitutionalized. The question is rather, how can nation states' experiences with societal constitutionalism be transformed under the different conditions of globality? In particular, how is the role of politics for transnational sub-constitutions then to be formulated in the magical triangle of politics, law, and autonomous social spheres? Resignation? Guidance? Supervision? Complementarity? Replacement of *la politique* by *le politique*?[17]

2. Constitutional emptiness of the transnational?

The current debate is marked by false *tabula-rasa* assumptions regarding the non-existence of constitutional norms in social sub-areas, not only within the nation state, but also in the transnational sphere. While modern constitutionalism was able to take root in nearly all nation states, it was weakened, so it is said, by the increasing transfer of state responsibilities from the nation state to new transnational organizations, regimes, and networks. At this transnational level, however, a constitutional emptiness is believed to prevail. And it is only against the background of this supposedly constitution-free area of globality that the argument arises as to whether constitutionalism is at an end or is in fact experiencing a renaissance.

It can be empirically confirmed that the constitutional emptiness of the transnational is a false assumption. Social scientific analyses of a 'new constitutionalism', together with long-standing investigations by economists and commercial lawyers of emerging institutions of a global economic constitution, not to mention international law studies on the growing significance of transnational constitutional norms, suggest exactly the opposite. Constitutional institutions have already established themselves in the transnational sphere with an amazing density.[18] Despite the failure of the constitutional referendum, it is now only rarely denied that the European Union

[17] Discussed in particular at the end of chapter 4.

[18] On actually existing global constitutionalism from the viewpoint of international law see eg Klabbers (2009) 'Setting the Scene', 3; on the 'New Constitutionalism' see Schneiderman (2008) *Constitutionalizing Economic Globalization*, 328 ff. For the ordoliberal view of the global economic constitution: Behrens (2000) 'Weltwirtschaftsverfassung'.

has its own independent constitutional structures.[19] But it is also the case that other international organizations, transnational regimes, and their networks are in the meantime not only significantly juridified, but also undergoing a process of constitutionalization. They have become parts of a global (if thoroughly fragmented) constitutional order, albeit one that has not reached the density of national constitutions. The global institutions that emerged from the treaty systems of the 1940s—the Havana Charter, GATT, Bretton Woods; the new arrangements of the Washington consensus—the IMF, World Bank, WTO; and the recently initiated public debate concerning a 'global finance market constitution'; these all speak the language of a real existing global societal constitution that is undergoing a process of change.

The new constitutional question must be reformulated, then, for a second time. As discussed in more detail in the next chapter, not only have social sub-areas in nation states already developed independent constitutions, but it is also the case that genuine constitutional structures have long existed in the transnational sphere. In this respect too, then, it is not the creation *ab ovo* of new constitutions in a constitution-free globality that is at stake, but rather the transformation of an already existing transnational constitutional system. The new constitutional reality is only concealed by the fact that an equivalent of the constitutional subject of the nation state is not so easily recognizable at the transnational level. A world state as a new constitutional subject is a utopia—and a bad one at that. Immanuel Kant knew as much. But what then are the new constitutional subjects under the conditions imposed by globality?[20] The system of international politics? International law? International organizations? Transnational regimes? Global networks? New assemblages, configurations, or ensembles? The constitutionally relevant question is whether such configurations are at all capable of bearing constitutions. The answer depends on whether such non-state institutions exhibit sustainable analogies to the nation-state *pouvoir constituant*; to the self-constitution of a collective; to democratic decision-making; and to the organizational part of a political constitution in the strict sense.

3. Reducing transnational governance to political processes?

In addition to these two prevalent misconceptions—that nation states did not acknowledge partial constitutions in civil society, and that

[19] On this debate, see Walker (2008) 'Post-Constituent Constitutionalism'; Weiler and Wind (2003) *European Constitutionalism Beyond the State*.

[20] This is the question raised in chapter 3.

transnational spheres are constitution-free—there is a further misconception, whereby the current debate underestimates the radicality of a societal constitutionalization. The need for a constitution is only attributed to the emergence of political 'governance' that is different from 'government', that is, from traditional nation-state governmental practices. 'Governance' is regarded as the result of social-political-administrative interventions through which public and private actors solve social problems.[21] The networking of specialized bureaucracies from various nation states with private actors from the transnational corporations, trade associations, NGOs, and hybrid regimes are now identified as the new problematic of global governance; a problematic that must now be surmounted by constitutional institutions.[22] Prominence is given to the constitutional limitation of political power, whose particular feature is that it is partially 'socialized'.

Doubtless this socialization of political power is one of the central elements of global governance. Nonetheless, the analysis does not go far enough. It simply trivializes the problem to suggest that the power constellations of global governance, comprising new, private actors, need to be limited with constitutional norms. Here again the blinkered nature of politico-legal constitutional theories becomes apparent, focused even in respect of transnational relationships only on political phenomena in the narrow sense. In contrast, a sociological view shows that the constitutionalization of particular global social spheres of activity—that is, outside of international politics—is the actual problem.[23] The problems associated with societal constitutionalism in global society only become visible when we transcend political processes in the narrow sense, making clear that private actors not only participate in the political power processes of global governance, but also establish their own regimes outside of institutionalized politics.

The differences between social sub-constitutions and a political constitution come, then, to the fore. Sociological analysis of the global subsystems—the economy, science, culture, and mass media—raises difficult questions.

[21] Kooiman (2000) 'Societal Governance', 139 f.

[22] For a well thought-out concept of governance, Grande, et al. (2006) 'Politische Transnationalisierung'; Neyer (2004) *Postnationale politische Herrschaft*.

[23] This is made clear in Rosenau's typologies of global governance. His first typology initially reduces the social actors—multinational corporations, NGOs, markets, informal elite groups, partial public spheres—to their participation in political governance: Rosenau (2000) 'Change, Complexity, and Governance'. His second typology then gives prominence to particular social orders, Rosenau (2004) 'Strong Demand, Huge Supply', 31, 41.

Are today's global subsystems developing a dynamic of uncontrolled growth that must be subjected to constitutional restrictions? Do analogies exist in these sectors to the self-limitation of such expansive dynamics, in particular as regards the political separation of powers? To what extent must we generalize the principles of political constitutions in order to avoid the pitfalls of 'methodological nationalism'? How must we respecify those principles for the particularities of a social institution in the global sphere?[24] Such a method of generalizing and respecifying will investigate whether, in transnational sub-areas, an equivalent can be identified to national constitutions as regards functions, arenas, processes, and structures.[25]

Transnational sub-constitutions do not strive towards a stable balance, but rather follow the chaotic pattern of a 'dynamic disequilibrium' between contradictory developments—between the autonomization and the limitation of the function logic of subsystems.[26] To date, the new global constitutional orders have for the most part established only *constitutive rules*, which have normatively supported the freeing up of various rationalities at the global level. Today, however, it has become clear that there is a need for reorientation. After long historical experience with the expansionist tendencies of globalized subsystems and, following the shocks of endogenous crises, counter-movements are now appearing, which—after violent social conflicts—formulate *limitative rules* in order to counteract self-destructive tendencies and to limit damage to their social, human, and natural environments. It is true that political arguments have always thematized the 'vertical' constitutional problem: what are the limits to be imposed on the new global regimes in their relation to nation states? But the more serious 'horizontal' constitutional problem was not even considered: 'whether the autonomy of the function systems might not lead to mutual burdens to the limits of their structural adaptability with their very differentiation'.[27]

The negative externalities of expanding systems, as well as their self-destructive potentials became apparent in the recent crisis of the capital

[24] On generalization and respecification (as opposed to analogy, which either uses vague relations of similarity or generalizes only and fails to respecify), see Parsons and Ackerman (1966) 'Concept of "Social System" '. Respecifying political fundamental rights for economic organizations: Schierbeck (2000) 'Operational Measures', 168.

[25] This is the subject of chapter 4.

[26] The historical 'double movement' between the expansion of markets and their subsequent limitation is analysed by Polanyi (1995 [1944]) *Great Transformation*, 106 ff., 182 ff. The argument appears in generalized form—not just for the economy, but for many social spheres—as release of autonomies and legal prohibitions that follow negative experiences in Wiethölter (2005) 'Just-ifications of a Law of Society', 76.

[27] Luhmann (1997) *Gesellschaft der Gesellschaft*, 1087. In detail, regarding the mutual burdens of transnational regimes and political-legal reactions: Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1005 ff.

markets. The previously existing global capital market constitution was not simply the result of a blind evolutionary process during which markets automatically globalized themselves. It happened rather with the active participation of politics and the law. The dismantling of national barriers and an explicit policy of deregulation led to a politically desired and legally stabilized global financial market constitution that set free uncontrolled dynamics. But limitative rules which would replace national regulations were not on the political agenda; indeed, for many years they were resisted as counterproductive. Only with the near-catastrophe we have experienced, does it appear that collective learning processes will in future seek constitutional limitations. Wolfgang Streeck considers this as a hopeless task, since national or international rules are repeatedly and successfully circumvented. Given the efforts put into such evasion, he asserts that ex ante regulation is impossible.[28] But such obsessive pessimism is not much better than its counterpart, obsessive optimism. We should rather try to get to grips with the evolutionary dynamics of near-catastrophes in these cases. Political-legal regulation is in fact evolving according to the dictum: '*fatta la legge, trovato l'inganno*', but it could equally well be said: '*fatto l'inganno, trovata la legge*'. New rules produce new circumventions, but also new circumventions produce new rules. An evolutionary learning process works in both directions, but will only have a post factum effect. And, rather than any model of a rational learning process, the mutual adjustments seem to follow the pattern, well-known from the drug scene, of 'hitting the bottom'.[29]

Thus the agenda of a transnational constitutionalism also changes in this context: it is not the *creation*, but rather the fundamental *transformation* of a pre-existing constitutional order. A particularly urgent task is to limit the negative externalities of the social dynamics unleashed. And it is here that the global financial constitution and the constitution of *trans*-national corporations in particular come under the constitutional microscope.

4. *Reducing the third-party effects of fundamental rights to the states' duties of care?*

The debate about fundamental rights within transnational 'private' spaces suffers from similar deficiencies. It addresses socialization tendencies but at the same time remains fixated on the state. The scandals involving breaches of human rights by transnational

[28] Streeck (2009) *Re-Forming Capitalism*, 236 ff.

[29] Discussed in detail in chapter 4, under I.3.

corporations, outlined above, are usually discussed as a problem of the 'horizontal' or 'third-party-effect' of fundamental rights. Fundamental rights, originally guaranteed exclusively against the states, are now supposed to become effective against 'third parties'—private transnational actors. However, the resulting duties of care are imposed not on the private actors themselves but on the international community of states.[30]

This approach misinterprets the horizontal effect of fundamental rights in several respects. In its fixation on the state, it rather puts the cart before the horse. Instead of imposing duties on those transnational private actors who breach fundamental rights, it obliges the community of states alone to protect against these breaches. The contentious issue of whether private actors are themselves bound by fundamental rights is thus consciously obscured. And all this is done as if it were a question of the states' power of definition as to whether fundamental rights exist in social spheres. Finally, one cannot regard the horizontal effect of fundamental rights as purely a problem of power. This would miss its real task: to limit expansionist tendencies of social subsystems that do not function through the medium of power.

If the task is to use constitutional means to limit the expansionist tendencies of social subsystems, it is no longer possible to sustain either the state-centricity of fundamental rights, nor their attribution to individual actors, nor their exclusive focus on social power phenomena, nor their definition as spheres of autonomy protected by subjective rights. Can fundamental rights be made effective against social communicative media themselves, rather than against social actors? Is the concern to protect not only individuals, but also social institutions against expansive social media? Must the horizontal effect of fundamental rights be implemented through organization and procedures, rather than through subjective rights?[31]

But nor can the third-party effect simply be limited to the 'negative' function of fundamental rights, that is, to the protection of individual autonomy. It must also take into account their 'positive' function: their role of active civic empowerment. In state constitutions, this is reflected in the

[30] For example the UN Human Rights Committee, General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, paras. 6–8; Clapham (2006) *Human Rights Obligations of Non-State Actors*, 241 ff.; McCorquodale and Simons (2006) 'State Responsibility for Extraterritorial Violations'; Anderson (2005) *Constitutional Rights*, 126 ff.

[31] Chapter 5 attempts to answer these questions.

political rights to participate in public affairs, but it is virtually unknown in the debate on horizontal effects. The challenge is to delineate active civic rights not only in the power medium of politics, but also in the communicative media of other social systems.[32]

5. A unitary, cosmopolitan global constitution?

A final problem concerns the unitary bias of the very term constitution, which also impacts on world society in its use. International lawyers as well as political philosophers advance arguments for a unitary constitution of the entire world community.[33] While they reject the idea of a world state as unrealistic, they nevertheless present the 'international community' as the substrate for an emerging global constitution; no longer, as in traditional international law, merely a community of sovereign states, but now as an ensemble of political and societal actors and a legal community of individuals.[34] International constitutional law is conceived as far as possible in parallel with nation-state constitutional law: constitutional norms at the top of a legal hierarchy, with the whole globe as a unitary jurisdiction, encompassing all national, cultural, and social spheres.[35]

The very marked fragmentation of world society, emphasized by sociological analyses, causes acute difficulties for such a cosmopolitan constitutionalism. Fragmentation is regarded, if at all, as a shortcoming to be eliminated, not as a challenge requiring the redefinition of the constitutional problems facing world society. The alternative view is this: if constitutionalism can be applied only to the fragments of global society, then the unitary global constitution must be abandoned and attention concentrated instead on the fundamental conflicts between these fragments. In this case an all-embracing constitutional law will be able to function—if at all—not as a unitary law, but simply as a global 'constitutional conflict of laws'.[36]

[32] This is discussed in chapter 5, under III.

[33] Fassbender (2007) 'We the Peoples of the United Nations', 281 ff.; Höffe (2005) 'Vision Weltrepublik'.

[34] Different variants of a cosmopolitan constitution are analysed by Rasilla del Moral (2011) 'At King Agramant's Camp'.

[35] For a critique of these 'constitutional illusions', Fischer-Lescano (2005) *Globalverfassung*, 247 ff.

[36] First steps in this direction: Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1017 ff.

Moreover, a transnational constitutionalism will have to conform to the *double fragmentation* of world society.[37] As a result of the first fragmentation, the autonomous global social sectors insist stubbornly on their own constitutions, in competition with the constitutions of nation states. Moreover, unitary standards of a global constitution are rendered utterly illusory by the second fragmentation of the world into various regional cultures, each based upon social principles of organization that differ from those of the western world. If one wishes to conceive at all of a 'global constitution', the only possible blueprint is that of particular constitutions for each of these global fragments—nations, transnational regimes, regional cultures—connected to each other in a constitutional conflict of laws.[38]

[37] On transnational law reacting to the double fragmentation of world society: Teubner and Korth (2011) 'Two Kinds of Legal Pluralism', 27 ff.

[38] This is the theme of chapter 6.

2

Sectorial Constitutions in the Nation State

Constitutions of social sub-areas came to light, as indicated in the previous chapter, not just with functional differentiation on a global scale, but which had already become virulent in the era of the nation state. Today, under transnational conditions, they have acquired a new, dramatic topicality. Will constitutionalization effectively contain the expansionist tendencies, harmful to both society and the environment, of autonomous global subsystems? The question simultaneously arises as to what role international politics should play in the constitutionalization. Should it prescribe constitutions for other sectors of global society, or act as a participant observer of autonomous societal constitutionalization processes? Should it be a co-ordinator of divergent system logics, or a repair shop for functional differentiation?

To make matters clearer, in the following pages we shall discuss the conceptions of sectorial constitutions that became influential in the age of the nation state. Against the background of historical options we can better define how globalization has changed the situation and what new role sectorial constitutions are taking on in the relation between politics, law, and social subsystems. This will produce guidelines as to how national societal constitutionalism can be transformed into a global form.

I. SOCIETAL INSTITUTIONS UNDER LIBERAL CONSTITUTIONALISM

1. Constitution-free spheres of individual freedom

Liberal constitutionalism abstains consciously from constitutionalizing civil society.[1] Liberal constitutions are expressly confined to state institutions in

[1] On the non-constitution of social sub-areas in liberal constitutionalism, Grimm (1987) *Recht und Staat der bürgerlichen Gesellschaft*, 11 ff., 192 ff.; Grimm (1991) 'Entstehungs- und Wirkungsbedingungen', 45 ff. Prominent today in favour of the restriction of the constitution (basic institutions of society) to political processes in the narrow sense is Rawls (1971) *A Theory of Justice*, 11 ff.

the narrow sense. Societal activities should remain free of state intervention and not be subject to the norms of the state constitution. This abstinence allows the constitutional dimension of the separation of state and society to be realized. Fundamental rights are seen as areas of freedom for individuals, who are defended by protective rights against state intervention. Activities in civil society are not ascribed to social institutions but rather to the individuals themselves, who order their areas of freedom under private law but without reference to the state constitution.

In an influential essay, the historian Reinhart Koselleck has strongly criticized constitutional theory and constitutional law that even today they are committed to this programme and direct their attention solely to the state constitution.[2] The historical reality ought to be recognized that—as far back as the nation-state era—a more comprehensive societal constitution existed that governed not just state political activities, but also economic, social, and cultural institutions. Social, ecclesiastical, economic, and financial orders ought not to be treated merely as matters of simple legislation, but as problems of a genuine 'societal constitution'. Koselleck seeks to liberate constitutionalism from its limitation to the state and to extend it to all institutions of society. This concept 'should include all those institutions governed by law . . . without which a political community is incapable of political action'. The fundamental structures of civil society would have to be treated in terms of constitutional politics as equal to the structures of the state constitution.

Koselleck also points to the new problematic of transnational constitutionalism. He holds that the conventional, state-centric concept of the constitution makes it impossible 'to address the post-state—and in some respects supra-state—phenomena of our time'. He is particularly interested in the question of the role of transnational corporations in the framework of the overall constitution.

In this way Koselleck opens up far-reaching perspectives. He explicitly poses the question of the constitution for non-state institutions of society, thereby opening up new questions that he himself does not answer: what distinguishes a 'societal constitution' from 'legislation'? In other words, what is the difference between the constitutionalization of civil society institutions and their mere juridification? Furthermore, is there a unitary 'societal constitution' that governs the whole of society, or are there various sub-constitutions? Finally, do societal institutions give themselves

[2] Koselleck (2006) 'Begriffsgeschichtliche Probleme', 369 ff.

constitutions autonomously, or is it politics that is the legitimate provider of constitutions? These questions can only be answered within a broader sociological view, which will be developed in the appropriate context in the following chapters. A rough outline here will serve to reveal the inherent blindness of liberal constitutionalism vis-à-vis societal sub-constitutions.

As is well-known, state constitutions under liberalism lay claim to a double function: to constitute political power, and to limit it under the rule of law. The term 'constitution' here means not only that the organizational rules for the conduct of politics should be subject to norms, but that political power should be autonomous in relation to societal sources of power. The constitution separates political power from military might, economic wealth, and religious authority, and creates autonomous sources of power. The build-up of power and consent to produce collective decisions is the characteristic feature of the autonomy of modern politics.[3] Independent political power results from the reflexivity of power processes: in the relationship between *pouvoir constituant* and *pouvoir constitué*, power is applied to power with an independent political collective evolving as part of this process. This is, in the narrow sense, the 'constitution' of political power, which then needs the medium of law to stabilize it, making it relatively independent of power fluctuations and perpetuating the reflexivity of power. This necessary interplay between politics and law is what makes for the 'constitutionalization' of politics—as opposed to its self-foundation—in the strict sense. The second function, limitation of political power, is to create boundaries between politics and its societal environs. Essentially, this boundary-drawing process is implemented via political fundamental rights, with politics imposing self-limitations in regard to the autonomy of individuals.[4]

2. Autonomous societal orders

From a sociological viewpoint, it seems obvious that these two functions of the constitution cannot be limited to politics.[5] Other autonomous social

[3] Weber (1958 [1919]) 'Politik als Beruf'.

[4] An excellent systems-theory inspired interpretation of historical constitutional processes in the UK and France in Thornhill (2008) 'Towards a Historical Sociology'.

[5] Thus with recourse to the classics of social theory Prandini (2010) 'Morphogenesis of Constitutionalism'. Similarly, Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 532 ff. Both authors observe a historical co-evolution of social structures and constitutional norms and accordingly criticize the reduction of constitutionalism to the state constitution. Likewise, referring to the separation of politics and economy and the consequent need for an economic constitution, Anderson (2009) 'Corporate Constitutionalism'.

orders constitute themselves in parallel with politics and are dependent on constitutional law for their stability. Under functional differentiation, there are no longer any societal norms which are equally valid for all social institutions. This creates a demand for their independent constitutionalization.[6] Whether this includes fixed and written constitutions is another matter. The economy autonomizes itself via the medium of money, making itself independent of other social orders, and creates economic institutions via reflexive processes.[7] Its self-foundation is based upon fundamental legal institutions—property, contract, the monetary system. This creates the problematic of the boundaries: which equivalents to fundamental rights can guarantee that the medium of money does not dominate society as a whole? A similar case can be made for science and the autonomous medium of truth. Epistemologies are the reflexive mechanisms which define the boundaries of science. Corresponding constitutional questions arise for religion. This dual function of constitutions—foundation of an autonomous order and its self-limitation—is required for vast numbers of institutions during the modernization process.[8] And this is where we must seek the answer to the question left open by Koselleck. In contrast to the simple juridification of social sub-areas, we may only speak of their constitutionalization once legal norms have assumed this dual function.[9]

But why is liberal constitutionalism blind to this constitutional problematic, which emerges not only in politics, but in all social institutions? The answer lies in the self-description of the new civic society.

> The French revolution had swept aside . . . the fragile self-understanding of a hierarchical social order that had for some time been tottering. It had however no alternative concept of modern society in place. Its constitutional conceptions were limited to the political system, and in all other respects there was simply the release of the individuals for a certain lifestyle—an idea that could be briefly summarised in the sense of '*enrichissez-vous*'.[10]

[6] This is Luhmann's rationale for the need for political constitutions. This needs to be generalized to all subsystems, Luhmann (1973) 'Politische Verfassungen im Kontext', 171.

[7] Luhmann (1988) *Wirtschaft der Gesellschaft*, 302 ff.

[8] More detail in chapter 4, under I. Luhmann poses the questions of self-foundation and self-limitation not just for politics, but for all function systems without explicitly using the terminology of constitutionalism. He discusses these questions under various titles, especially reflection of subsystems and integration of society. See Luhmann (1997) *Gesellschaft der Gesellschaft*, 601 ff.

[9] On the difference between juridification and constitutionalization of societal sectors using the example of the Internet, Teubner (2004) 'Societal Constitutionalism'. More on this in chapter 4.

[10] Luhmann (1997) *Gesellschaft der Gesellschaft*, 1083.

According to its self-image, the bourgeois revolution had successfully eliminated the feudal orders, finally destroyed the intermediate institutions, and created a relationship of immediacy between polity and citizen. There was no place for autonomous social orders existing alongside the political community.[11] Rousseau saw this quite clearly: 'Il importe donc pour avoir bien l'énoncé de la volonté générale, qu'il n'y avait pas de société partielle dans l'état.'[12] Independent social institutions would only disrupt this self-image, raising questions of legitimation and limitation of power within society, thus bringing up the constitutional question for civil society itself. However, after the bourgeois revolution, all intermediate powers—estates, churches, corporations—were ignored, relegated to the private sphere, or politically repressed. The immediacy of citizen and polity obstructed the view of the multiplicity of newly arising social institutions, whose own constitutional problematics were thereby silenced and relegated to latency.

Social freedom was indeed explicitly guaranteed, but was solely understood as the self-fulfilment of individuals and not related to supra-individual, collective, or institutional processes outside of politics. Complex social orders were of course highly visible, but were seen only as the result of individual action.[13] Subjective rights were not only understood as a legal empowerment of private interest, or even as a simple granting of the right to take legal action. Far more fundamentally, the individual was seen to be the creator of law within its autonomous sphere. The subjective right itself was an independent source of law—first becoming a *facultas*, later a freedom—permitting legal subjects to create rules of their own and develop inter-subjective orders. But this right was only granted to individuals, not to social institutions.[14] Private law supported this private-autonomous constitution of social orders by means of contract and tort. Here too, the exclusive orientation towards the individual was a matter of course: 'All law exists for the sake of the ethical freedom

[11] This view persists in current political theory. Habermas, whose early work, Habermas (1992 [1962]) *The Structural Transformation of the Public Sphere*; Habermas (1969) *Protestbewegung und Hochschulreform*, vehemently demands the democratic constitutionalization of social spheres, while in his later writings on global constitutionalism he returns to an exclusively politics-centred view, Habermas (2006) 'Does the Constitutionalisation of International Law Still Have a Chance?'.

[12] Rousseau (1762) *Du contrat social ou principes du droit politique*, 59.

[13] Stated thus by Grimm (1987) *Recht und Staat der bürgerlichen Gesellschaft*, 11 ff., 192 ff.; Grimm (1991) 'Entstehungs- und Wirkungsbedingungen', 45 ff.

[14] The reference of subjective rights solely to the individual human being in Kant (2008 [1785]) *Grundlegung zur Metaphysik der Sitten*, 345.

inherent in each individual human being.'[15] Even the law of associations that in practice developed private collective institutions were understood at this time exclusively as the result of the contractual activities of individuals.[16] As the famous controversy about the juridical person shows, social collectives were either degraded to fictions of the state or dissolved into individual contractual relations. A 'corporate constitution' or, more generally, an 'organizational constitution' as the foundation and limitation of collective autonomy is inconceivable in this scheme of things.

In entirely complementary fashion, state constitutional law adopted fundamental rights that guarantee freedom of individuals and not, for example, of social institutions. The constitutional nature of social sub-areas was merely defined as a product of individual freedom guaranteed under private law and thus consigned to latency. This was in practice a mere 'transitional semantics' of society's self-description. It saw the old structures of the estates destroyed, but did not yet recognize the new quality of function systems and formal organizations and therefore ascribed social orders to individuals alone.[17] It thus ignored the problematic of civil society institutions: how is their autonomy to be guaranteed; how are their expansive tendencies to be limited; and how is social integration still possible in the face of their centrifugal tendencies.

Only since the time of Hegel, who recognized a plurality of social institutions—family, civil society, state—and integrated them into his constitutional theory, has it been explicitly registered that the new social order is more complex than the mere immediacy of a polity to citizens.[18] Hegel endorses a two-chamber parliamentary system, with the second chamber consisting of the 'mobile side of bourgeois society', its members representing certain 'spheres' of bourgeois society appointed by its corporations. Such a corporatist constitution indeed reflects the functional differentiation of society. While the Enlightenment always comprehended society solely in terms of the citizen-community dichotomy and accordingly espoused democracy and the general right to vote, Hegel acknowledges bourgeois society as an intermediate sphere between family and

[15] Savigny (1840) *System des heutigen römischen Rechts*, 2. The 'fiction theory' of the juridical person is dominated by the dichotomy of the state's imposition of norms and the will to power of individuals, see Wieacker (1973) 'Theorie der juristischen Person', 361 ff.

[16] The famous contrary polemic of Gierke (1863) *Genossenschaftstheorie*, 141 ff.

[17] Luhmann (1981) 'Subjektive Rechte', 80 ff.

[18] Hegel (1991 [1821]) *Elements of the Philosophy of Right*, 199 ff., 220 ff., 275 ff., 282 ff.

state and sketches a functional differentiated society with a hierarchical structure. The result is not a 'constitution of the estates', misleadingly deemed as regression to the old society, but a representation of social differentiation within politics. Integrating centrifugal tendencies of the system of needs is however exclusively a function of the state.

Institutionalist theories and, in particular, the new discipline of sociology then came up with more complex self-descriptions of society. They identified the multiplicity of non-state social orders in modernity, thus at the very least implicitly raising the constitutional question for each of them.[19] Only much later did private law and constitutional law develop self-descriptions that no longer saw social orders as mere products of individuals acting in a private and autonomous capacity, but as institutions with their own, different, logics whose collective self-foundation, self-limitation, and integration into society are recognized as constitutional problems.[20] This raises the issue of societal constitutionalism in its real sense. It became then one of the fateful questions of the 20th century whether, in the constitutionalization of social sub-areas, the political system is playing the leading role or whether the sub-areas autonomously constitute themselves.

II. TOTALITARIAN SOCIETAL CONSTITUTIONS

The most radical answer to the centrifugal tendencies of modern society was given by the political totalitarianisms of the 20th century. While liberal constitutionalism sidelined the various social orders into constitutional latency, totalitarian concepts placed them right at the centre of the state's demand to control. Totalitarian states seek to subject all social institutions to their political constitution. It is direct political control that dominates. Here, too, the question of societal constitutionalism remains latent; not however because the social sectors are ignored, but because they are subject to the state's claim to totality. This is primarily served by the sole political party, which forms a parallel bureaucracy, embracing and politically controlling all social activities.[21]

One remarkable and frequently overlooked aspect of both socialist and fascist regimes is that, despite their political claim to totality, they do not

[19] In particular Durkheim (1933) *The Division of Labor in Society*; Romano (1918) *L'ordinamento giuridico*; Hauriou (1986 [1933]) 'La théorie de l'institution et de la fondation: Essai de vitalisme social', 96 ff.

[20] For private law in particular, Raiser (1963) 'Rechtsschutz und Institutionenschutz'. For constitutional law, Häberle (1983) *Die Wesensgehaltgarantie des Artikel 19 Abs. 2*.

[21] On the constitutions of fascism, Nolte (2008) *Faschismus in seiner Epoche*; Payne (1997) *A History of Fascism, 1914–1945*, 92, 249, 312. On the constitution of council (*soviet*) democracy under socialism, Burnicki (2002) *Anarchismus und Konsens*.

engage in a thorough de-differentiation of social life. They intend rather to maintain a certain autonomy of social sectors, in order to secure the support of their elites, to include 'private' institution in politics, and then to politically instrumentalize them. They concentrate their attention on autonomous sectors in order to demand from them a maximum output for political purposes. They seek to achieve their political 'synchronization' via a sophisticated dual strategy. We thus misunderstand totalitarian social constitutions if we view them as a regressive de-differentiation in favour of the logic of the political.[22] The totalitarian state does not give up the plurality of social orders, but maintains them, asks for their political support, and constitutionalizes them as formal, hierarchical organizations that it attempts to control.

While the first strategy amounts to a totalization of the formal organization, the second aims at a totalization of politics. It seeks to force the political integration of formally organized areas of society by virtue of the single party strictly binding them to the political system. The Soviet system of government abolishes bourgeois parliamentarianism and seeks to politically organize the entire society. It constitutionalizes hierarchically various areas of production so that the single party can take political control. Fascist states design their 'new economic and social constitution' so that they introduce political planning but at the same time retain the underlying market institutions.[23] Various sectors of society are maintained in their independent logic, but then formally organized and brought under political control by the parallel organization of the fascist party. Under state corporatism (or authoritarian corporatism) the state creates social organizations with numerical limitation, monopoly of representation, obligatory membership, political elimination of pluralism, and regulation by legal coercion.[24] Authoritarian 'organization societies' therefore attempt to integrate the diverging autonomous areas of society through simultaneous processes of formal organization and close political control.

Their repressive nature has ultimately discredited totalitarian constitutions. Two serious mistakes regarding the structure of modern society are

[22] A systems-theoretical analysis of the Soviet system of society and its ambivalent relationship with functional differentiation in Hayoz (1997) *L'étreinte soviétique*. For the societal constitution of the GDR this ambivalence—the encouragement of differentiation with a simultaneous 'homogenizing' of social sectors—is confirmed by Pollack (1991) 'Ende einer Organisationsgesellschaft', 293 f. On systems-theoretical analyses of the fascist and Nazi regimes, Thornhill (2008) 'Towards a Historical Sociology'.

[23] In depth on the interrelationship between state-established sub-constitutions and the underlying social structures in National Socialism, Brüggemeier (1979) *Entwicklung des Rechts*, 25 ff., 35 ff.

[24] On the characteristics of state corporatism, Schmitter (1974) 'Still the Century of Corporatism?'.

responsible for their historical failure. The very double strategy that—via the Soviet system or via the corporative organization of society—maintained the autonomy of social sub-areas, using it for political purposes, in the long run suffocated the dynamics of functional differentiation.[25]

The first mistake lies in their organizational strategy. This cannot but fail because it focuses exclusively on the large formal organization in which the energies of the professions and their constituencies are combined. Constituting each of the major function systems of society as a hierarchical formal organization destroys the precarious interrelationship of the professional-organizational core of a function system with its spontaneous area, ie the interrelationship of government organizations with the public sphere, business corporations with the market, courts with those subject to the law, media companies with the public. The organizational strategy misjudges the hidden agenda of functional differentiation, which is to make use of the spontaneous area in its creative forces.[26] Society's potential for reflection is by no means only concentrated in the formal organizations, in firms, universities, courts, or media companies, but simultaneously has its effects in the spontaneous areas of society. The strategy of constituting entire functional areas as formal organizations fails to understand that 'no single function system can achieve its own unity as an organisation'.[27]

The second error lies in the typical integration strategy which totalitarian constitutions apply with the help of the single political party. It fails because it binds social sectors so tightly to politics that their control places intolerable restrictions on them.[28] Since they transform function systems into formal organizations and politicize them thoroughly via the single party, they undoubtedly achieve a spectacular short-term mobilization of social forces. The long-term price to pay is, however, high rigidity, lack of adaptability, and loss of social creativity.[29]

[25] Hayoz describes the effect of the two strategies as the 'hindering or blocking functional differentiation on a regional level', Hayoz (2007) 'Regionale "organisierte Gesellschaften". On parallel blockages in fascism, Thornhill (2008) 'Towards a Historical Sociology'.

[26] On the interaction between organizational and spontaneous areas within social subsystems, Teubner (2003) 'Global Private Regimes'.

[27] Luhmann (1997) *Gesellschaft der Gesellschaft*, 841 ff., 1084 ff.; Luhmann (2000) *Organisation und Entscheidung*, 384 f.

[28] Hayoz (2007) 'Regionale "organisierte Gesellschaften" ', 165 f.; Pollack (1991) 'Ende einer Organisationsgesellschaft', 297 ff.; Thornhill (2008) 'Towards a Historical Sociology'.

[29] On the state failure of fascist regimes, Mason (1993) *Social Policy in the Third Reich*, especially 107.

III. SUB-CONSTITUTIONS IN THE WELFARE STATE

1. *Historical lessons*

The welfare states of the late 20th century undoubtedly learned their lessons from these historical experiences—ie how liberal constitutionalism ignored civil society institutions and how totalitarian regimes completely absorbed them. They thus developed a rather ambivalent attitude to societal constitutionalism. The social-state constitutions introduced after 1945 can be seen as a reaction to the 'highly interpenetrative, quasi-corporatist constitutional programmes of the 1920s and the processes of social colonisation by authoritarian regimes in the 1930s'.[30] They respect the autonomy of social subsystems and decline to stipulate their basic structures through direct political control. The welfare states therefore limit themselves to imposing relatively modest constitutional frameworks. At the same time they have learned the lesson from liberal-constitutional abstinence. Negative externalities and centrifugal tendencies of social subsystems now feature so strongly in the public consciousness that it is no longer plausible to sideline them to the latency of individual private-autonomous forms.

The reaction is two-fold. On the one hand, the welfare state takes responsibility for numerous function regimes. Education, science, the health service, radio and television are constitutionalized as semi-state institutions, to which the state grants only a limited autonomy. On the other, the welfare state leaves other subsystems, particularly the economy, undisturbed in their autonomy, but then engages in overall political co-ordination.[31] With this double orientation, the policy of the welfare state is not merely to regulate social activities but to constitutionalize the inner order of autonomous social sectors. The prototype is the 'constitution of the corporation': state legislation introduces co-determination rights for labour unions but refrains from direct intervention. The ensuing problem is to promote the autonomy of subsystems while preventing externalities through their centrifugal and expansionistic tendencies. It is one of the most explosive problems of functional differentiation: how much 'inwards expansion' does society produce, how much monetarization, scientification, medicalization, mass-mediatization can it bear?[32]

[30] Thornhill (2012) 'State Building, Constitutional Rights and the Social Construction of Norms', (manuscript) 20 f.

[31] On both tendencies, Vesting (2012) 'Ende der Verfassung?', (manuscript) 4 ff.

[32] Luhmann (1997) *Gesellschaft der Gesellschaft*, 757.

The welfare state accordingly seeks to achieve a precarious balance between a constitutional intervention in social sub-orders while all the time respecting their independent constitutions.[33] But how can this balance be achieved?

2. Statist societal constitutionalism

In view of this problem, a statist approach to societal constitutionalism, as proposed by some authors, will not work.[34] According to this view, the state constitution provides organizational norms not only for the political process, but at the same time for non-state social institutions. The German constitution, particularly as regards fundamental rights and the regulation of legislative competences, is supposed to contain elements of an economic constitution, a cultural constitution, a media constitution, a military constitution, and an environmental constitution. Thus the state is supposed to specify basic structures of these social sub-areas. Fundamental rights are interpreted not only as individual entitlements but as objective principles of law which 'organize' functional subsystems. The task of constitutional doctrine and the constitutional court is to hammer out these elements into a coherent systematic of state-organized societal sub-constitutions.

While this concept rightly questions whether and how social institutions will be constitutionalized, its main problem lies in the statist answer given. The revealing formulation, that the state's constitutional norms themselves 'organize' 'liberal-autonomous action and function systems of society',[35] is a typical over-estimation of the regulatory power of the state in relation to the evolutionary dynamics of social differentiation. A statist societal constitutionalism, cloaked in a constitutional law doctrine, will exhibit self-blocking tendencies, as one can observe in state-centred societies where 'an occupational group-specific corporatism and state *dirigisme* have created a fairly rigid and highly stratified organisation society'.[36] The state will place excessive demands on its steering capacity; civil society will

[33] How precarious this balance is, shows constitutional doctrine in its ambivalence on the question whether the German constitution (*Grundgesetz*) represents the 'constitution of the state' or the 'constitution of society', eg Herzog/Grzeszick (2010) in: Maunz/Dürig, Grundgesetz paras. 50 ff.

[34] Main representative: Scholz (1971) *Koalitionsfreiheit als Verfassungsproblem*, 154 ff., 158 ff.; Scholz (1978) *Pressefreiheit und Arbeitsverfassung*.

[35] Scholz (1978) *Pressefreiheit und Arbeitsverfassung*, 131.

[36] Hayoz (2007) 'Regionale "organisierte Gesellschaften", 163; very critical of both tendencies in France are Algan and Cahuc (2007) *La société de défiance*.

become too dependent on the state's power; and established power positions within social sub-areas will be fixed via constitutional law.[37]

3. Politicization of social sectors

Other variants of societal constitutionalism seek to avoid this fundamental error of statist solutions. They clearly see the totalitarian dangers when the constitutions of social sub-areas are placed under state control. They therefore demand that interventions by the state constitution must always take into account the particular features of social relations.[38] For them, the political constitution is not merely an ensemble of norms that organize government, but a 'normative directive' for the whole society. The state constitution, it is argued, requires democratic decision procedures and the protection of fundamental rights for each segment of society. The principles of the political constitution, in particular fundamental rights, are not only applicable to the political decision-making process: 'they embody normative principles that are binding on society itself and permeate all social relations'.[39] In contrast to the state's direct control of social processes, however, they stipulate that the state limits itself to requiring that social institutions arrange their internal decision-making processes according to the model of state political processes. The constitutionalization of society is thus a political task for the parliamentary legislator, who extends the political constitution into all areas of society. Such constitutional interventions in society would however have to respect the particularities of civil society which, in contrast to the vertical relations of public law, are essentially seen in the horizontal relations between private actors.[40]

Here sociological theories of private government have carried out pioneering work by analysing business corporations and other private organizations as genuinely political associations. Consequently, they demand a transfer of constitutional principles to private organizations. Indeed, they can be credited with having identified private-sector corporations as para-political organizations which develop organizational power in order to produce collectively binding decisions.[41] They identified decisions within

[37] These consequences become apparent in Scholz (1978) *Pressefreiheit und Arbeitsverfassung*, 188 ff.

[38] 'After all, only constitutional states draw a clear distinction between and establish an institutional separation of the spheres of public authority and of civil society, both of which operate according to distinct societal and, consequently, legal logics.' Preuss (2012) 'The Guarantee of Rights', (manuscript) II; Preuss (2005) 'The German *Drittwirkung* Doctrine'.

[39] Preuss (2012) 'The Guarantee of Rights', III 2 c.

[40] See Kumm (2006) 'Who's Afraid of the Total Constitution?'.

[41] Key texts: Selznick (1969) *Law, Society and Industrial Justice*; Dahl (1990) *After the Revolution?*, 80 ff., 100 ff.

business organizations that were supposedly oriented solely towards market efficiency as political phenomena which allowed them to draw analogies with the major political systems. In terms of legal policy, theories of private government which discover political power in organizational contexts, ask for the constitutionalization of economic power, its legitimation and limitation. Similar to state constitutions, private governments would have to establish their legitimacy through an explicitly political form of their organizational rules while ensuring their members' spheres of freedom through the equivalents of fundamental rights. As a complement, the parliamentary legislator is made responsible for limiting social power relationships through their constitutionalization, in particular through fundamental rights.

The theories of private government are too narrowly restricted to formal organizations or indeed only to business corporations. More comprehensive theories accordingly demand that the constitutionalization be expanded to the entire economic process and at the same time to other societal processes. The starting point was the political 'idea of the employment constitution', ie the 'order that entitles employees to jointly exercise decision rights, previously the exclusive preserve of employers, in areas specified by law or by contract'.[42] This idea would subsequently become more widely generalized. The state constitution is understood as a 'societal constitution', with the consequence that democratic co-determination and fundamental rights are to be extended to all socially relevant organizations by the legislator, who is alone legitimized for this purpose.[43] The programme is intended to discipline the capitalistic order through the interventions of state policy. While these interventions are largely directly implemented via legal regulations of society, they are also indirectly implemented by imposing on social subsystems constitutions that are based on the model of democratic politics. Sociological background is provided by Polanyi who analyses the inexorable marketization of society, but at the same time identifies social counter-movements that reconstruct the 'protective shell of culture-specific institutions'.[44]

[42] Sinzheimer (1976 [1927]) 'Wesen des Arbeitsrechts', 108 ff.

[43] In programmatic terms, Ridder (1975) *Soziale Ordnung des Grundgesetzes*, 47 ff.; Ridder (1960) *Verfassungsrechtliche Stellung der Gewerkschaften*, 18; Preuss (2012) 'The Guarantee of Rights'. In a comparative perspective, Anderson (2005) *Constitutional Rights*; Anderson (2004) 'Social Democracy and the Limits'. On the transfer of the programme to the EU, Rödl (2009) 'Constitutional Integration'.

[44] Polanyi (1995 [1944]) *Great Transformation*, 106 ff., 182 ff. In the economic-constitutional law discussion, the following explicitly adhere to Polanyi's ideas: Amstutz (2001) *Evolutorisches Wirtschaftsrecht*, 16 ff.; Joerges (2011) 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form'.

Even where they intend to respect their autonomy, however, such state interventions systematically underestimate the self-constituting potential of civil society institutions. At the same time they overrate the cognitive and power-related capacities of the parliamentary legislator. It is illusory to believe that political legislation, by virtue of its democratic legitimation, is in a position to autonomously define the fundamental norms for the economy, science, the arts, the health service, or the mass media and enforce them by means of constitutional law. Friedrich Schiller was well aware of the autonomy of art and science: '... both of them rejoice in an absolute immunity from arbitrariness of man. The political legislator can enclose their territory, but he cannot govern within it.'[45] This is true even if the legislator does not insist on detailed regulations and simply prescribes for each of them a sub-constitution. Against well-meaning social democratic intentions it needs to be said that the political constitution is not a 'normative plan according to which society should be developed'; it is not a 'sketch for a good society or for a future that can be chosen'.[46] Therefore, the direct 'politicisation of problems is ... the best way to destroy the complex, non-visible processes of self-organisation within a society'.[47] Functional differentiation is not a question of a basic political choice, but a complicated evolutionary process in which fundamental *différences directrices* gradually crystallize and specialized institutions emerge in accordance with them. During this process, function systems themselves stipulate their own identity via elaborate semantics. The state can if necessary link to such developments and to a certain extent intervene in a corrective manner, but cannot shape their fundamental norms.[48]

Moreover, these variants of societal constitutionalization regularly commit a category error. They apply the decision models of politics, untested, to other social sectors. By institutionalizing political procedures within these non-political contexts—elections, representation, organized opposition, group pluralism, negotiation, collective decision-making—they hope to curtail their suspect autonomy. The actual goal is

[45] Schiller (2009 [1879]) *Über die ästhetische Erziehung des Menschen*, Ninth letter.

[46] Luhmann (1973) 'Politische Verfassungen im Kontext', 21.

[47] Ladeur (2000) *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation*, 185. Politicization is here understood as problem-solving through governmental policies, not in the sense of a politicization in the subsystem itself. See chapter 4, under V.

[48] Luhmann (1997) *Gesellschaft der Gesellschaft*, 745.

the politics-led integration of diverging rationalities by imposing on them an internal 'political' constitution. In this sense, the welfare state clause in the German constitution is understood as obligating social institutions to adopt structures that are homogeneous with state-political decision-making processes.[49] However, the unintended result is that social institutions tend then to be wrongly politicized and carved up along party political lines. The university reforms of the 1970s in Germany provide an illustration of an over-hasty transposition, with legitimation and control mechanisms that only made sense in a political context transferred without further ado to social institutions.[50] The widespread misery produced by the 'democratization' of the universities is a symptom of the mimicry of political procedures having the counterintuitive effect of their further bureaucratization.

While theses theories rightly criticize liberalism for its separation of state and society and its constitutional ignoring of civil society, they do not know how to deal with the private/public distinction. It has now become a ritual to deconstruct the private/public distinction, but to replace it by a society-wide merger of the public and the private, is simply misleading.[51] Sociologists have registered the fall of the wall dividing state and society, but they can see nothing in its place other than a politicization of society as a whole.[52] Similarly, legal scholars attack the distinction between public and private law as no longer up to date, but they substitute it with the vague assumption that private law is thoroughly political.[53] Instead of replacing the outdated dualism with more complex models of a plural differentiation and then strictly orienting social constitutions towards these differences, they assert a continuous politicization of society and attempt to fashion it by expanding the normative claims of the political constitution to practically every social institution. The consequence is that fundamental differences between the logic of politics and the autonomous

[49] Ridder (1975) *Soziale Ordnung des Grundgesetzes*, 47 ff.; Ridder (ed) (1960) *Verfassungsrechtliche Stellung der Gewerkschaften*, 18.

[50] The unbroken optimism of such a transposition of political decision-making models into areas far removed from politics is reflected in Habermas (1969) *Protestbewegung und Hochschulreform*.

[51] Important contributions to the debate, Horwitz (1982) 'History of the Public/Private Distinction'; Grimm (1987) *Recht und Staat der bürgerlichen Gesellschaft*, 11 ff., 192 ff. A sceptical counterview, Röhl and Röhl (2008) *Allgemeine Rechtslehre: Ein Lehrbuch*, 412 ff.

[52] *Locus classicus*: Habermas (1992 [1962]) *The Structural Transformation of the Public Sphere*, 141 ff.; on a somewhat modified view, Habermas (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 359 ff.

[53] Kennedy (1999) 'Background Noise?'; Engle (1993) 'After the Collapse'.

social spheres are falsely levelled out.[54] Indeed, the social-state concept of social constitutions develops

> a view of the state that naively observes the structure of society as hierarchically dictated by states, it falsely construes the coalescence of the state with other social functions (especially the law and the economy) as an index of the state's structural dominance, and it fails causally to probe at the underlying motives for the interdependence between the state and other functional spheres (especially the law and the economy).[55]

In contrast to this, the question would be to allow different areas of society a constitutionalization of their own, creating a precarious balance between their constitutional autonomy and the political constitutional interventions.[56] As already mentioned, this is indeed the very aim of welfare state conceptions. However, one cannot achieve the integration of diverging dynamics if one conceives social subsystems as (para-)political systems and organizes them accordingly. A mere appeal to the legislator to take account of the horizontal relations between private parties will scarcely work as a corrective. Welfare state concepts lack any respect for the independent rationalities and normativities of social function systems.

IV. ECONOMIC CONSTITUTIONALISM FOR THE WHOLE SOCIETY

1. Ordoliberal constitutionalism

That politics should absolutely respect the independent constitution of economics is the trademark of the ordoliberal view. It insists on an economic constitution that is autonomous in relation to politics. It has a promising potential insofar as the economic constitution may reveal the paradigm for a multiplicity of autonomous partial constitutions. But this potential is cast aside when the ordoliberal theory transforms the economic constitution into the constitution for the whole society. Similar to the mistaken integration of society through its overall politicization,

[54] This is the justified nub of Ladeur's pointed polemic against the exaggerated expansionist tendencies of political claims to organization, Ladeur (2006) *Der Staat gegen die Gesellschaft*, esp. 119 ff.

[55] Thornhill (2012) 'State Building, Constitutional Rights and the Social Construction of Norms', (manuscript) 5 f.

[56] This is the argument by Steffek (2003) 'Legitimation of International Governance', 258. He emphasizes that different forms of governance need different principles and processes of legitimation.

this theory commits the error of integrating society by institutionalizing market mechanisms in all areas of society.

Property, contract, competition, monetary institutions—in ordoliberalism these fundamental institutions form the economic constitution. It gains legitimacy not from the political decisions of the legislative, but primarily from the inner logic of economic action. State interventions are justified in only one case. When the economy releases self-destructive dynamics, in particular restraints on trade through cartels and monopolies, the state must act to prevent this. Such interventions must not however take on the form of discretionary political acts, but solely of general rules of law.[57]

This could in fact provide stimulating ideas for a multiplicity of social sub-constitutions, but it is prone to an intolerably narrow economism. In particular, it focuses solely on the constitutional conflict between the economy and politics, which it one-sidedly resolves in favour of the economy. It simply ignores the equally important constitutional conflicts between the economy and other social subsystems. This is clearly apparent in the ordoliberal theory of economic fundamental rights. They are identified exclusively in the rights of economic citizens in relation to the expansionist tendencies of the state. But this theory never looks for actual equivalents to political fundamental rights in the economy itself; in other words, it never seeks protection against the no less problematic expansionist tendencies of the economy into other social areas.[58] If we are serious about an economic constitution, it will also have to restrain economic dynamics. While ordoliberalism emphatically demands the limiting of state-political expansion, it is blind to economic expansionist tendencies. It is of course aware that economic power in cartels and monopolies needs to be limited, but restricts this to their internal effects on markets. The—potentially drastic—effects of economic expansion into other social areas whose integrity needs to be constitutionally protected are ignored. A genuine equivalent of political fundamental rights would be rules against the commodification of science, art, medicine, culture, and education. Constitutional norms would be needed to prohibit the infringement of individual and institutional integrity by economic actions. While ordoliberalism indeed attempts to limit economic power, for instance by compulsive contracting or anti-discrimination rules for

[57] *Locus classicus*: Böhm (1933) *Wettbewerb und Monopolkampf*; a view currently championed today by Mestmäcker (2003) *Wirtschaft und Verfassung*.

[58] This is however developed in its constitutional dimensions as '*ius supra iura*' by Amstutz (2001) *Evolutorisches Wirtschaftsrecht*, 11 ff.

corporations with a dominant market position, it has no answer to the actual problem of fundamental rights under an economic constitution. Nor does it even discuss the threat to individual and institutional integrity through sheer economic rationality in situations with no economic power, ie in the very situations where the market, competition, the price mechanism, or the profit principle are all functioning normally.

In particular, ordoliberal theory fails to deal with privatization. When former state activities are organized along market lines, this would represent a continuous provocation for any economic constitution worthy of the name, because now it is no longer state action, but rather privatized activities that endanger fundamental rights. Take the case of privatized universities: would the instructions of the director of a privately-funded university to scientists regarding their research be declared unconstitutional? Are the special admission rules for children of alumni and rich donors, common in some of the most advanced industrial societies, permissible? May a private university reduce fundamental research in favour of applied research because the former is unprofitable? Freedom of science and education are no less endangered when they are subordinated to an economic instead of a political rationality.

But economistic reductions are not limited to fundamental rights. It is just as problematic to ground the economic constitution on the authority of scientic reason, as ordoliberal theory has done, indeed both before and after the financial crisis. In this view, the legitimacy of economic institutions is based on rational choice philosophy, not on political voting decisions. Science thus is supposed to elevate the economic constitution above the state-political constitution, even where the latter can invoke its democratic legitimation. The grotesque nature of such a neo-natural law conception is revealed by three simple questions: How can a cognitive theory that offers causal explanation and prediction create normative legitimacy? Are not 'political' debates and decisions needed in order to make the jump from the cognitive to the normative? How stable is a constitution founded on science if it is confronted by controversies that cannot be solved within science? Science, under no compulsion to make decisions, does not need to decide on these issues; economic constitutional law must however decide. Obviously, there is a 'political' decision hidden beneath ordoliberalism's foundations in economic science.

An economic constitution plainly cannot be legitimized by the technocratic dictates of economics. Like every other political or social constitution, it is a product of innumerable decisions made in situations of uncertainty. It thus contains an irreducible 'political' element. Ignoring

its non-economic foundation, an economic constitution will suffer a legitimacy deficit that cannot be remedied, neither by scientific theories, professional expertise, nor competition mechanisms. We must of course guard against rashly equating this political element with a connection to state politics. Rather, we need to generalize the above-mentioned theory of private government: political decisions in the broader sense, ie decisions regarding the public interest, are made not only by government, but at many places in society, in particular in the economy. Here lies the potential of social constitutions since they provide the basis for politics outside politics. Their autonomy is based not on scientific reason, nor on competition mechanisms, but on political constitutionalization within the economy. More on this later.[59]

2. *Constitutional economics*

Apart from ordoliberal theory, economists have independently developed a constitutional theory—constitutional economics.[60] It is expressly limited not to the constitution of the economy in the strict sense, but instead proposes that each social group and each social institution is based on its own constitutional rules. This represents an interesting step forward that opens up a vista onto numerous other constitutions in society. But this progress is cancelled out by another narrow view. The rules of such constitutions are supposed to exclusively draw upon rational choice principles. This excludes any overall social perspective and cannot provide any insight into the destructive effects of economic action on its environments.

There is an economic imperialism at work that drives the ordoliberal view as well as constitutional economics. The theories behave as imperialistically as does economic practice. Applying rational choice to any social behaviour the theories maintain that they can explain behaviour outside of monetary transactions. Rational choice declares itself as all-embracing, including the internal constitution of love, religion, science, health, and politics. It remains blind to the *proprium internum* of other rationalities. And the more recent theories of behavioural economics, which in the name of realism argue against the universal rule of rational choice, remain nevertheless in the grip of the economic paradigm and offer only some

[59] Addressed in detail in chapter 4, under V.

[60] The founder is Buchanan (1991) *Constitutional Economics*; Buchanan (1994) *Economics and the Ethics*. On the more recent discussion, Block (2010) 'Critical Look at The Calculus'; Vanberg (2005) 'Market and State'; Okruch (2004) 'Verfassungswahl und Verfassungswandel'. Especially for constitutional elements in private law, Kerber and Vanberg (2001) 'Constitutional Aspects of Party Autonomy'.

empirical corrections to the model. Economic practice is similarly imperialistic: it only knows the social co-ordination forms of the market, profit, and competition, expanding them by all means possible, even through political interventions, into areas that lie outside of monetary transactions.

Economic constitutionalism, transaction cost theory, the theory of property rights, public choice, the economics of institutions, and legal economics are all different strands of one movement that wishes to replace the supposedly stale terms of public interest, justice, and solidarity with the ideal of economic efficiency. The movement speaks with the pathos of a natural law, simultaneously in the name of 'nature' and of 'reason'. The internal rationality of market and organization is identified with the nature of modern society, which needs to reflect the legal constitution of economics and society.[61] It stylizes itself as the result of a paradigm shift that completely replaces older moral-political orientations and, in its claim to exclusivity, tolerates no other paradigm beside itself.[62] It invokes here in particular its historical victory in modern social orders, that economic rationality has been institutionalized society-wide, indeed now almost world-wide. This is undoubtedly where its great strength lies: who can evade the argument that modern society is an economic society and that a modern constitutional law has to develop legal forms that are adequate for both the market and economics?

At the same time, however, its great weakness lies in its imperialistic claim. Imprisoned in its own optic, it can only perceive social transformations as the replacing of a moral-political by an economic monocontexturalism. From an overall social perspective, by contrast, it becomes clear that the One Reason of modernity has transformed into a late-modern polycontexturalism, a pluralism of partial rationalities, that forbids the political and social constitutions to incorporate exclusively economic rationality. Alongside the economy there are in particular politics, science and technology, the health service, the system of media, the law itself, and a multiplicity of formal organizations that each follow their own rationalities and normativities and accordingly develop independent constitutional orders. The attempt to control these diverging dynamics through their forced economization is no less dubious than the attempt to politicize them by means of a state constitutionalization.

[61] Barry (1989) *Theories of Justice*.

[62] eg Priest (1990) 'New Legal Structure of Risk Control'.

V. CONSTITUTIONAL PLURALISM

An intermediate result can be established: the tendency of liberal constitutionalism to ignore civil society is nowadays discredited. Even more discredited is its totalitarian counter-concept, which extended the state's universal claim to all sectors of society. On the other hand, current welfare state concepts rightfully emphasize that the state should create a framework for sectorial constitutions, but that this is only legitimate if at the same time it respects their autonomy. However, they underestimate the dynamics of the subsystems. The injection of political power and consensus procedures into social sub-areas has a counterproductive effect. In its turn, economic theories correctly underscore the autonomy of the economic constitution. But they lose their credibility when they totalize economic rationality, rejecting all other partial rationalities as irrational, and push the integration of society as a whole via market mechanisms.

It is thus necessary to navigate between the Scylla of welfare-state concepts and the Charybdis of purely economic theories. A guide for this Odyssean course might be offered by Rudolf Wiethölter:

> Taking autonomy seriously means relying on self-determination and at the same time on the inevitable externalisation which should not be understood as outside determination but rather as potential support from outside in situations where self-help is not possible. It could be compared to therapeutic assistance or support structures outside the law.[63]

Different variants of a constitutional pluralism indeed try to steer this difficult course.[64] Western Europe is experimenting with a multiplicity of social constitutions granting the political constitution only the status of *primus inter pares*. Constitutions are everywhere in society: not just *ubi societas, ibi ius*, as Grotius once said, but *ubi societas, ibi constitutio*. Self-founding orders are developing at numerous places in society and are being stabilized by constitutional law. Law must accordingly develop a 'multilateral constitutionalism' that does not bind social orders unilaterally either to the constitution of the state or to the economy, but rather

[63] Wiethölter (1988) 'Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung', 27 f. The programme of a legal constitutional law in Wiethölter (2005) 'Just-ifications of a Law of Society'.

[64] For a solid concept of constitutional pluralism, Walker (2002) 'Idea of Constitutional Pluralism'.

models specific constitutions that do justice to the peculiarities of the various orders.[65]

1. Neo-corporatist arrangements

Neo-corporatism emerged as particularly influential, both in political practice and in social theory, generating especially in post-war Germany numerous sectorial constitutions (corporations, business associations, labour unions, universities, professional organizations, mass media).[66] Although the controversy between the neo-liberal and state-interventionist camps dominated the ideological debate, social practice was controlled by neo-corporatist arrangements. In political economics, theories of the 'varieties of capitalism' worked out clearly the properties of the neo-corporatist regime.[67] This regime, in which organized interests exercise quasi-public functions, was particularly influential in the 1970s,[68] before being pushed back by the rising tide of neo-liberalism in the 1980s. Only after the major financial crisis was increased attention paid to it once more.[69]

The far-reaching influence of interest groups on politics, extending from sheer lobbyism to genuinely public functions of private actors, the institutionalization of labour co-determination in corporations, the control of markets through the self-regulation of business associations, the strong role of professional organizations in almost all social sectors—in the health service, sport, culture, science, education, the mass media—all

[65] Wielsch discusses access rights to information and develops the concept of a 'multilateral constitutionalism' that orients the constitution of knowledge not to the requirements of the economy, but also to those of other systems, particularly of science and art: Wielsch (2009) 'Epistemische Analyse des Rechts', 70; Wielsch (2008) *Zugangsregeln*, 31 ff.

[66] For a good elaboration, see Streeck and Kenworthy (2005) 'Theories and Practices of Neocorporatism'.

[67] Foreign observers saw this much more clearly than Germans who were blinded by the major ideological controversy between liberal and welfare state concepts and failed to take sufficient notice of the differences between the association-directed economy in continental Europe and its market-directed counterpart in the Anglo-American world. On varieties of capitalism, Hall and Soskice (2005) *Varieties of Capitalism*.

[68] Leading representatives: Streeck (2008) 'Korporatismus'; Streeck and Schmitter (1985) *Private Interest Government*; Schmitter (1974) 'Still the Century of Corporatism?'.

[69] 'Apart from the two extremes of communism and capitalism, there are alternatives, for example the Scandinavian or the German models. The Chinese system has brought prosperity to the population, however at the price of gross violations of human rights. The German welfare state model has on the other hand functioned very well. It might also be a model for the new US administration.' Stiglitz, Spiegel-Online 2 April 2009. For similar comments from an economic history perspective, Abelshauser (2003) *Kulturkampf*, 177 ff. In contrast, over-hasty predictions that globalization means the end of neo-corporatism, Streeck (2009) *Re-Forming Capitalism*, 230 ff. have turned out to be wrong.

these neo-corporatist arrangements institutionalize the representation of various social interests. In each case they are based on a special constitution which contains constitutive rules for self-regulation and at the same time permits the private associations to function as participants in the broader political process.

It is with a remarkable realism that neo-corporatist theories analyse the competition between state regulation and social self-regulation. In contrast to the rigidities of the authoritarian state corporatism of the 1930s, they submit, it is only freely formed social groups, without compulsory membership and without comprehensive state regulation, that are capable of making productive use of the interaction of spontaneous and organized elements within social subsystems.[70] Although co-determination was institutionalized by state legislation, they make the point against the welfare state's fantasies of omnipotence, that co-determination cannot work successfully without the self-foundation and self-regulation of labour unions and corporations. Finally they turn against the frequent criticism of the associations' political influence and they emphasize auto-constitutional elements in the mediation of interests, which reflects the functional differentiation of society within politics.

At the same time neo-corporatist theories keep their distance from constitutional economics. While also stressing the self-foundation of social institutions, neo-corporatist concepts do not however engage in the artificial assumptions of rational choice. Moreover they argue that the influence of social self-regulation depends to a very large degree on its protection by the state constitution. And they account for the role of formal legal rules. The law places the spontaneous organization of employee interests on a permanent footing so that their influence on business decisions can be stabilized relatively independently of market and power fluctuations.

The 'triangular constitutionalization' of social subsystems—a division of labour between their self-foundation in society, the constitutional interventions of the state, and the stabilizing role of the formal law—may be considered as the important practical and theoretical contribution of neo-corporatism. Co-determination is the paradigm for the intricate interaction of societal constitutions and their external constitution through politics and law. State co-ordination through statutory laws

[70] An informative comparison between authoritarian and societal corporatism in Williamson (1985) *Varieties of Corporatism*, 137 ff.

is closely co-ordinated with social self-organization in corporations and trade unions, and with the courts constantly readjusting the balance.

The Achilles heel of neo-corporatism was of course always the internal constitution of the large social organizations, whose lack of representivity and democratic legitimacy constantly made them a target for criticism.[71] It is at this very point that complementary theories of 'deliberative-participatory polyarchy' come in, stressing not just the political relevance of civil society, but also attempting to discover their democratic potential and to design procedures of civic participation.[72] In parallel fashion, theories of civil society have developed a constitutional programme for the modern 'organizational society': 'to restore limited government and devolve the minutiae of governance to civil society, whose organizations are to be politicized and turned into "constitutionally ordered democratically self-governing associations".'[73]

2. *Societal constitutionalism*

David Sciulli developed the concept of 'societal constitutionalism', which concentrates on another weak point of neo-corporatism.[74] Neo-corporatism is far too beholden to the dualism of politics and economics and to a large extent ignores other social sectors. As the repeatedly used term of 'interest mediation' suggests, it focuses too narrowly on the relations between institutionalized politics and the economy. According to its self-understanding, neo-corporatist arrangements transform trade associations and labour unions into participants in the political system and turn their institutionalized interest mediation into political decisions. It underestimates the autonomy of other social subsystems which makes them relatively distant from institutionalized politics. At the same time the concept is too close to the economy and takes only trade associations, corporations, and trade unions into account. What is missing is to respecify neo-corporatist institutions in other independent logics in society. Societal constitutionalism in fact corrects this deficit, because it is aimed from the outset at society in all of its sub-areas.

Starting with the dilemmata of rationalization in modernity, keenly analysed by Max Weber, Sciulli attempts to identify counter-forces which

[71] In detail Teubner (1978) *Organisationsdemokratie und Verbandsverfassung*.

[72] Dorf and Sabel (2003) *Constitution of Democratic Experimentalism*.

[73] Hirst (2000) 'Democracy and Governance', 28. See also Black (1996) 'Constitutionalising Self-Regulation'.

[74] Sciulli (2001) *Corporate Power in Civil Society*; Sciulli (1992) *Theory of Societal Constitutionalism*; Sciulli (1988) 'Foundations of Societal Constitutionalism'.

would work against the massive evolutionary drift towards an increasing authoritarianism. This drift is pushed by four impulses:

(1) fragmentation of action logics results in escalated differentiation, pluralization, and reciprocal compartmentalization of separate spheres: each area of action in society develops its own formal rationality that is in insoluble conflict with the rationalities of other areas;
(2) dominance of instrumental calculation as the only rationality acknowledged in all areas: given the collision of rationalities in modernity, the logic of instrumental calculation alone is becoming generally accepted in economics and politics, but increasingly in other action sectors as well;
(3) comprehensive replacement of informal co-ordination by bureaucratic organization: increasingly, in all areas of life, formal hierarchically structured organizations staffed by experts are proliferating as promoters of formal rationalities;
(4) increasing confinement in the 'iron cage of modernity': particularly outside politics, formal organizations are proliferating within different social areas, leading to a comprehensive rule-based orientation of the individual.

This drift inevitably ends, society-wide, in intensive competition for positions of power and social influence, in highly formalized social control, and in political and social authoritarianism. The only social dynamics that have effectively opposed this evolutionary drift in the past, and that will do so in future, are to be found according to Sciulli in the institutions of a 'societal constitutionalism'. It is crucial to institutionalize procedures of non-rational norms (non-rational in the sense of rational choice) that can be empirically identified in 'collegial formations', ie in the professions and other norm-producing and deliberative institutions. They are

> typically found not only in public and private research institutes, artistic and intellectual networks and universities, but also within legislatures, courts and commissions, professional associations and, for that matter, the research divisions of private and public corporations . . . and even the directorates of public and private corporations.[75]

The normative consequence is that the autonomy of such collegial formations is publicly legitimized, politically guaranteed, and legally secured.

[75] Sciulli (1992) *Theory of Societal Constitutionalism*, 80.

Drawing on the historical autonomy guaranteed to religious spheres, bargaining partners, and free associations, these guarantees should also be extended to include 'deliberative bodies within modern civil societies as well as for professional associations and sites of professionals' practice in corporations, universities, hospitals, artistic networks and elsewhere'.[76]

What essentially differentiates all of these variants of a constitutional pluralism from their welfare-state and economic rivals is the role that they assign to the state in social constitutionalization. Unlike constitutional economics, they do not limit the state to prescribing only minimal preconditions of an autonomous economic constitution. But nor does constitutional pluralism identify itself with the implementing of political goals throughout society, as envisioned by welfare state concepts. Rather, it concentrates the role of politics on specifying constitutional models for social sub-areas so that a close co-operation of state and social actors can be achieved to keep in check the centrifugal tendencies of functional differentiation. The state itself is assigned the task of integrating conflicting subsystems, however, not by making collective obligatory judgments, rather by co-ordinating the co-operation of public and private organizations.[77]

After the previous sobering experiences with the all-embracing political direction of social processes, this seems to be a thoroughly realistic and at the same time sophisticated reduction of the function of the state. It however requires institutional measures that oblige autonomous subsystems to co-operate with state institutions. This necessitates 'a constitutionalization of the relations between the organized social actors in order to protect their autonomy and to secure their mutual compatibility'.[78] The main aim is therefore that they become capable of negotiating and compromising, and become reliable partners for political co-ordination efforts.

The various concepts of a constitutional pluralism mutually complement each other in this co-operative orientation. For neo-corporatist strategies, which seek to transform social fields—the economy, science and technology, health, media—into collective actors so that they can function as partners for politics, the difference between function system and formal organization represents a serious problem. Function systems themselves are capable neither of action, nor negotiation, nor communication. They must be substituted by formal organizations that possess

[76] Sciulli (1992) *Theory of Societal Constitutionalism*, 208.

[77] In this context, Helmut Willke has developed the most sophisticated theory, Willke (1992) *Ironie des Staates*; Willke (1995) *Systemtheorie III*.

[78] Willke (1992) *Ironie des Staates*, 358.

these abilities as collective actors, even if they cannot strictly represent the full area that they are supposed to.[79] It must however also be ensured that the numerous organizations of the functional area are sufficiently centralized via hierarchical umbrella organizations to make sure they can participate in neo-corporatist negotiations. In their turn, the 'deliberative-participatory polyarchy' strategies, with their demands to constitutionalize social institutions, aim at the internal problem-solving abilities of the collective actors. And the strategy of societal constitutionalism seeks to increase the deliberative ability of social institutions through the mechanism of collegial institutions.

Obviously, this complex arrangement is tailored to the special conditions of the nation state. The investigations of Wolfgang Streeck in particular have shown that constitutional pluralism has proven to be very successful, but that it is dependent on institutional constitutions that are only to be found in nation-state contexts.[80] This is above all because the state organizations have sufficient power and cognitive resources to manage the complicated process of co-ordinating diverging subsystems. These conditions are thus far only to be found in the nation state. Similarly, on the side of the participating social institutions, there are conditions that are only present in the nation-state context: the networking of social organizations, their willingness for long-term co-operation, the principle of generalized reciprocity, and the acceptance of short-term restrictions in expectation of future benefits. Whether, under globalization conditions, the equivalents of such a constitutional pluralism can be brought into being, is an open question. However, the fundamental problem to which societal constitutionalism reacts will have become clear: How is it possible to increase external pressure in order to stem the negative externalities of autonomous subsystems by means of their internal self-limitation? This problem might, under the conditions of globalization, become even more acute than in the nation state.

[79] Luhmann (1997) *Gesellschaft der Gesellschaft*, 843.

[80] Streeck (2009) *Re-Forming Capitalism*; Streeck and Kenworthy (2005) 'Theories and Practices of Neocorporatism'.

3

Transnational Constitutional Subjects: Regimes, Organizations, Networks

I. GLOBAL STRUCTURES

How does the situation change with globalization? Globalization has many aspects, but above all, it means that functional differentiation, first realized historically within the nation states of Europe and North America, now encompasses the whole world. Certainly, not all subsystems have globalized simultaneously, with the same speed and intensity. Religion, science, and the economy are well-established as global systems, while politics and law still remain mainly focussed on the nation state.[1] For the most part, their cross-border communications are organized through mere *inter*-national relationships while genuinely transnational political and legal processes, in which communications form direct global networks, without the need for intercession by nation-state actors, are only gradually emerging. International political relations, international public law, and international private law are only slowly being over-layered by transnational political and legal processes.

Due to this staggered globalization, the pressure to internally constitutionalize the globalized subsystems is all the greater as compared to their national counterpart. One reason is that their co-ordination problematic is exacerbated. When the function systems become global, thus freeing themselves from the dominance of nation-state politics, there is no longer an agency to set them limits, stem their centrifugal tendencies, or regulate their conflicts.[2] The constitutional question, however, is not merely one of co-ordination. Co-ordinating autonomous systems is only one part of the more comprehensive constitutional problematic

[1] Luhmann (1997) *Gesellschaft der Gesellschaft*, 145 ff., 806 ff.

[2] In detail on the co-ordination problems of different system rationalities in world society: Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1005 ff.; see also Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 494, 533.

resulting from their high autonomy.[3] Whether—and, if so, how—globalized subsystems will achieve a high degree of autonomy while there are no political-legal institutions capable of supporting this process and when, at the same time, nation-state politics even act to hinder the process with their territorial validity claims, is an additional constitutional problem. Here, the staggered nature of globalization produces a tension between the *self-foundation* of autonomous global social systems and their political-legal *constitutionalization*.[4]

In the nation state these two processes occurred simultaneously. Territoriality was the basis not only for the state constitution, but also for the constitutions of other social subsystems. Territoriality should be understood as a symbolic space for power relationships, not merely as a geographical concept.[5] Once power is established on the basis of physical force as the communication medium of politics, it takes shape not as an actual relationship between ruler and subject, but rather as an abstract, asymmetrical claim to authority within a territory, governing not only people but also material resources and interactions. This, in its turn, affects other autonomous subsystems, because the political-legal infrastructure supporting their autonomy remains linked to a particular territory.[6] Autonomous subsystems which have developed in long historical processes of self-foundation are, in principle, independent of territorial borders and depend only on the effective range of the means of communication. However, their political-legal constitutionalization is bound by territorial borders. While the growing independence of social subsystems is accompanied, stabilized, and strengthened and at the same time limited in its effects by the constitutional infrastructure provided by the politics and laws of the nation state, this process only works within the borders of the territorial state. Not only, then, do political constitutions claim validity within the borders of the nation state and are limited to it; the constitutions of the economy, social security, the press, the health service and, to some extent, science and religion do the same. This gives rise to a latent tension between function systems that are not limited by territorial borders and their constitutions which are limited by such boundaries.

[3] Prandini (2010) 'Morphogenesis of Constitutionalism', 312 ff.

[4] The conceptual dimensions of constitutions will be discussed in more detail in chapter 4, under I and III. At the moment we are identifiying new transnational constitutional entities: it is sufficient here to sketch out briefly the characteristics of constitution functions and processes.

[5] Sack (1986) *Human Territoriality*, 19, 31 ff.

[6] On the society-integrating role of territoriality, Preuss (2010) 'Disconnecting Constitutions from Statehood', 30 ff.

Economic communications are global, but economic constitutions are nationally based. Science makes a claim to universal truth, but scientific constitutions remain national. Unlike politics or law, admittedly, none of these subsystems has confined its self-foundation to a certain territory. Nevertheless, since political and legal support was provided solely within the borders of the nation state, most of the institutionalized communication of the subsystems took place within these borders.

This tension between self-foundation and constitutionalization of function systems, which already existed in the era of the nation state, has increased with the globalization of communicative media. Now national borders no longer function as meaningful dividers between social, economic, and cultural systems.[7] Global self-foundation and national constitutionalization are irrevocably drifting apart,[8] causing pressure to de-territorialize societal sub-constitutions. Yet the triangular constellation of politics-law-subsystem which, as shown in the previous chapter, bore the societal sub-constitutions in the nation state, has no counterpart in the global context. Its role in both enabling and limiting system autonomy remains unfulfilled.

This is particularly evident for the neo-corporatist arrangements discussed above. Because they drastically restricted the options available to social institutions, they could simultaneously allow them a larger measure of autonomy. But such a complex fine-tuning between societal organizations and political institutions cannot be repeated on a global scale. Moreover, the mutual trust and socio-cultural norm-consensus cannot be mobilized to the required degree.[9] Even at European level, where the European Commission, the European Trade Union Confederation and European trade associations experiment with a 'social dialogue', the expansion of neo-corporatism beyond the nation state has had only limited success.[10] At the global level, corporatist arrangements would be doomed to utter failure. The contradiction remains: the self-foundation of social subsystems is taking a global course, while only nation-state institutions are available to ensure their political-legal constitutionalization. This shifts the balance within the politics-law-subsystem triangle as the fundament of societal constitutionalism. Which constitutional subjects, then, will replace nation states to advance the constitutionalization of the

[7] Murphy (1996) 'Sovereign State System', 90.

[8] Copious empirical material on this in Sassen (2006) *Territory-Authority-Rights—From Medieval to Global Assemblages*.

[9] Streeck (2009) *Re-Forming Capitalism*, 93 ff.

[10] Evidence in Streeck and Schmitter (1991) 'From National Corporatism to Transnational Pluralism'.

global sectors? Can the system of international politics take on this role? Or will the global function systems develop their own constitutions? Or will they be replaced by other transnational configurations—regimes, formal organizations, networks, assemblages, or ensembles?[11]

II. SOCIAL CONSTITUTIONALIZATION BY THE STATES?

1. The UN Charter

Claims to constitutionalize world society *in toto* have been made primarily by the United Nations. The UN Charter, according to Jürgen Habermas, establishes a new constitutional order in which member states are no longer solely partners to international treaties, but rather 'together with their citizens, they can now understand themselves as the constitutional pillars of a politically constituted world society'.[12] According to this view, the UN Charter has developed beyond its original character as a mere treaty. Together with other fundamental international law treaties such as the International Convention on Human Rights, the Convention against Racial Discrimination, and the Rome Statute of the International Criminal Court, it has been transformed into a genuine constitution of the international community.[13] Relevant for our purposes is the claim of the United Nations to encompass not only international politics in the narrower sense, but also to govern the main problem areas of world society. The International Labour Organization (ILO), World Health Organization (WHO), UNICEF and other UN agencies, in particular, have made significant advances in developing constitutional norms for sub-areas in world society.[14]

For a polemical analysis these ambitions are nothing more than 'constitutional illusions' ie phantasms of a global state constitution.[15]

[11] Assemblages, configurations, constellations, and ensembles are, in contrast to regimes and networks, social entities with rather diffuse structures: on assemblages, Sassen (2006) *Territory-Authority-Rights—From Medieval to Global Assemblages*; on configurations, Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 517 ff.; on ensembles, Delmas Marty (2009) *Ordering Pluralism*.

[12] Habermas (2006) 'Does the Constitutionalisation of International Law Still Have a Chance?', 161. Pleading for a world constitution, Höffe (2005) 'Vision Weltrepublik'.

[13] Especially accentuated by Fassbender (2007) 'We the Peoples of the United Nations'; Fassbender (2005) 'Meaning of International Constitutional Law'; Dupuy (2002) 'L'unité de l'ordre'; Dupuy (1997) 'Constitutional Dimension'.

[14] On some exemplary developments of constitutional norms, Walter (2001) 'Constitutionalizing (Inter)national Governance'.

[15] Fischer-Lescano (2005) *Globalverfassung*, 247 ff. From a sociological perspective Stichweh (2007) 'Dimensionen des Weltstaats', esp. 34 f.

In fact, nation-state constitutional conceptions are uncritically transferred to global relations, burdening the UN with the impossible task of producing norms for a cosmopolitan constitution, as if it were simply an inflated nation-state collective. Here 'methodological nationalism', which acknowledges only states as elements in international relations presents an *obstacle epistémologique*. Even for world society it cannot overcome a state-centric view of constitutions.[16] A realistic assessment will refute such exaggerations, but will also have to acknowledge constitutional norms which do indeed emerge in the UN. While the UN has itself undergone a constitutionalization process, the result was certainly not a world constitution, but rather the more limited constitution of a formal organization. The UN has, in reality, created an organizational constitution, not a world constitution. When it attempts greater ambitions, these are at best political impulses for a constitutionalization playing out elsewhere. This is particularly true for the norms issued by the ILO, the WHO, UNICEF and the Human Rights Commission (OHCHR) for their particular issue areas.[17]

2. *Soft law of the states*

One striking example of how nation states act only as impulse-giver for societal constitutions is the interaction of 'private' and 'public' codes of conduct for multinational corporations.[18] In transnational contexts, the states play a markedly different role in corporate constitutions as compared to national contexts. The 'soft law' formulated in the UN Codes of Conduct for various global institutions cannot be compared to binding constitutional norms laid down by national parliaments and constitutional courts. It is particularly the high autonomy enjoyed by transnational corporations that has changed the relations between state

[16] Accurate criticism in Chernilo (2007) *Social Theory of the Nation-State*; Beck and Sznaider (2006) 'Unpacking Cosmopolitanism'; Wimmer and Glick-Schiller (2002) 'Methodological Nationalism and Beyond'.

[17] Critical of the world-constitutional law claim of the UNO: Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte', 46 f.

[18] U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003). In detail, Teubner (2012) 'Self-constitutionalization of Transnational Corporations?'.

and private collective actors compared to corporate constitutions within a nation state. One observer expressed this in strong terms:

> Contract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated becomes the regulator.[19]

The corporate constitutions in nation states could be divided, in terms of the interplay between public and private law, into three hierarchically-structured formations. National legislation constitutionalized social organizations according to neo-corporatist principles. Corporate constitutions were based on this primacy of state law, in the form of constitutional law and ordinary law. The state organized the neo-corporatist co-operation between capital, labour, and the state itself through rules governing participation on the supervisory board, rights of decision for works councils, and the norms of the collective bargaining system. State private and company law provided rules on liability and directed the 'company interest' to the interests of various stakeholders and to the common welfare. The state imposed severe restrictions on corporate activity in the areas of workplace health and safety, product quality, and environmental protection. The corporations' private ordering, in its turn, was clearly subordinate to state legislation. They regulated only those areas of autonomy granted to them by the state.

This nation-state hierarchy of norms can be described as an interplay between 'hard' and 'soft' law. The state established hard law—company law, co-determination law, employment law, and regulatory law—in the form of binding norms, with any breach subject to sanctions. Internal company rules, however, were merely a sort of soft law, not recognized as genuine legal norms, but only as expression of private autonomy. Their binding nature and their implementation depended on recognition by the state; they were subject to the control of the state courts.

Compared to this traditional hierarchy, transnational Codes of Conduct now do not fit into the time-honoured categories.

> Seen from classical legal concepts—if we understand law to be sanctioned commandments of state organs, for example—we can hardly comprehend a change in the way in which law exists, or in what it is. Legal concepts of legal science which are directed at an either/or validity are not suitable for detecting the sublime shifts in the way in which law fulfils its function and is experienced as meaningful.[20]

[19] Backer (2008) 'Multinational Corporations as Objects and Sources', 26.

[20] Luhmann (1985) *A Sociological Theory of Law*, 263.

The Codes reveal an inversion of the hierarchy between state law and private ordering. This reversal is striking in the hard law / soft law dimension. State rules are now only 'soft law', while the mere private ordering of transnational corporations has gained in strength to become 'hard law'.

For example, the rules of the UN Codes of Conduct cannot be compared to the nation-state corporate law. Originally, the 2003 'Draft Norms on the Responsibilities of Transnational Corporations' contained a supranational regulatory body that would directly regulate transnational corporations, issuing binding norms under international law, complete with sanctions.[21] This plan changed, however, following strong resistance from influential nation states and corporate lobbying. The version finally adopted contains only non-binding 'soft law' recommendations, with no legal sanctions to ensure that they are implemented.[22]

In contrast, internal company codes, which are indeed examples of non-state 'private ordering', are enforceable law, largely binding and accompanied by effective sanctions. Private law doctrine may still vehemently deny their genuine legal character, insisting that to be valid, norms must come from the state, while refusing to recognize the legal validity of private ordering.[23] Only gradually are legal concepts inspired by economic and sociological analyses gaining ground which, subject to certain conditions, ascribe the character of law to the private ordering of transnational actors.[24] Whether, however, they are law or not, internal company codes are directly binding on the actors involved and have effective sanctions that can be enforced by compliance departments established for that very purpose.[25]

This means that internal organizational rules are independent from state regulations. In complete contrast to the usual hierarchical relation between state and private norms, the state codes do not act as the legal basis for the validity of the private codes: these attain their validity from

[21] See references in Fn. 18.

[22] See, with intelligent commentary, Backer (2008) 'Multinational Corporations as Objects and Sources'.

[23] The way in which traditional doctrine treats private ordering is sharply criticized in Köndgen (2006) 'Privatisierung des Rechts', 479 ff.

[24] In a neo-monistic perspective Köndgen (2006) 'Privatisierung des Rechts', 508 ff.; Calliess (2006) *Grenzüberschreitende Verbraucherverträge*, 182 ff.; Michaels (2005) 'Re-State-ment of Non-State-Law', 1224 ff.; Schanze (2005) 'International Standards'. In a legal-pluralistic perspective Teubner (1997) 'Global Bukowina', 11 ff. The difference between the two is that neo-monism constantly seeks state inclusion norms (including unwritten ones!), while legal pluralism presupposes inclusion of private ordering in the global legal system.

[25] Herberg (2007) *Globalisierung und private Selbstregulierung.*

an independent combination of primary and secondary norms in the world of private ordering. They form a closed non-state system of normative validity that is hierarchically-structured within itself. At the top are the principles of the corporate constitution, followed by provisions on implementation and monitoring in the middle, while the lower level contains specific behavioural instructions. They thus produce their basis for validity in the form of their own constitutional norms. These subject internal company norms that regulate behaviour via the legal code (legal/illegal) to a procedure in which they are assessed according to the constitutional code (constitutional/unconstitutional).

In practice, therefore, the public Codes of Conduct produce only constitutional impulses, sent out by—admittedly influential—international organizations to the transnational corporations. Whether or not the impulses then crystallize into constitutional norms depends on the transnational corporations' internal processes, not on those of the states.

3. International public law and global administrative law

Even the much-discussed 'constitutionalization of international law'[26] plays only a subordinate role when it comes to the constitutionalization of world societal sub-areas outside of international politics. Three norm complexes have, as a matter of fact, constitutional properties: *jus cogens*; norms with *erga omnes* effect; and human rights. Peters convincingly draws up five criteria to demonstrate the constitutional quality of human rights: (1) they limit the sovereignty of individual states; (2) they make a catalogue of fundamental values universally binding; (3) they establish a hierarchy of norms; mandatory higher-order law takes precedence over lower-order law; (4) they are not only programmatic, but have the status of positive international law with constitutional priority; (5) they are the argumentative basis for the judicial extension of international constitutional law.[27] As an expression of universal values, they do not need the consensus of individual states and are thus binding on even non-consenting states. Such constitutional norms emerge in the transformation of international law from a mere treaty order of sovereign states into

[26] On the recent discussion: Dunoff and Trachtman (eds) (2008) *Ruling the World?*; de Wet (2006) 'International Constitutional Order'; Peters (2006) 'Compensatory Constitutionalism'; Frowein (2000) 'Konstitutionalisierung des Völkerrechts'. On the precursors and their political and theoretical background, Rasilla del Moral (2011) 'At King Agramant's Camp', 583 ff.

[27] Peters (2006) 'Compensatory Constitutionalism', 585 ff.; the same conclusion using somewhat different criteria in Gardbaum (2008) 'Human Rights and International Constitutionalism'.

an independent legal order which, in the *'ordre public transnational'*, creates its own foundations as constitutional law. This constitutionalization now allows international law to do something unthinkable for a mere treaty order: to establish binding norms even against the express will of the parties to the treaty, legitimated not via the state treaties, but via the orientation of law towards the public interest.[28]

But for all the significance of this 'constitutional law in the making', we must not forget the sectorial nature of this development. The three norm complexes limit only international agreements and, as such, function exclusively within international politics in the narrow sense. Even Mattias Kumm, who has provided the strongest theoretical arguments so far for an international constitutionalism based on universal principles, admits that these constitutional principles—legality, subsidiarity, participation, responsibility, and fundamental rights—relate only to international politics and do not amount to a total constitution for the world or the many constitutions' other global sectors.[29] It is hardly surprising then that these constitutional principles take a peculiarly indifferent attitude to the *lex mercatoria* and other private orderings.[30] International constitutional law is not capable of achieving what the welfare states have managed in nation states, ie to create constitutions beyond politics.

'Global administrative law' is the latest candidate for the constitutionalization of world society.[31] In 2004, more than 2,000 global regulatory bodies, in the form of international or intergovernmental organizations, were listed.[32] Unlike the organizational law of the UN, or international law generally, both of which function within the context of institutionalized politics, the norms of this administrative law indeed apply directly to their relevant global subsystems. Kingsbury, in particular, has clearly demonstrated the 'social' nature

[28] Nowrot (2007) 'Transnationale Verantwortungsgemeinschaft', 59 ff.; Seiderman (2001) *Hierarchy in International Law*, 123 ff., 284 ff.

[29] Kumm (2007) 'Constitutional Democracy Encounters International Law'; Kumm (2004) 'Legitimacy of International Law'.

[30] Typical of this indifference (nonetheless plagued by self-doubt) Walker (2010) 'Beyond the Holistic Constitution?', 300 ff.

[31] Programmatically Kingsbury, et al. (2005) 'Emergence of Global Administrative Law'. See also Esty (2006) 'Good Governance at the Supranational Scale'. Most of these authors avoid the language of constitutionalism and content themselves with general principles of administrative law, without adequately addressing the basis of their validity in the transnational sphere.

[32] Cassese (2005) 'Administrative Law Without the State', 671.

of global administrative law.[33] In the regulation of transnational issue areas, an increasing number of forms of 'private ordering' are being activated that cannot be subsumed under traditional 'public' administrative law. 'Regulatory power appears to be flowing up from states to international bodies and out from states to non-public actors like transnational corporations and elements of global civil society.'[34] Yet we must also realize that the constitutional norms—due process in regulation, notice-and-comment rules, obligations to consult experts, the principle of proportionality, respect of fundamental rights, etc.[35]—are themselves concerned ultimately with the internal constitutions of the regulatory agencies and cannot function as constitutional norms in the regulated spheres.

III. THE INDEPENDENT CONSTITUTIONS OF GLOBAL INSTITUTIONS

1. Constitutional fragmentation

In all three areas the ambitious demands placed by national constitutional lawyers (in particular Dieter Grimm) on a constitutional subject will not be met.[36] Constitutions that cover all areas of life—only nation states can live up to this expectation. At the same time, however, such high requirements misinterpret the very nature of these processes. Certainly, the developed constitutions of nation states attempt with comprehensive claims to organize the whole political community. But in the discrepancy between globally established social subsystems and a politics stuck at inter-state level, the constitutional totality breaks apart and can then only be replaced by a form of *constitutional fragmentation*.[37] This is reflected in the 'rapidly proliferating number of regulatory spheres in which specific

[33] Kingsbury (2009) 'International Law as Inter-Public Law'.

[34] Backer (2005) 'Multinational Corporations, Transnational Law', 107.

[35] Kumm (2007) 'Constitutional Democracy Encounters International Law'.

[36] Grimm (2005) 'Constitution in the Process of Denationalization'. Trenchant criticism of the premises of Grimm's constitutional therory in Preuss (2010) 'Disconnecting Constitutions from Statehood', 42.

[37] The fragmentation of the constitutional development is particularly accentuated by Klabbers (2009) 'Setting the Scene', 11 ff.; Gardbaum (2008) 'Human Rights and International Constitutionalism'; Skordas (2007) 'Self-Determination of Peoples'; Fischer-Lescano (2005) *Globalverfassung*, 247 ff.; Teubner (2004) 'Societal Constitutionalism'; Walker (2002) 'Idea of Constitutional Pluralism'; Walter (2001) 'Constitutionalizing (Inter)national Governance'. The fragmentation thesis is supported from a sociological perspective by Sassen (2006) *Territory-Authority-Rights—From Medieval to Global Assemblages*.

regimes are being established and, as global regimes, are thwarting the local or regional autonomy of the nation state or territory'.[38]

> From these tensions between public and private, or local, national and global, fragments of a common law have emerged, blurring the categories that separated universalism from relativism.[39]

In the sea of globality, only islands of the constitutional will emerge. The new constitutional reality is characterized by the co-existence of independent orders, not only of states, but at the same time also of autonomous non-state social structures.[40] The comprehensive structural coupling of politics and law, observed by Luhmann in the constitutions of nation states, clearly has no equivalent at the level of world society.[41] At the same time, occasional couplings can be seen as and when social problems demand. Constitutional norms are developed ad hoc when a current conflict assumes constitutional dimensions and requires constitutional decisions.[42] The comprehensive claim to structure society which is typical for political constitutions within a nation state is then reduced in two ways. The political system of world society itself has no all-embracing constitution. Instead, constitutional fragments have been developed for particular policy areas: the UN and its sub-organizations, as well as some sub-areas of international law and global administrative law. For now there are practically no signs that the constitutional claims of international politics will be expanded to other social sub-areas, as was the case for the nation state. As already mentioned, we can speak at most of constitutional impulses, emanating from the political system in the direction of other sub-areas of global society.

Will the subsystems of global society be able to maintain their processes of self-foundation, without political-legal constitutional support? Will the autonomy that has developed worldwide in the economy, science, health, the communicative media, etc., be able to survive in the long term without legal-political constitutionalization? Are they therefore destined never to reach their full potential? Alternatively, will they have to rely on nation-state law, even though it can only provide a confusing variety of

[38] Stichweh (2007) 'Dimensionen des Weltstaats', 35. A thorough analysis of various fragmented transnational constitutions—UN, EU, WTO, HR—appears in Dunoff and Trachtman (eds) (2008) *Ruling the World?*

[39] Delmas Marty (2009) *Ordering Pluralism*, 13.

[40] Hurrell (2007) *Global Order.*

[41] Luhmann (2004) *Law as a Social System*, 487 f.

[42] Renner (2011) *Zwingendes transnationales Recht*, 233 ff.

territorially limited constitutional norms with conflicting claims? Or will they have to wait for a gradual convergence of national constitutional standards? Here we come up against a strange new phenomenon: *the self-constitutionalization of global orders without a state*.[43] The subsystems of world society are beginning to develop their own constitutional legal norms. As indicated by Neil Walker, there are now signs of a constitutional pluralism within global society.[44] When pressing social problems are building up within global sectors, social conflicts emerge that result in individual legal norms of a constitutional quality. These norms then become aggregated, over time, into the constitutions of the subsystems of world society.

This view is not, as is often claimed,[45] merely the result of theoretical considerations, rather it is based on empirical observations. A large-scale empirical study was conducted over several years investigating law creation in non-state institutions. The results were summarized with barely concealed surprise:[46]

> In some respects, the quasi-legal orders of world society themselves show constitutional characteristics. In addition to different social and ecological standards and to existing mechanisms of control and implementation, superior norms develop that define where the decision-making power should be located, how violations should be handled, and how third parties should be included. By analogy to state constitutions, private regulations embody mechanisms of self-restraint to reduce intrusions on other actors and other domains.

It is difficult to predict what follows from the relative distance between these societal constitutions and state constitutions.[47] At any rate, a layer of constitutional norms is emerging which do not follow the dominant 20th century trend, whereby law was instrumentalized for the purposes of state politics. This sort of constitutional law, made up by global fragments, will be less dependent on the power of states, less marked by state policies and the ideologies of political parties. This relative independence, however, will be replaced by a new dependence on the specific power

[43] Comprehensive evidence on the constitutions of 'private' global subsystems in chapter 1, Fns. 12 and 13.

[44] Walker hesitates, or is at least ambivalent here, in seeing 'private' regimes as part of this global constitutional pluralism, Walker (2002) 'Idea of Constitutional Pluralism'; more detail in Walker (2010) 'Beyond the Holistic Constitution?', 300 ff.

[45] Especially accentuated by Wahl (2010) 'In Defence of Constitution', 233 ff.

[46] Dilling et al. (2008) *Responsible Business*, 8.

[47] Intelligent comments by Engi (2007) 'Gemachtes Recht', 58 f.

and interest constellations within the global fragments. Not only will the various partial rationalities exert their influence, which is, in principle, unavoidable and which should result in a greater responsiveness to social needs than the constitutional law laid down by state authorities. But there is also the risk that 'corrupt' constitutional norms may develop from an excessively close coupling of sub-constitutions to partial interests.[48] This is a serious challenge to legal autonomy. Will the law be able to maintain its autonomy vis-à-vis the corrupting influences of the focal social system, which affect its proprium? One of the civilizing achievements of the nation-state constitutions has been that they have built up the connections between politics and law in such a way that the legal process is relatively independent of political influences and exercises, in its turn, a moderating influence on politics through the rule of law. Whether or not the fragments of a global constitutional law will withstand this comparison will depend, not least, on external influences, ie from national courts, from institutionalized politics, and from civil society.[49]

2. Constitutions of international organizations

Strikingly, although these processes are set in motion by functional differentiation, the constitutional norms are not directed towards the major function systems themselves. Financial and product markets are fully globalized, scientific communication takes place at a global level, the system of communicative media, news agencies, television, and the Internet all transmit news across the whole world. However, there is no sign of a global economic constitution, scientific constitution, or media constitution *sui generis*. It is not function systems that are constitutionalized via decision-making premises or fundamental rights. As has been experienced with neo-corporatist constitutions within nation states, the function systems themselves lack the capacity to act, become organized and thus, to become constitutionalized.[50] Global constitutionalization is directed rather at social processes 'beneath' the function systems, at

[48] On such corrupting influences using the example of the *lex mercatoria* see Teubner (1997) 'Global Bukowina', 19. It is an open question as to how much of a remedy would be provided by the development of an '*ordre public transnational*'. On the first approaches in international arbitration, Renner (2011) *Zwingendes transnationales Recht*, 91 ff.

[49] National courts will be especially influential here if they make the recognition of private ordering dependent on whether they comply with the rule of law and with democratic principles. Emphasized by Joerges (2011) 'New Type of Conflicts Law', 483 ff.

[50] Section IV.2 below considers the extent to which constitutionalization presupposes collectivity.

formal organizations and at contractual arrangements. Only indirectly, will it be possible to constitutionalize the global function systems.[51]

Primary candidates for independent constitutions are the transnational organizations, that is the international organizations of the state world, the transnational corporations and global non-governmental organizations. Regardless of whether they were formed through international treaties, like the World Trade Organization (WTO), or through private ordering, like the corporate codes of multinational corporations, their self-constitutionalization can be observed everywhere, insofar as organizations tend to emancipate from the original agreement of their founding members.

One well-known example is the constitutional emancipation of the WTO. Their constitutionalization took four different directions: (1) juridification of conflict resolution, (2) the most favoured nation clause, (3) priority of trade rules over political principles and (4) the option of direct effect. Most important was the juridifacation of conflict resolution. Originally, simple 'panels' were set up to mediate conflicts, via diplomatic negotiation, between member states and the WTO regarding the interpretation of the Treaty. Over time, however, these panels have developed into full-blown courts, with far-reaching competences, with their own decision-making hierarchy and better enforcement possibilities.[52] They take decisions not only on questions of ordinary law, but also constitutional norms which define external relations of the WTO to nation states.[53]

Constitutionalization is not restricted to organizations under public international law. Non-state organizations have constitutionalized themselves on the basis of private ordering. They have an even greater need for constitutionalization, since the constitutional norms of international law in principle do not apply to them. The regulatory agency of the Internet, ICANN, established under Californian law as a private association, is a case in point. Over time, it has developed functional and territorial

[51] In this sense Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 522, 524, speaks of global constitutions of function systems as 'constellations' or 'configurations'.

[52] Zangl (2008) 'Judicialization Matters'; Peters (2006) 'Compensatory Constitutionalism'. For a theoretical analysis of these developments, Skordas (2007) 'Self-Determination of Peoples'.

[53] On the constitutional problematic of the WTO Carmody (2008) 'Theory of WTO Law'; Dunoff (2006) 'Constitutional Conceits'; Cass (2005) *Constitutionalization of the World Trade Organisation*; Howse and Nicolaidis (2003) 'Enhancing WTO Legitimacy'; Picciotto (2005) 'WTO's Appellate Body'. Petersmann (2006) 'Human Rights, Constitutionalism and the WTO'; Petersmann (2000) 'WTO Constitution and Human Rights'; Mortensen (2000) 'Institutional Requirements of the WTO'.

representation, forms of separation of powers, and an effective 'jurisdiction' over domain name allocation. This gives rise to 'governance questions' of 'constitutional significance'.[54] The ICANN panels, when asked whether fundamental rights also applied to the Internet, did not refer to national constitutions, which would then only apply to national segments of the Internet, but instead developed their own autonomous fundamental rights standards.[55] In the 'companynamesucks' cases, where corporations try to prevent critique of their policies, the ICANN panels develop Internet-specific standards on freedom of opinion.[56]

'Corporate constitutionalism' is the most prominent case of constitutional law created through multinational corporations' private ordering. Long-term disputes with local organizations, social movements, non-governmental and international organizations have all obliged them to develop 'codes of conduct' that act as functional equivalents of national corporate constitutions.[57] 'These represent the glimmerings of the constitution of multi-national enterprises as an autonomous community of entities that have begun to regulate themselves through the construction of systems of governance independent of the states.'[58]

And even global standards organizations, such as the ISO, are now freeing themselves from their national counterparts and developing autonomous constitutional law. They produce norms for the representation of national bodies, experts and interest groups, norms of due process and institutionalized discourse, as well as substantive principles of decision-making.[59] Other forms of constitutional self-regulation have been developed by corporate groupings such as Social Accountability International which, as an NGO representing various interests, has developed labour standards (SA 8000) guided by ILO conventions and the UN Declaration of Human Rights.[60] A further example is the Caux Round Table (CRT), 'an international network of principled business leaders working to promote a moral capitalism'.[61]

[54] Post (1997) 'Governing Cyberspace'.

[55] Karavas (2006) *Digitale Grundrechte*, 136 ff.

[56] Renner (2009) 'Towards a Hierarchy', 551 f.

[57] Esp. Anderson (2009) 'Corporate Constitutionalism'; Abbott and Snidal (2009) 'Strengthening International Regulation'; Herberg (2007) *Globalisierung und private Selbstregulierung*; see also the empirical contributions in Dilling et al. (eds) (2008) *Responsible Business*.

[58] Backer (2006) 'Autonomous Global Enterprise', 567.

[59] Schepel (2005) *Constitution of Private Governance*, 403 ff.

[60] Social Accountability International, SAI Governance Structure, <http://www.saintl.org/index.cfm?fuseaction=Page.viewPage&pageId=594&parentID=472 2006>.

[61] Caux Round Table, About Us, <http://www.cauxroundtable.org/about.html>.

Last but not least, the *lex mercatoria*, the self-generated law governing the global economy, has developed an internal hierarchy of legal norms, at the top of which stand constitutional norms, principles, procedural rules, and fundamental rights, all under the umbrella term *'ordre public d'arbitrage international'*.[62] Detailed case law analyses have revealed how the arbitration bodies produced a whole range of 'self-generated constitutional norms of international arbitration'.[63] Even the awards of the politically contested international investment arbitration show signs of this development. Against the intentions of their founders, the panels have begun—under the impression of massive public protest—to develop constitutional principles—social obligations of private property, rule of law principles, and proportionality rules.[64]

3. Regime constitutions

It would, however, be over-hasty to ascribe constitutions solely to international organizations, as the literature on international institutions usually does.[65] Beyond their internal decision-making processes, their external relations with various 'constituencies' are becoming the constitutional target. Of course, strengthening the rule of law in internal decisions, establishing internal rules and guidelines, providing for supervisory bodies, compliance officers, and quasi-judicial functions is of constitutional importance; equally important is monitoring of the decisions of international organizations through national and international courts.[66] But constitutionalizing their internal structure does not suffice. To come to grips with ICANN's private ordering, it is not enough to account only for its formal organization as a private association registered under Californian law. ICANN in fact functions through a whole network of contracts which forms a comprehensive regulatory system beyond its formal organization. ICANN contracts with the organization VeriSign to act as domain administrator and

[62] Details in Collins (2012) 'Flipping Wreck'; Renner (2011) *Zwingendes transnationales Recht*, 92 ff.; Dalhuisen (2006) 'Legal Orders and their Manifestations'; Voser (1996) 'Mandatory Rules of Law'. A careful analysis of the genuine legal character of the *lex mercatoria* in Linarelli (2009) 'Analytical Jurisprudence', 184 ff.

[63] Renner (2009) 'Towards a Hierarchy', 554.

[64] For detailed case analyses, Schneiderman (2011) 'Legitimacy and Reflexivity in International Investment Arbitration'; Renner (2011) *Zwingendes transnationales Recht*, 126 ff.

[65] Amerasinghe (2005) *Principles of the Institutional Law*; Schermers and Blokker (2004) *International Institutional Law*; Alvarez (2001) 'Constitutional Interpretation'.

[66] On this Klabbers (2009) 'Setting the Scene', 25.

VeriSign, in turn, contracts with national domain administrators. The national domain administrators contract with Internet users stipulating domain name allocation via standardized contracts, which refer to the Internet regulation of the Uniform Domain-Name Dispute-Resolution Policy (UDRP). Moreover, ICANN is associated with governmental bodies via contractual relations, which allows the US government to influence this private governance. The ICANN constitution thus covers a complex network of contracts that cannot be equated with its formal organization. Nor can it be identified with the sum of the bilateral contracts: individual contracts and formal organizations are forming a whole regulatory network aimed at achieving one overriding purpose.[67]

In corporate constitutional law the codes of conduct are not at all confined to the boundaries of the individual transnational corporation. Rather, the corporate constitution governs a legal space made up by various collective actors which act within a closed network. Corporate codes have long since burst the bounds of individual corporations. They now apply to large corporate groups which may often cover thousands of individual subsidiaries. Moreover, pressure from the general public and from civil society organizations has extended the codes' scope of application even beyond group boundaries. Via contracts corporate groups require their suppliers and distributors to meet the standards of their corporate codes and they use these contracts to introduce effective surveillance and sanctions systems.[68]

It is thus not sufficient to refer only to international organizations as the new constitutional subjects. Nor is it sufficient to include only the internal structures of their regulatory contracts and networks. Rather, it is the concept of 'transnational regimes' that defines best the vectors of the constitutionalization process. Transnational regimes, commonly defined as a 'set of principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given cause-area',[69] are more

[67] On ICANN governance see Renner (2011) *Zwingendes transnationales Recht*, 169 ff.; Viellechner (2007) 'Können Netzwerke die Demokratie ersetzen?', 42f.; Hutter (2003) 'Global Regulation of the Internet Domain Name System'.

[68] An illuminating case study on the GAP and its supply and distribution system, Backer (2008) 'Multinational Corporations as Objects and Sources', 10 ff. For governance through networks in general, Anderson (2009) 'Corporate Constitutionalism'.

[69] Krasner (1982) 'Structural Causes and Regime Consequences', 186; Keohane and Nye (2001) *Power and Interdependence*, 5, 19: 'sets of governing arrangements' that include 'networks of rules, norms, and procedures that regularize behavior and control its effects'. On 'Ensembles of—formal and informal—institutions, organization, actors, relations, norms and rules' see Grande et al. (2006) 'Politische

than just formal organizations, contracts, or networks. Admittedly, the nature of this added value is not made entirely clear in the debate about regimes. It is the relevant environment that must be taken into account in addition to the internal structure of the organizations, contracts, or networks.[70]

It is helpful to distinguish between the centre and the periphery of a regime. At the centre of a regime, there is often a formal organization (or several formal organizations with contractual relations) with professional core competencies. But the regime also has a periphery, consisting of the interactions of the centre with its various constituencies. A regime constitution will then govern both the internal relations of the formal organization, contracts, or networks and the external relations in their relevant environmental sectors.[71]

IV. TRANSNATIONAL REGIMES AS CONSTITUTIONAL SUBJECTS?

Can, however, transnational regimes become suitable constitutional subjects, ie are they social institutions capable of having their own constitutions? Constitutional lawyers have raised this question and answered it with a resounding 'no!'[72] In their view, only nation states can have their own constitutions—not international organizations or transnational regimes, and certainly not 'private' transnational regimes. The so-called constitutions beyond the nation state, they argue, lack a social substrate that could provide a suitable object for a constitution. These critics seek to dismiss their constitutionalization by producing an impressive list of shortcomings. Transnational regimes lack the following features that would provide the basis for an authentic constitution:

— a 'demos', the collective body behind the constitution;
— the dialectic of *pouvoir constituant/pouvoir constitué* ;
— the legitimacy arising from the democratic consensus of all stakeholders;

Transnationalisierung', 123. For a useful typology of regimes, Young (2011) 'Introduction: The Productive Friction Between Regimes', 4 ff.

[70] Aiming in this direction Baecker (2009) 'Power to Rule the World'; White (1992) *Identity and Control*, 226.

[71] This approximates to the ideas of Simma (2009) 'Universality of International Law', 275.

[72] Loughlin (2010) 'What Is Constitutionalisation?', 64 f.; Grimm (2009) 'Gesellschaftlicher Konstitutionalismus'; Grimm (2005) 'Constitution in the Process of Denationalization', 460 ff.; Wahl (2002) 'Leitbegriff oder Allerweltsbegriff'.

— the infrastructure of a political pluralism;

— the surplus of meaning of a collective founding myth.[73]

We should not, it is true, indiscriminately treat transnational regimes and nation states as constitutional subjects. Neither, however, if we wish to avoid the trap of methodological nationalism, should we accept the dogma that only nation states are constitutional candidates. We should instead modify the prerequisites for constitutional substrates. Firstly, the constitution should be disconnected from statehood, so that transnational issue-specific regulatory regimes may be considered candidates for constitutionalization.[74] Secondly, the constitution should be decoupled from institutionalized politics, thus allowing other areas of global civil society to be identified as possible constitutional subjects. Thirdly, the constitution should be decoupled from the medium of power, thus making other media of communication possible constitutional targets.[75] But despite these significant changes, we should continue to use the concept 'constitution'. Alternative terms, such as 'meta-regulation', 'indispensable norms', or 'higher legal principles' are inadequate to comprehend the complexity of issues that the concept 'constitution' covers.[76] In empirical and in normative terms, there are lessons to be learnt from the rich history of nation-state constitutions. We should indeed start with the concept of 'constitutional subject', tailored to the nation state, and then generalize and respecify it to both its transnational and its civil society equivalents. Constitutional sociology can help us with both these tasks, as it has developed the clearest analysis to date of the conditions surrounding the constitution of social systems and the contributions made by legal norms to this process.[77]

[73] In detail on these objections Wahl (2010) 'In Defence of Constitution', 232 ff.; Dobner (2010) 'More Law, Less Democracy?', 148 ff.; Vesting (2009) 'Politische Verfassung?', 617 ff.; Somek (2008) *Individualism*, ch 8; Haltern (2003) 'Internationales Verfassungsrecht?'.

[74] In detail on this decoupling Preuss (2010) 'Disconnecting Constitutions from Statehood', 30 ff.; Brunkhorst (2005) 'Demokratie in der globalen Rechtsgenossenschaft', 332 ff.; Möllers (2000) *Staat als Argument*; Hofmann (1999) 'Von der Staatssoziologie'.

[75] Even advanced constitutional sociologists such as Thornhill do not carry out this decoupling of constitution and power, creating a peculiar blind spot as regards the constituting and limitation of communicative media other than power. Thornhill (2011) 'Constitutional Law from the Perspective of Power', 247.

[76] The alternative terms usually only reflect the hierarchy of norms and are indifferent to the constitution's other functions and structures (described in more detail in chapter 4). On the rather unsatisfactory reduction of the constitutional problem to meta-regulation, Bomhoff and Meuwese (2011) 'Meta-Regulation'; on indispensable norms Luhmann (2008) 'Are There Still Indispensable Norms in Our Society?', 27 ff.

[77] More detail on this generalization and respecification of the constitution for various social areas in Prandini's analyses, oriented towards Parsons' theory, Prandini (2010) 'Morphogenesis of Constitutionalism', 310 ff.

1. Pouvoir constituant/constitué

Whether the paradoxical relation of *pouvoir constituant/pouvoir constitué*, underlying the nation-state constitution, also applies to non-state social orders is certainly the most difficult question.[78] Do private transnational regimes also experience the phenomenon described by Jacques Derrida as a 'mystical recursivity', whereby a constituent power, undecided between performativity and constativity, founds itself while it simultaneously presupposes its own existence?[79] Or does the nation have a monopoly because other contexts do not meet the conditions for a 'polity'? We should maybe avoid the term 'self-determination' when discussing other social sub-orders or we should use a purely 'functional' definition of the term 'constitution'.[80] Or maybe we should abandon self-determination as 'emphatic republicanism' and see it as only one of several possibilities for constitutional foundation.[81] The alternative would be to keep the principle of collective self-determination for non-state constitutions, but to redefine it.[82]

If we move away from a formal juridical viewpoint, which reduces the constituent power to the question how to organize a constituent assembly in terms of members, competences, and procedures,[83] we must determine which social phenomenon is meant by 'constituent power'. In constitutional theory there is great controversy as to the substrate of the '*pouvoir constituant*'. The options are manifold:

[78] On this in detail Kalyvas (2005) 'Popular Sovereignty'; Michelman (1998) 'Constitutional Authorship'; in particular from the German discussion, Böckenförde (1991) 'Verfassungsgebende Gewalt des Volkes'.

[79] Derrida (1984) *Otobiographies: l'enseignement de Nietzsche et la politique du nom propre*, 13. On the foundational paradoxes in transnational contexts Buchanan (2008) 'Reconceptualizing Law and Politics', 7 ff.

[80] This is the proposal of Renner (2011) *Zwingendes transnationales Recht*, 232 f., who only intends to use the term constitution 'functionally' in non-political contexts, reducing it to two elements: structural coupling and the hierarchy of norms, see chapter 4, under V.2.

[81] eg Kumm (2006) 'Beyond Golf Clubs'. Kumm replaces the concept of collective self-determination as the highest constitutional principle with a recourse to the 'republican principles' contained in original constitutional deeds. This well-considered alternative is however faced by the problem of the merely structuralist premise of founding through 'principles' that does not sufficiently address the processuality involved in the formation of principles. If we look closely at these processes, however, it becomes clear that, historically, reflection procedures maturing in politics generate these 'republican principles'. Then the term of a constituent 'power' also once again makes sense in sociological terms.

[82] Indeed, Skordas (2007) 'Self-Determination of Peoples' re-defines self-determination, moving from ethnic via territorial to functional configurations. Similarly Anderson (2011) 'Counterhegemonic Constitutionalism' who identifies transnational social movements as phenomena of a global *pouvoir constituant*.

[83] eg Herdegen in: Maunz/Dürig (2010), Grundgesetz, Art. 79 Rn 7–12.

- individuals constituting a politically active citizenry;
- the entire 'people' as a pre-constitutional community ('We the people') constituting a 'polity';
- pre-political relations that then take on a genuinely political quality;
- relations of facts that are then transformed to norms by the use of a 'border concept';
- power relations between groups in society whose compromise on a constitution is then elevated ideologically;
- semantic fictions which provide a founding myth for imagined communities.[84]

None of these suggestions is particularly satisfactory from the viewpoint of systems theory, which refuses to identify the *'pouvoir constituant'* with either individuals, or the entire population, or a simple power relationship between social groups. Systems theory opts for a phenomenon of social communication. Here it is suggested to understand the *'pouvoir constituant'* as a *communicative potential*, a type of social energy, literally as a 'power' which, via constitutional norms, is transformed into a *'pouvoir constitué'*, but which remains as a permanent irritant to the constituted power.[85]

To counter critics of systems theory, who predictably claim that this definition 'de-humanizes' the whole *pouvoir constituant*, we should say that this does not cut the link between the constitution and actual people. On the contrary, this link is re-established. Firstly, all anthromorphical identification of the *pouvoir constituant/pouvoir constitué* with the 'people', the 'community', the 'collective' or 'group' is clearly misleading. For what is the effect of constitutionalization? It structures communications, but it certainly does not form people. We should leave this noble task to medical doctors, psychologists, and priests. However, it makes sense to connect the *pouvoir constituant* to people since this draws attention to the energy

[84] A more recent controversy in constitutional theory on this question appears in the collection by Loughlin and Walker (2007) *Paradox of Constitutionalism*. A good discussion of classical assumptions in Möllers (2003) 'Verfassungsgebende Gewalt'. On global constitutionalism as entrenching the prerogatives of power elites, Hirschl (2006) 'New Constitutionalism'; Hirschl (2004) *Towards Juristocracy*. On semantic fictions, Vesting (2012) 'Ende der Verfassung?' (manuscript), 8 ff.

[85] It is possible here to link to Menke's thoughts on 'force', ie to think of the difference of the social and psychic systems as an effect which is developed through the force that demands their unity. Menke (2011) 'The Self-Reflection of Law and the Politics of Rights'. The concepts of *multitudo* and *potentia* are not dissimilar in Hardt and Negri (2004) *Multitude*, and the terms *Souveränität*, *Territorialität*, *Volk* in Preuss (2010) 'Disconnecting Constitutions from Statehood', 35 ff.

and the meaning that form the backdrop to self-constitutionalizing communication, ie to 'flesh and blood' people. The constitutional potential would not be properly understood if we focus—via a badly conceived systemic perspective—only on communicative processes within social systems. The *pouvoir* presents itself in the structural couplings between social systems and the consciousness and corporeality of actual people. *This is what triggers the* pouvoir constituant, *the potential, the capacity, the energy, indeed the power of self-constitutionalization: the reciprocal irritations between society and individuals, between communication and consciousness.* Such an approach recalls ideas of intersubjectivity, but with the key difference that here there is no uniform shared meaning, no merging of horizons between the minds involved, but rather a series of separate but intersecting consciousness and communication processes. Significantly for the constitutional question, here we find the 'interweaving' of various reflection processes—the identity reflection of the individual and the identity reflection of social systems. The 'constitutional subject' is then not simply a semantic artefact of communication, but rather a pulsating process at the interface of consciousness and communication, resulting in the emergence of the *pouvoir constituant*. Such a view, however, should not lead us back to the misconception of a collective made up of a number of people. The *pouvoir constituant* is neither solely the capacity of the sum of the individuals, nor a social relationship. Rather, this *pouvoir* emerges as a communicative potential, as social energy, which forms in the area of perturbation where individual consciousness encounters social communication. A suitable term here would be 'communicative power', had it not already been adopted as a term by other theoretical traditions.

At this stage we should relieve politics of its delusions of omnipotence.[86] The political constitution of the state cannot bundle the collective energies of the whole society, founding the nation's unity. In modernity, the collective potential is no longer available as a whole, but has been dispersed into numerous social potentials, energies, powers. This is due to the narrow specialization of the communicative media—power, money, knowledge, law. The unidimensional orientation of each social system represents the simultaneous blessing and curse of functional differentiation. And today's constitutions cannot but reflect this high degree of fragmentation.[87]

[86] On this Schütz (1997) 'Twilight of the Global Polis'; in a more radicalized formulation Schütz (2009) 'Imperatives without an Imperator'.

[87] Indeed the 'disembodiment of constitutional authority' through social differentiation processes becomes now particluarly visible in globalization, Kuo (2009) '(Dis)Embodiments of Constitutional

It is no longer possible for any authority to represent the whole of society. This loss is a particular problem for politics, experienced as a painful trauma and therefore regularly denied.[88] Even Thomas Vesting, who otherwise combats the hypertrophy of the state vis-à-vis society, still upholds the political constitution's claim to govern the whole of society, rather than restricting it to formalize the political medium of power.[89] Vesting, however, runs into the contradiction that politics is only one social subsystem among others, but produces a constitution that claims to govern all other sectors of society. How can this be justified? How can a constitutional lawyer who works on the premises of functional differentiation again postulate the primacy of politics: not for the state, but now for the political constitution? A legal economist law could equally well make a counter-case for the primacy of the economy, as does indeed Mestmäcker with his theory of the economic constitution.[90] Other disciplines, particularly in today's 'knowledge society', could equally well insist on the pre-eminence of their social area. For they can all—not just politics—legitimately claim the society-wide relevance of their partial rationality. The primacy of a function system can, however, only be claimed within a particular local and situational context. It changes from place to place and from situation to situation.[91] One cannot, like Vesting, formulate that modern society is without a centre or an apex and then at the same time give it a secret centre and apex: the political constitution. Political constitutions do not bring together the whole collective potential of society and give it political form through the law. Rather, they represent exclusively society's specific political potential—its assets, resources of power, and consensus—for the purposes of collective decision-making.[92]

Authorship', 223 ff. If, like Kuo, we view this simply as a process of decline, however, in which the original 'ordinary politics' degenerates into non-legitimized decisions by expert elites, we lose sight of the social potentials released by the multiplication of the *pouvoir constituant/constitué*.

[88] Subtle observations on this political trauma, Schütz (1997) 'Twilight of the Global Polis'.

[89] Vesting (2009) 'Politische Verfassung?', 616 ff.

[90] Mestmäcker (2003) *Wirtschaft und Verfassung*.

[91] Stichweh (2011) 'General Theory of Function System Crisis', 53.

[92] In a later attempt, Vesting (2012) 'Ende der Verfassung?' (manuscript), 8 ff., tries to defuse the problem he has produced. He distinguishes now between the symbolic unity of a total constitution, whose narrative seeks to found society as a whole, and the multiplicity of subsystem constitutions, which are more directed at technical questions. He insists on a collectively shared belief in the 'unity' of the constitution in which the whole society articulates and represents itself. This differentiation may be of use in the nation-state context, because it can explain the 'excesses' of the state constitution for society as a whole. It has little explanatory power for world society, since the 'unity'of an imagined world community constitution exists only in the feeble symbols of 'international community' or 'mankind'. The considerably denser narratives are told elsewhere, in the fragments of world society, in

Apart from this specific political '*pouvoir constituant*', there are, in modern society, a number of other societal potentials which legal norms formalize into various constitutions. Tully comes very close to this when he—referring back to Locke, Marx, and Weber—identifies 'political power', 'labour power', and 'security power' which, when formalized through legal norms, produce numerous 'constitutions of systems of law beyond the state'.[93] Similarly Steffek suggests that differing forms of transnational governance require different legitimizing principles and procedures.[94] Some Internet lawyers support this view, when they argue that under modern conditions popular sovereignty is fragmented and that one of these of fragments is transferred to the intermediary powers of the Internet.[95]

Therefore the paradoxes of the *pouvoir constituant/pouvoir constitué* are multiplied. Not just politics, but other social systems, too, establish themselves through self-referential processes by which, *ex nihilo*, they constitute their own autonomy.[96] Constitutions deal with the paradoxes of self-reference practically by externalizing them to the surrounding context. Social systems are never entirely autonomous: there are always points of heteronomy. If this externalization now occurs with the help of constitutions, the moment of heteronomy comes when the social system refers to the law. The 'self' of the social system is defined heteronomously by legal norms and it can then define itself autonomously thereby. While the unity of a social system develops through the concatenation of its own operations, its identity is created in its constitution through the re-entry of external legal descriptions into its own self-description.

In the theory of political constitutions, this 'self' was traditionally understood as 'something', as a collection of existing substantive qualities and characteristics. Lindahl rightly argues against this approach: 'the "self" of self-constitution speaks to reflexive identity, to identity as collective selfhood in contradistinction to identity as sameness'.[97] Self-constitution, then, is always simultaneously *genitivus objectivus* and *subjectivus*. The 'self' of the constitution is both the subject and the object of self-constitution:

religions, ethnic groups, nations, function systems, and organizations that are more than mere technical constitutions.

[93] Tully (2007) 'Imperialism of Modern Constitutional Democracy', 319, 323 ff.

[94] Steffek (2003) 'Legitimation of International Governance', 258.

[95] Post (1998) 'Unsettled Paradox'.

[96] On the paradoxes of the economic system Luhmann (1988) *Wirtschaft der Gesellschaft*, 181; Derrida (1991) *Donner le temps 1. La fausse monnaie*, 39.

[97] Lindahl (2007) 'Constituent Power and Reflexive Identity', 10.

'collective self-constitution means constitution both by and of a collective self'. In this way, a constitution constructs collective identity as the self-description of a social system with the help of norm-creating law. Such collective identities are formed in politics, but also in the economy and other social systems. In transnational contexts, it is the issue-specific regimes, analysed above, that form new kernels around which collective identities crystallize.

2. Collective identity

We must, however, be careful in the terms we use. The concept of *collective identity* refers to the self-description of a social system. It should not be confused with a different social phenomenon, with the *collective* in the strict sense, ie a corporate actor or a formal organization.[98] In the case of nation-state constitutions, such a mistake is easily made since the 'state' is at the same time a mere collective self-description of the political and a full-fledged formal organization which, as a collective actor, functions internally as a hierarchy and, externally, communicates with its environments. Therefore some authors argue that non-state constitutions as well need to create a new collective actor. Ulrich Preuss, for example, claims that a necessary result of various non-state constitutional processes is the emergence of a corporate actor.[99] This however repeats the historical misunderstanding of corporatism—not just state authoritarianism corporatism of the 1930s, but also democratic neo-corporatism—which conceives the functional subsystems as formal organizations and attempts to impose an organizational constitution upon them. We should, instead, distinguish clearly between the operational closure of a social system and its constitutionalization. In politics, the *closure* of the system requires not only its self-description as a 'state', but also its formal organization as a 'state'. Otherwise it is impossible to differentiate between the specific power processes of politics and other power processes in society. The equivalent problem of operational closure is, however, resolved differently in other systems: in the economy and the law it is much easier to distinguish between acts of payment and exchanges, or between legal

[98] A sophisticated discussion of the collective in Beckenkamp (2006) 'Herd Moves?' who (with other criteria than in the text) differentiates between 'collective actor' and 'corporate actor'. The text uses the attribution of actions to communicative identity as a criterion; for more detail see Teubner (1988) 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person'.

[99] Preuss (2010) 'Disconnecting Constitutions from Statehood', 33, 37.

acts and moral judgements. For *constitutionalization,* however, a self-description is enough, ie establishing a collective identity.

We should abandon, then, the false premise that constitutionalization inevitably means the transformation of a group of individuals into a collective actor. Neither is it true that the collective identity of a social system implies an effective formal organization. It may be true for the nation state, as the state is indeed constituted as the collective actor of politics, but not for other social systems. Other function systems—the economy, science, law, the health system, the media—all manage without a collective actor and, unlike the state, are not represented internally and externally by a formal organization. Their self-foundation does not take place through a formally organized collective, but rather as a communicative self-foundation with no formal organization of the whole system. What about transnational regimes? For their constitutionalization they do not need to become collective actors, as the *lex mercatoria* demonstrates. As shown above, higher constitutional norms emerge without any equivalent of a state organization. In some cases, there is indeed an effective international organization at the heart of a regime, eg the ICANN, for the *lex digitalis*, or the WTO, for the trade law. In that case, the regime does go beyond a collective identity and develops the properties of a collective actor that is similar to the state.[100]

In international relations, even the political system, in contrast to the nation state, does without its own autonomous collective actor and uses the concept of the international community simply to describe itself in its constitutional processes. Tomuschat's definition of the 'international community' indeed refers to a transnational political constitution and definitely not to a full-fledged collective. He understands the

> international community as an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values.[101]

The expression 'community', as used in this definition, is rather confusing. It is generally known that, according to Tönnies, 'community' means a particularly intensive form of social relations in contrast to 'society' and, in the world of international politics, such intensive social relationships are hard, indeed impossible, to find. Even within the nation state, the term 'community' sounds less convincing than it once did, due to the fragmentation of society. Postmodernity is characterized by a multiplicity of social

[100] On this Dunoff (2011) 'New Approach to Regime Interaction', 150 ff.

[101] Tomuschat (1999) 'Ensuring the Survival of Mankind', 88; see also Bogdandy (2006) 'Constitutionalism in International Law', 233 ff.

identities and world views; thus, 'community' is rather inadequate. If we are looking for a community, 'the place of the constitutional subject must, in (post)modern society, remain empty'.[102] This very much applies outside the context of the nation state. There are too many different cultural understandings of a political community, thus, an 'international community' in a cosmopolitan sense cannot develop. We would do better to refer not to a community, but rather to the political system of world society. This indicates neither a group of people nor a fictitious community, and certainly not humanity as such, but only those worldwide communications that concentrate on building power and consensus for collective decisions. It includes disparate entities: nation states and international political regimes and their respective administrations and constituencies.

The situation is similar in the economy, in the law, and in science. Concepts which some find helpful, such as 'epistemic community', 'economic community', or 'nomic community' should be used with extreme caution since, once again, none of the sociological characteristics of a community are present. Berman's ideas are therefore problematic, since his anthropological approach always assumes the presence of culturally defined communities that function as constitutional subjects.[103] In reality, however, the communities referred to in social constitutions are just imagined identities, just self-descriptions of their operational unity.

Further arguments against non-nation-state constitutionalism tend also to hypostatize the idea of a community. They claim a constitutional privilege for the nation state: only a state (and no other social orders) can be identified as a collective by virtue of a founding myth. Haltern, in particular, will only recognize a constitution if its legal imagination can call upon the founding myth of a collective, one which ultimately demands of its members acts of sacrifice and death.[104] He stresses, rightly, that a constitution does not necessarily require a demos, a primordial ethnic group, or intermediary structures, but that it does need a legal imagination of revolution and memory. This interesting cultural understanding of the constitution makes the important link between constitution and collective identity. Haltern emphasizes, again rightly, that the state need not describe itself in terms of 'scientific' constitutional theories, but could do so in a different way, for example in terms of founding myths. This can be achieved in legal language,

[102] Vesting (2009) 'Politische Verfassung?', 612.

[103] Berman (2007) 'Global Legal Pluralism'. Apart from this hypostasizing of cultural communities, Berman's analyses of global law to a large extent coincide with the assumptions made here.

[104] Haltern (2003) 'Internationales Verfassungsrecht?'; Haltern (2003) 'Pathos und Patina'.

contrary to political and economic constitutional thought. Haltern's references to self-sacrifice and death, however, seem like a return to certain ideas of the collective that are, to put it politely, no longer contemporary even for nation states, and certainly not for other social systems. While such conceptions may appear 'deeper' than others, their constitutional myth of a nation represents a mere temporary phenomenon, which carried weight during the period between the mid 18th and 20th centuries.[105]

Nation states are not alone, as Haltern suggests, in requiring a founding myth as the basis for their constitution. There are many non-state legal orders, particularly religious or ethnic groups, whose founding myths can easily match national myths for intensity, elaborateness, and 'depth'.[106] The founding myth of many institutions is boosted by their constitution, which acts as a collective memory, a store-house of meaning. The constitutions of transnational regimes also create their own individual myths of origin, by developing and constantly referring to fictional explanations of their own beginnings.[107] These narratives, however, are not plucked out of thin air: they must be corroborated by external circumstances on which the fictional accounts can be based. The constitutions of transnational regimes do not choose the founding myth typical for politics—the will of the legislators—but invent their own founding narrative. They trace their origins to the social subsystems to which they are structurally coupled. There must be enough non-legal material available to provide meaning which their legal order can 'misinterpret' as legal precedents. The founding myth of each regime justifies this operational misunderstanding. All that is required are 'situations in which it was sufficiently plausible to assume that earlier people also followed legal norms'.[108]

In the transnational context, as shown by Koskenniemi, these founding myths did not arise out of the comprehensive narrative of public international law, but rather developed

> [t]hrough specialization—that is to say, through the creation of special regimes of knowledge and expertise in areas such as 'trade law', 'human rights law', 'environmental law', 'security law', 'international criminal law', 'European law',

[105] May it be asked, just as a cross-check, whether the readiness of Islamist groups to countenance self-sacrifice and killing also make them into constitutional subjects?

[106] Fundamental to the founding myths of non-state legal orders, Cover (1983) 'The Supreme Court, 1982'.

[107] On this in detail using numerous examples, Dunoff (2011) 'New Approach to Regime Interaction', 150 ff.

[108] Luhmann (2004) *Law as a Social System*, 57.

> and so on—the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos.[109]

The UN human rights regime, the WTO free trade regime and the newer global environmental regime all have this sort of constitutional narrative.[110] And even private regimes have their founding myths, which are at the heart of their constitutions and legitimize their 'jurisgenerative power'. In the *lex mercatoria*, the agreements concluded cannot refer back to a national legal constitution. Nevertheless, a constitutional basis has been developed in support of the idea that the expectations generated by these agreements are legally binding. Instead of referring to a national constitution, the *lex mercatoria* calls upon a rich fund of relevant non-legal material—international trade and transport customs and commercial practices—that developed in the chaotic environment of the world market. When disputes have to be settled, political and legislative institutions are by-passed and it is claimed, with little basis in fact, that these social practices have 'always' had legal effect and have had constitutional authority since time immemorial. Similarly, reference is made to earlier arbitration awards, made not according to existing national law, but rather according to standards of 'equity'. These decisions, although they were expressly meant as non-legal (*ex aequo et bono*), are later referred to as if they were legally binding precedents, to which the techniques of distinguishing and overruling are then applied. In this way, the constitutional self-validation of the *lex mercatoria* also occurs in the ongoing history of ancient trade customs.

Vesting's comments, which in his view solely apply to the constitution of the whole society, also in truth hold for each partial constitution:

> The constitution, however, in its symbolic dimension, where alone it can find its own identity, is inextricably linked with institutions such as language, media, culture, common knowledge, cultural memory, etc. It relies, then, on a symbolically loaded space, a cultural text, which extends beyond the finite lifespan of one individual or collective actor and inscribes a constant self-logic of naming and names ('constitution'), and thus the creation of identity, into historical time.[111]

[109] Koskenniemi (2009) 'Politics of International Law', 12 f.

[110] Particulars in Dunoff (2011) 'New Approach to Regime Interaction', 150 ff.

[111] Vesting (2012) 'Ende der Verfassung?' (manuscript), 11. Using the example of the media constitutions, Vesting himself must grant that not only will a comprehensive constitution produce its own 'narrative identity', but that such identities are also developed by particular conditions.

Lindahl gives a more accurate description of the relationship between narrative, partial constitution, and collective identity. After a thorough discussion of the controversies surrounding the constitutional collective, he then defines the collective identity not as substantial attributes of a group, but instead consistently dissolves it in a communicative process: 'to act is to respond'.

> Here, then, is the main contribution of the paradox of constituent power to an ontology of collective selfhood: the collective self exists in the modes of questionability and, by way of its acts, of responsiveness.[112]

This is, in principle, pure communication—question-response—without the need to assume the existence of a collective actor. The collective self is not set in stone in the founding deed of a nation, regime, or formal organization, understood in the substantial sense, but is an ongoing process during which its identity changes through a series of reflexive actions, through alternating questions and answers. Constitution is thus a living process: the self-identification of a social system with the assistance of the law.

Ultimately the self-identification of constitutional subjects of all types ends in a reflection on their social identity. The key question for any constitution concerns how to strike the right balance between reference to the self, to others, and to society. Such a formulation obviously refers back to the tradition of subjective rights for the autonomous individual.[113] The autonomy of the subject acquires meaning not merely from the pursuit of individual interests or the desire for self-realization. Rather, autonomy is constitutively linked to responsibility vis-à-vis the whole and others; a responsibility which is not imposed from outside, but which can only be formulated by individuals themselves via the autonomous reconstruction of the world. The link to autonomy/responsibility is equally constitutive for the autonomy of social systems.[114] The double connection between autonomy and responsibility—of individuals and of social systems—is possibly the most important message to emerge from a sociology of constitutions. How can a social system bring its overall societal function into balance with its contribution to others? The answer is that only reflection

[112] Lindahl (2007) 'Constituent Power and Reflexive Identity', 21.

[113] Kant spoke of a man's duties, based on moral autonomy, 'towards himself', Kant (1977) *Metaphysik der Sitten*, 547. On this from a philosophical viewpoint, Menke (2011) 'The Self-Reflection of Law and the Politics of Rights'.

[114] It ultimately underlies Durkheim's social theory with its distinction of mechanical and organic solidarity, Durkheim (1933) *The Division of Labor in Society*.

within the social system, in its specific historical situation, can determine its own function and contribution. This, then, is how constitutions contribute to the public interest; not centrally, in the political system, which sets out the public interest requirements for all areas of society, but rather decentralized within each and every single social system. Only an independent constitution can undertake to define the identity of a social system, its compatibility with society as a whole and its surrounding contexts. If transnational regimes develop these reflexive capabilities, and mobilize legal norms to support them, their status as constitutional subjects will be justified.

4

Transnational Constitutional Norms: Functions, Arenas, Processes, Structures

The subjects of societal constitutionalism take different characteristics, depending on whether they are formed in the national or in the transnational arena. We can mark this as a provisional outcome of the two previous chapters. New constitutional subjects have emerged in the course of globalization: international organization, transnational regimes and networks. They are characterized by denationalization and fragmentation, a high level of autonomy, and an issue-specific orientation. Despite the objections of nationally-minded constitutional scholars, there is no alternative but to recognize a considerable number of transnational institutions as constitutional subjects. As shown in the previous chapter, if we want to do justice to global realities, we will have to take on board three points: (1) The nation state can no longer be regarded as the only possible constitutional subject. (2) The fragmentation of global society into functionally defined regimes is today a reality. (3) It is not only public institutions in the narrow sense that are constitutionalized; this must also be conceded to institutions in the private sector.

Yet—as constitutional scholars continue to object—even if transnational regimes were candidates for constitutions, their rules do not display the specific characteristics of constitutional rules. What is going on under the heading of constitutionalization, they say, amounts only to a juridification of social spheres, either via public international law or via private ordering; but it in no way involves the emergence of genuine constitutional norms. In short: this is juridification, not constitutionalization. The norms of the WTO, ILO, ICC, ICANN, the *lex mercatoria*, the *lex sportiva* and other transnational regimes perform only regulatory functions, not constitutional ones. They cannot, it is said, bring about the interplay which can be observed in national politics between the arenas of public opinion and binding decision-making. Furthermore, the alleged constitutions within the transnational sphere display at best a hierarchy

of legal norms, but they cannot anchor this norm hierarchy in democratically organized political processes.[1]

These objections are no longer about constitutional subjectivity but about the quality of norms, and to answer them involves considerable analytical efforts—a merely metaphorical talk about constitution should certainly be avoided.[2] Whether or not transnational regimes are developing genuine constitutional law beyond mere ordinary law will be discussed by using four criteria.[3] That we do not limit ourselves to the criteria for a 'formal' concept of constitution is presumably self-evident at this point.[4] Instead, constitutions outside the state need to satisfy the requirements of a 'material' concept of constitution, according to which a constitution establishes a distinct legal authority which for its part structures a *societal* process (and not merely a political process, as is the case with nation-state constitutions) and is legitimized by it.[5] The norms of a transnational regime will have to pass the following quality tests in order to count as constitutional norms:

(1) *Constitutional functions*: do transnational regimes produce legal norms that perform more than merely regulatory or conflict-solving functions, ie act as either 'constitutive rules' or 'limitative rules' in the strict sense?

(2) *Constitutional arenas*: is it possible to identify different arenas of constitutionalization—comparable to the arenas of organized political

[1] Grimm (2005) 'Constitution in the Process of Denationalization', 460 ff.; more cautious in negative judgement Grimm (2009) 'Gesellschaftlicher Konstitutionalismus'; Loughlin (2010) 'What Is Constitutionalisation?', 64 f.; Wahl (2010) 'In Defence of Constitution'; Wahl (2008) 'Verfassungsdenken jenseits des Staates'. For a counter-critique, Holmes (2011) 'Rhetoric of Legal Fragmentation', 125 ff.

[2] Wahl's criticism of advocates of a transnational constitutionalism, Wahl (2002) 'Leitbegriff oder Allerweltsbegriff'.

[3] For a clear distinction between juridification and constitutionalization in the transnational context, Klabbers (2009) 'Setting the Scene', 8 ff. On the relevant criteria (constitutional functions and structures) see the detailed analyses of Gardbaum (2008) 'Human Rights and International Constitutionalism'. The additional criteria used here (constitutional arenas and processes) become plausible if—as systems theory suggests—we direct attention to internal differentiation and event chains in the transnational regimes.

[4] Classically on formal constitutions, Kelsen (1978 [1934]) *Pure Theory of Law*, 221 ff. Some transnational regime constitutions (eg the WTO) do in fact meet the three necessary conditions: (1) written document; (2) hierarchy of norms; (3) complicated procedure. Others, eg the *lex mercatoria*, only fulfil (2), to a small extent (3) and not (1), see Dalhuisen (2006) 'Legal Orders and their Manifestations'. They would thus belong to the class of informal or latent constitutions, as in the famous special case of the British state constitution. *Locus classicus*: Dicey (1964 [1889]) *Study of the Law of the Constitution*, 23.

[5] Definition in reference to Kumm (2006) 'Beyond Golf Clubs', 508. A similar definition of civil society constitutions in Amstutz, et al. (2007) 'Civil Society Constitutionalism', 245.

processes and the spontaneous process of public opinion, as they are regulated in the organizational part of state constitutions?

(3) *Constitutional processes:* do the legal norms of the regimes develop a sufficiently close connection to their social context or their 'nomic community'—comparable to that between constitutional norms and the 'nomic community' of nation states?

(4) *Constitutional structures:* do the regimes form typical constitutional structures as they are known in nation states, in particular the familiar superiority of constitutional rules and judicial review of ordinary law?

I. CONSTITUTIONAL FUNCTIONS: CONSTITUTIVE/LIMITATIVE

1. Self-foundation of social systems

In terms of systems theory, the political constitutions of nation states have the constitutive function of securing the autonomy of politics which has been acquired in the modern era in relation to 'other' religious, familial, economic, and military sources of power. They do so by formalizing the medium of political power.[6] In Thornhill's words:

> constitutions (whatever their express and volitional design) normally have the function that they formulate objectivised rights regimes in order to support the abstraction of state power as an autonomous social commodity, and, as far as possible under different historical conditions, to ensure conditions facilitating the generalisation of power across society. In serving this purpose, then, it is also suggested here that constitutions usually provide a sensibilised political mechanism for a society, which uses right to identify and codify the fissures between otherwise interpenetrated social spheres, and which consequently underwrites the wider differentiation of all distinct spheres of exchange within society.[7]

Mutatis mutandis, other sectorial constitutions—the constitution of the economy, science, the media, and the health system—perform the parallel constitutive function, namely, of securing the autonomy of their specific medium, nowadays on a global scale. Each partial constitution makes use of 'constitutive rules' to regulate the abstraction of a homogenous communicative medium—power, money, law, knowledge—as an autonomous social construct within a globally-constituted function

[6] Moving in this direction Thornhill (2008) 'Towards a Historical Sociology', 169 ff. Further on Luhmann's constitutional theory, Luhmann (1990) 'Verfassung als evolutionäre Errungenschaft'; Luhmann (1973) 'Politische Verfassungen im Kontext'.

[7] Thornhill (2011) 'The Future of the State' (manuscript), 18.

system.[8] At the same time the constitutions make sure that the society-wide impact of their communicative media is guaranteed under different historical conditions. They develop organizational rules, procedures, competences, and subjective rights for both these orientations, codifying the separation between the social spheres and thus supporting the functional differentiation of society.[9]

What is striking about the constitutions of the functional global regimes is how exclusively they promoted this constitutive function in the last few years—that is, how their attention focused solely on institutional conditions for their autonomy. The regime constitutions were obsessed with one overriding problem: that national boundaries are creating obstacles to an unrestrained global interconnection of function-specific communications not only in the economy, but also in science, education, health care, and the media. National 'production regimes' are made principally responsible for this problem: while they support effectively the function systems, their support ends at the boundaries of each nation state.[10] To dismantle such nation-state barriers has become the primary constitutional aim of transnational regimes. Today's global constitutionalism thus aims to accomplish two things: to break down the close structural couplings between the function systems and nation-state politics and law, and to enable function-specific communications to become globally interconnected. Constitutive rules thus serve to unleash the intrinsic dynamics of the function systems at the global level.

Both the advocates of the 'New Constitutionalism' and the proponents of an ordoliberal global economic constitution identify precisely this constitutive orientation of the global regimes, even if their political assessments are diametrically opposed.[11] Such a worldwide 'neo-liberal'

[8] The difference, emphasized by John Searle, between constitutive and regulative norms is fundamental to a theory of constitutions, Searle (2006) 'Social Ontology'. The existence of constitutive rules in many social sectors is the reason why Lindahl and Preuss detach the term constitution from its narrow reference to the state and extend it to a whole series of transnational and social institutions, Lindahl (2007) 'Constituent Power and Reflexive Identity', 14 ff.; Preuss (2010) 'Disconnecting Constitutions from Statehood', 40 ff.

[9] These formulations generalize Thornhill's functional designations of political constitutions to all partial constitutions, Thornhill (2008) 'Towards a Historical Sociology', 169 ff.

[10] Production regimes are stable national or regional interconnections of the economy, politics, and law. Their differences are responsible for the varieties of capitalism, Hall and Soskice (eds) (2005) *Varieties of Capitalism*. On the interpretation of production regimes as structural couplings between different function systems, Teubner (1998) 'Legal Irritants'.

[11] On the new global constitutionalism, Anderson (2009) 'Corporate Constitutionalism'; Schneiderman (2008) *Constitutionalizing Economic Globalization*, 340 ff.; Bieling (2007) 'Konstitutionalisierung der Weltwirtschaft'; Tully (2007) 'Imperialism of Modern Constitutional

constitutionalization, aimed at achieving the autonomy of social subsystems (and of global markets in particular), has been promoted in the Washington Consensus of the past 30 years. It has produced not only specific political regulations but also fundamental constitutional principles. In the economy these have aimed at giving global corporations unlimited options for action, abolishing government shareholdings in corporations, combating trade protectionism, and freeing business corporations from political regulation.[12] The overriding constitutional principle of the International Monetary Fund and the World Bank is to open up national capital markets. For their part, the constitutions of the World Trade Organization (WTO) and likewise of the European internal market, the North American Free Trade Agreement (NAFTA), the Mercado Común del Cono Sur (MERCOSUR), and the Asia Pacific Economic Co-operation (APEC) are establishing constitutional safeguards for free trade and direct investment.[13]

The *lex mercatoria*, too, which has developed a layer of constitutional norms on top of its ordinary contract law rules, focuses mainly on this constitutive function. 'Private' courts of arbitration have defined private property, freedom of contract, and competition as part of a 'transnational public policy'.[14] In the constitutions of multinational corporations, three 'neo-liberal' principles of corporate governance have been firmly established: almost unlimited corporate autonomy, the orientation of company law towards capital markets, and the establishment of shareholder value.[15] In order to enforce these principles, corporate constitutional politics have successfully dismantled nation-state production regimes whenever they impede the global expansion of corporate activities.[16] The newly emerging global corporate constitutions therefore pursue two goals: to reduce the influence of nation-state politics and law on

Democracy', 328 ff. On the world economic constitution: Behrens (2000) 'Weltwirtschaftsverfassung'. International law too has registered the developing of genuine constitutional law, see Klabbers (2009) 'Setting the Scene', 4 ff.

[12] Detailed analysis and criticism in Stiglitz (2002) *Globalization and Its Discontents*, 53 ff.

[13] On constitutional phenomena in transnational trade regimes, Cass (2005) *Constitutionalization of the World Trade Organization*; Gill (2003) *Power and Resistance*; Stone (1994) 'What Is a Supranational Constitution?'.

[14] Elements of a transnational economic constitution are identified in the 'private' arbitral regimes by Renner (2011) *Zwingendes transnationales Recht*, 91 ff., 229 ff. In practice identical, but using the terminology of natural law to emphasize the fundamental character of the relevant legal norms, Dalhuisen (2006) 'Legal Orders and their Manifestations'.

[15] On the emerging corporate constitution of global corporate governance, Backer (2006) 'Autonomous Global Enterprise'.

[16] On the various production regimes as stable configurations of economics, politics, and law see Fn. 10.

corporate activities, and to promote the 'rule of law' insofar as it facilitates worldwide transactions. Constitutive constitutional norms of this kind serve to release the intrinsic dynamics of business corporations at the global level.

2. *'Double movement' of global constitutionalism*

In the long run, however, the one-sided 'neo-liberal' reduction of global constitutionalism to its constitutive function cannot be sustained. It is only a matter of time before the systemic energies released trigger disastrous consequences—alongside their indubitably productive effects. Now a fundamental readjustment of constitutional politics will be required to deal with the outburst of social conflicts. This is the moment when Polanyi's 'double movement' makes its presence felt, which, as Streeck argues, identifies

> . . . the not just plural but inherently contradictory forces responsible for the specific dynamism of capitalist development, making it move, not linearly, but in its fits and spurts, and in cyclical waves of institutionalization and de-institutionalization.[17]

In such processes of 'dynamic disequilibrium', which alternate between liberation and limitation of systemic energies, the tipping point has now been reached. After a long constitutive phase, combating the risks of unrestrained liberalization has now become indispensable.[18] Limitative constitutional norms are now needed rather than constitutive ones.

This is the situation after dismantling nation-state regulations at a transnational level. While global function-specific communication is no longer hindered by nation-state production regimes, the constitutive constitutional politics of the Washington Consensus has overriden many of the limitations that nation states placed on the dynamics of the function systems. Unburdened by nation-state restrictions, the systems are now placed to follow, globally, a programme of maximizing their partial rationality. Despite the fact that they differ in their theory assumptions, sociological analyses in the tradition of Karl Marx, Max Weber, and Niklas Luhmann all agree on the consequences of this diagnosis. Whether the

[17] Streeck (2009) *Re-Forming Capitalism*, 235 f. For connections between Polanyi's theory and transnational constitutionalization, Joerges and Falke (2011) *Karl Polanyi, Globalisation and the Potential of Law.*

[18] Augsberg et al. (2009) *Denken in Netzwerken*, 82 ff.; Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte'.

laws of motion of capital, or the rationalization of spheres of social action, or the dynamics of functional differentiation—all identify the destructive energies created by the one-sided function-orientation of a social sector. Globalization has an accelerating effect. The dismantling of national production regimes releases destructive dynamics in the global systems; destructive dynamics in which the one-sided rationality-maximization of one social sector collides with other social dynamics.

This dynamic pointedly raises the question of whether functional differentiation necessarily transforms the 'normal' self-reproduction of function systems into a compulsion towards unlimited growth. The theory of autopoietic systems has long broken with the axiom of classical structural functionalism, namely, the imperative of sheer system maintenance. Connectivity of recursive operations has become the new imperative—the autopoiesis is either continued or it is not.[19] Beyond this, however, the disturbing question arises of whether functional differentiation secretly implies a peculiar growth compulsion. Since function systems orient themselves towards one and only one binary code, they destroy the inherent self-limitations which worked effectively in the multifunctional institutions in traditional societies. As a consequence, the self-reproduction of function systems and formal organizations follow an inexorable growth imperative.

Slightly inflationary tendencies in the symbol production would be the normal state of affairs; without them function systems become caught up in a shrinking spiral that threatens their productivity.[20] Beyond such 'normal' growth, however, their recursivity seems to succumb to the pressure to accelerated repetition and growth. If so, what is it that triggers such 'turbo-autopoiesis'? The infamous expansion tendencies of function systems—politicization, economization, juridification, medialization, and medicalization of the world—indicate indeed a compulsive growth dynamic, to a higher or lower degree in each function system. Observing in several systems a tendency to increased symbol production, Stichweh assumes indeed such an inherent growth imperative. He registers the difference between the normal state of 'slightly inflationary growth processes' and crisis-inducing excessive growth.[21] The responsibility lies with the communicative media of money, power, law, truth, and love. They increase not only the motivations for accepting communication, but

[19] Luhmann (1995) *Social Systems*, 54.

[20] Advocating such a concept for the economy is Binswanger (2009) *Vorwärts zur Mässigung*, 11 ff.

[21] Stichweh (2011) 'General Theory of Function System Crisis', 55 ff.

produce at the same time excessive growth expectations, a kind of 'credit' to future communications. The credit can only be redeemed through constantly greater contributions and their retroactive impact on likewise increasing expectations of 'credit', so that a spiral of growth arises. The pathological spiral of growth appears no longer to develop only in the economy, but rather in many, if not all, function systems.

This growth dynamic goes beyond the cycle of acceleration which Rosa diagnosed for today's 'high-speed societies'.[22] Acceleration of social processes is merely a partial phenomenon of a larger growth dynamics which unfolds in three dimensions: not only temporal, but also substantive and social. While Rosa observes rightly the temporal dimension, its substantive dimension is realized in the growth imperative of symbol production, ie a tendency to multiply operations of the same kind. And in the social dimension, a social epidemiology, ie imitation, spreading, and contagion, has been identified, particularly the 'herd behaviour' in the financial markets.[23]

Inherent pressures towards ever greater production have been for a long time identified in the economy. They are the precondition for its self-reproduction, but when they are spurred on, a sudden switch towards destructive tendencies occurs.[24] But the pressure is also found in other function systems. Is it possible to identify the difference between 'normal' growth and its 'pathological' forms? In the case of law, we can clearly see that law not only resolves conflicts and returns to a position of rest. Rather, its own regulations actually generate conflicts, which then call for further regulation. Through its regulatory intervention in daily life, law itself produces the situations which then give rise to conflicts.[25] And, at the same time, each norm generates problems of interpretation, which themselves generate further conflicts. Finally, the sheer mass of legal rules produces rule-conflicts which call for the production of yet more rules. It appears that the high autonomy of law enhances the number of conflicts. All this would still be the normal slightly inflationary tendency of law. What should be viewed critically, however, is a kind of dependency syndrome in the law, in which the production of norms comes to depend on external stimulants—economic contractual mechanisms and political legislation—which generate, at both national

[22] Rosa (2005) *Beschleunigung*, esp. 295 ff.; Rosa and Scheuerman (2009) *High-Speed Society*.

[23] Informative, Stäheli (2011) 'Political Epidemiology'.

[24] Binswanger (2009) *Vorwärts zur Mässigung*.

[25] Luhmann (2004) *Law as a Social System*, 153.

and transnational level, the much criticized pathologies associated with the excessive juridification of the world. Could these be the legal growth excesses of late modernity? In politics, the excessive growth pressures of the welfare state are the obvious candidate. In science, research generates ever greater uncertainty that can only be eliminated by more research which in turn generates new uncertainties. In this sphere, furthermore, the well-known pressures of 'publish or perish' have now reached such a level of intensity that 'academic ghostwriting' has become a growth industry posing a serious threat to the credibility of academic publishing.[26] In all these contexts, it is necessary to distinguish between normal growth necessary for continuity and the growth excesses that threaten the maintenance of the system.

3. Self-constraint of growth pressures

It is important, then, to identify the dynamics which speed up the spirals of growth to such an extent that they tip into destructiveness. Growth acceleration in today's globalized function systems is a heavy burden on themselves, on society and on the environment. It entails grave 'consequences that arise from their own differentiation, specialisation and orientation towards high performance'.[27] Three problem areas can be identified: (1) the collision of a particular sub-rationality with other sub-rationalities; (2) collision with a comprehensive rationality of world society;[28] and (3) the collision of the function-maximization with its own self-reproduction. The evolutionary dynamics of these three collisions certainly have the potential to result in a societal catastrophe. But there is nothing necessary about the collapse, as Karl Marx postulated, and nothing necessary about Max Weber's 'iron cage' of modernity. Niklas Luhmann is more plausible: the occurrence of catastrophe is contingent. It depends on whether countervailing structures will emerge which prevent the positive feedback catastrophe.

When it becomes concrete, this contingency experience of the catastrophe may be regarded as the 'constitutional moment'.[29] This is not yet the

[26] In detail on these pressures of enhancement, Stichweh (2011) 'General Theory of Function System Crisis'.

[27] Luhmann (1997) *Gesellschaft der Gesellschaft*, 802.

[28] A comprehensive rationality of world society? Caution is in order. There is no authority that could define this rationality. However, the possibility exists that the subsystems, from their decentralized perspective, reflect on a macro-rationality.

[29] This is clearly a different use of the term than in Ackerman (2000) *We the People*, 266 ff., 285 ff.

moment when the self-destructive dynamic makes the abstract danger of a collapse appear—that is the normal state of things. Rather, it is the moment when the collapse is directly imminent. The functionally differentiated society appears to ignore earlier chances of self-correction; to ignore the fact that sensible observers draw attention to the impending danger with warnings and incantations. In the self-energizing processes of maximizing sub-rationalities, self-correction seems to be possible only at the very last minute. The similarity with individual addiction therapies is obvious: 'Hit the bottom!' It must be one minute before midnight. Only then, today's addiction society has a chance of self-correction. Only then is the understanding lucid enough, the suffering severe enough, the will to change strong enough, to allow a radical change of course. And that goes not only for the economy, where warnings about the next crisis are regularly ignored. It goes too for politics, which does not react when experts criticize undesirable developments, but waits instead until the drama of a political scandal unfolds—and then reacts frantically. The Kuhnian paradigm shift in science appears to be a similar phenomenon, where aberrations from the current dominant paradigms are dismissed as anomalies until the point where the 'theory-catastrophe' forces a paradigm shift.

The constitutional moment refers to the immediate experience of crisis, the experience that an energy released in society is bringing about destructive consequences, the experience that can be overcome only by a process of self-critical reflection and a decision to engage in self-restraint. The phenomenon of social systems experiencing the dark side of their promise of progress is, ultimately, not a deviation from the 'healthy' course of things; it is not an error to be avoided. On the contrary, this experience almost seems to be a necessary precondition for changing their internal constitution. Ultimately, then, it is a system's pathological tendencies that bring forth the constitutional moment, the moment of imminent catastrophe in which the decision is made between the energy's complete destruction and its self-restraint.

Functional differentiation has entailed a daring experiment involving a move away from a grand unity of society to the release, instead, of a multitude of fragmented social energies which—because they are not limited by any built-in counter principles—have generated an enormous internal growth dynamic. Indeed, this process has made possible great achievements of civilization in the arts, science, medicine, economics, politics, and the law. Yet the dark side of each of these processes leads potentially to moments of catastrophe—constitutional

moments—and is precisely what facilitates collective learning about self-constraint. For international politics, the year 1945 is the paradigm. It was the constitutional moment for a worldwide proclamation of human rights after the dehumanizing practices of political totalitarianism, the moment at which political power throughout the world was prepared to constrain itself. Similarly, 1789 and 1989 were moments at which, after a period of destructive expansionary tendencies, politics limited itself by firmly establishing the separation of powers and fundamental rights in political constitutions.[30]

The constitutional moment is not limited to politics. In functional differentiation, all subsystems develop growth energies which are highly ambiguous in their productivity and destructiveness. In many sites the new constitutional question is arising, namely: '[H]ow much inward expansion does society generate in this way, how much monetarisation, juridification, scientification and politicisation is it able to generate and to cope with, and how much of it at the same time (rather than, say, monetarisation alone)'.[31] During the recent phase of functional differentiation this becomes the key problem for social constitutions. This is the actual experience of late modernity following the triumphant victory of the autonomous function systems. It is no longer a matter of 'What are the institutional conditions of possibility for their autonomy?' Instead, 'Where do the limits to the expansion of subsystems lie?' The paradigmatic example is the economy, which is marking its triumphs and its defeats in the context of global turbo-capitalism.

4. *'Capillary constitutions'*

If excessive growth allows a social subsystem to get out of hand, there are two options: state intervention or internal constitutionalization. Permanent state control is, after the experiences of totalitarian systems, no longer seriously considered as an option. More suitable, instead, are political mechanisms for governing social processes, in the form of global regulatory regimes—albeit the significance of these is ambiguous. After all, what are the options available? Either administrative steering of global communication or externally imposed self-limitation of system options. If it is correct that the main concern is to avert the danger of the three collisions—the system's self-destruction, environmental damage in the

[30] Thornhill (2008) 'Towards a Historical Sociology'.

[31] Luhmann (1997) *Gesellschaft der Gesellschaft*, 757.

broadest sense, endangerment of world society—then the second option is preferable. This is the message of societal constitutionalism. Any global constitutional order is faced with the task: How can a sufficiently large degree of external pressure be generated on the subsystems to push them into self-limitations on their options?

Why self-limitation and not outside limitation, though? Does not experience show that self-limitation merely serves to set the fox to keep the geese and that excesses can only be prevented through outside influence? Equally, though, does not experience also show that attempts at trying to control internal processes through external interventions regularly end in failure?[32] At this point societal constitutionalism does a difficult balancing act between external intervention and self-direction.[33] A 'hybrid constitutionalization' is required in the sense that in addition to state power, external societal forces—that is, formal legal norms and 'civil society's counter-power from other contexts (media, public discussion, spontaneous protest, intellectuals, protest movements, NGOs, trade unions, professions and their organizations)[34]—exert such massive pressure on the expansionist function system so that it will be constrained to build up internal self-limitations that actually work.

However, workable limitations can take effect only within the system's own logic, not outside it.

> Every function system determines its own identity . . . elaborating semantics of self-interpretation, reflection, and autonomy. The mutual dependencies of the subsystems can no longer be normed in general. Indeed they can no longer be legitimized at all as a condition for order at the overall social level.[35]

The difficult task of co-ordinating the function of a social system and its environmental tasks at a sufficiently high level can be tackled only through system-internal reflection, which can certainly be prompted from the outside but cannot be replaced.[36] This is why there can be no

[32] On the limits of political regulation, Braithwaite (1982) 'Enforced Self-regulation'; Ogus (1995) 'Rethinking Self-Regulation'; Gunningham and Rees (1997) 'Industry Self-Regulation'; Ayres and Braithwaite (1992) *Responsive Regulation*.

[33] 'Regulation of self-regulation' is the result of an extended debate on the steering capacities of politics and law, Haines (2009) 'Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster'; Hoffmann-Riem (2001) *Regulierte Selbstregulierung*.

[34] In detail on the politics of NGOs, Brunnengräber et al. (2005) *NGOs im Prozess der Globalisierung*. On professions as countervailing powers in transnational context, Herberg (2011) 'Bringing Professions Back in', 115 ff.

[35] Luhmann (1997) *Gesellschaft der Gesellschaft*, 745.

[36] Luhmann (1997) *Gesellschaft der Gesellschaft*, 757.

external political definition of transnational sectorial constitutions, but only indirect political impulses or constitutional irritations. The knowledge regarding which kind of self-limitation can be selected does not even exist as such. It cannot simply be accessed, but rather has to be generated internally first. Endogenous growth imperatives can be combated only with endogenous growth inhibitors. The knowledge required to do so cannot be built up by an external observer as centrally available experiential knowledge, but only out of the combined effect of external pressures and internal discovery processes.

High cognitive demands are nevertheless made of national and international interventions by the world of states and by other external pressures, for the very reason that they cannot simply direct behaviour, but ought instead to create irritations selectively. 'The state cannot intervene directly so as to achieve particular desired situations or the assessment of "results"; rather, it must observe the social systems, and direct its intervention more specifically at their self-transformation.'[37] When subsystemic rationality develops self-destructive tendencies, external political interventions are indeed unavoidable, however, they need to be geared 'to create new possibilities through the breaking open of self-blockades; but not to superimpose a different state rationality'.[38] Political-legal regulation and external social influence are only likely to succeed if they are transformed into a self-domestication of the systemic growth dynamic. This requires massive external interventions from politics, law, and civil society: specifically, interventions of the type suited to translation into self-steering.

The task would be, with a bit of luck, to combine external political, legal, and social impulses with changes to the internal constitution. Again with Derrida, changes to the 'capillary constitution' itself are necessary, down to the very arteries of the communication circulation, 'where their fineness displays a microscopic form' and where they cannot be touched by the influences of the 'capital constitution' of the state.[39] It seems that Derrida was inspired here by the Foulcauldian reformulation of the concept of power: the problem of today's societies lies not with the excesses of juridical power wielded by the political sovereign, but rather in the phenomenon of 'capillary power', achieved through progress in scientific

[37] Ladeur (2006) 'Methodische Überlegungen', 657.

[38] Ladeur (1984) *'Abwägung'—Ein neues Paradigma des Verwaltungsrechts. Von der Einheit der Rechtsordnung zum Rechtspluralismus*, 60.

[39] Derrida (1991) *L'autre cap*, 44.

disciplines and dependent on technology. This capillary power permeates the social body through to its very microstructures.[40]

No one knows in advance how such a capillary constitutionalization might work in practice. Ex ante prognoses are by definition impossible. And, for that reason, there is no alternative but to experiment with constitutionalization. The application of external pressure means that the self-steering of politics, or law, or other subsystems, creates such irritations of the focal system, that ultimately the external and internal programmes play out together along the desired course. And that cannot be planned for, but only experimented with.[41] The desired course for social sub-constitutions is, as has been said, limitations of the endogenous tendencies towards self-destruction and environmental damage. This is the core of the constitutional problematic, this difficult handling of the focal subsystem's self-transformation and that of their environmental systems.

5. Devil and Beelzebub

It is noteworthy that it is the political system, of all things, which has assumed an historic role as a precursor, in its own sphere, for exactly this paradoxical undertaking: subjecting its own expansion to its self-limitation.[42] Only Beelzebub can cast out the devil! The history of political constitutions of the nation states teaches us a lesson regarding the way in which a social system can limit its own possibilities, increased immensely by functional differentiation, through relying upon its own resources. It cannot be over-emphasized that these self-limitations did not arise automatically by reason of functional imperatives, but rather only under immense external pressure, as the result of fierce constitutional battles. In this auto-limitative role, politics of the nation states has set the benchmark of how constitutions can assist a social system to limit, for itself, its own growth compulsions.

The limitations had different lines of attack, of course, depending on the expansion tendency of the political system. As a countermovement to political absolutism in the early modern period, political separation of

[40] Foucault (1976) 'Räderwerke des Überwachens und Strafens', 45.

[41] External attempts at irritation and internal reaction must converge in the direction of a common difference minimization, see Luhmann (1997) 'Limits of Steering', 43 ff.; Luhmann (1989) 'Politische Steuerung'; Luhmann (1990) 'Steuerung durch Recht?'. This interplay of several self-regulation processes is what the systems-theoretical control theory aims at, not, as is frequently claimed, solely at the self-regulation of the economy or another social system.

[42] On this thesis with copious historical material, Thornhill (2008) 'Towards a Historical Sociology'.

powers was intended to divide absolute power, and to restrain the subpowers through their mutual control. *Rechtsstaat* principles were intended to place normative limits on the prerogative of the all-powerful sovereign. Following the separation of politics, administration, and justice, the politicization tendencies within administration and justice were supposed to be restricted. And, finally, fundamental rights were intended as the great civilizing achievement with which politics would itself abstain from politicizing individual and institutional spheres of autonomy within society. In today's changed conditions, new self-limitations are added to these classical limitations. On the one hand, fierce competition among western industrialized states, and the enforced modernization politics of the developing states have transformed the threat to the natural environment into an urgent problem of the political constitution, which can only be addressed through transnational constitutionalization. On the other hand, politics has to answer with constitutional self-limitations to the famous-infamous 'growth-acceleration-laws' of the welfare state. To guarantee the independence of the central banks and to set effective limits to national debt is quite clearly to engage in matters of constitutional importance.[43] The constitutional importance of the question of whether subsidies and other excessive state expenditures should be subjected to a test of sufficient connection with the public welfare is, in contrast, rather more hidden. Social-scientific and political performance reviews by authorities independent of the state (similar to audit courts), which render errors visible and avoidable could be among the currently urgent constitutional self-limitations of the politics of the welfare state.

What does this mean, though, for other sub-constitutions? How to transfer the limitative function from politics to other social subsystems is guided by the criterion of societal compatibility that imposes restrictions on the subsystems:

> Affiliation to society therefore places all subsystems in their own functions and capacity for variation under conditions of structural compatibility. The constitution has the function for the political system of reformulating such conditions of social compatibility for internal use, ie in a decidable form.[44]

Constitutional self-limitation in the sense of compatibility with society is not a problem particular to politics, but one facing all subsystems

[43] Luhmann (2004) *Law as a Social System*, 412.

[44] Luhmann (1973) 'Politische Verfassungen im Kontext', 6.

in society.[45] Similarly, compatibility may be imposed externally, but it cannot entirely be defined from the outside: it must largely be produced from within the system. While politics construes its constitution according to the power-building model and must use power to ensure its self-constraint, other social systems must align their independent constitutions and their constraints to their communicative media (eg economics to payment operations, science to cognitions, the mass media to news operations). This sets the form of the internal constitution and its limitation. The original meaning of 'constitution', once a medical expression for the condition of the body as ill or healthy, is still present in each constitution, because there are always two aspects to interventions: the proper functioning of the internal organs and the suitability of the body to the life in its environment.[46]

In order to inhibit pathological compulsions to grow, stimuli for change, which follow the historical model of the self-limitation of politics, need to generate permanent counter-structures that will take effect in the payment cycle down to its finest capillaries. Just as in political constitutions power is used to limit power, so the system-specific medium must turn against itself. Fight fire by fire; fight power by power; fight law by law; fight money by money. Such a medial self-limitation would be the real criterion differentiating the transformation of the 'inner constitution' of the economy from external political regulation.

II. CONSTITUTIONAL ARENAS: INTERNAL DIFFERENTIATION IN SOCIAL SYSTEMS

A further question arises, namely, whether societal constitutions also provide, similar to political constitutions, the institutions to guarantee the 'possibility of dissent as a precondition of an independent selectivity distributed within the society'.[47] In liberal constitutionalism it is the legal institutions of property and liberty that perform this task in society (and especially in the economy). However, this is not enough in the present situation. What is needed is a stronger politics of reflection in today's globally constituted function systems in which disputes can be conducted regarding their contributions to the environment and their overall social role. It is particularly urgent in the global economy

[45] Arguments in this direction, Prandini (2010) 'Morphogenesis of Constitutionalism', 312 ff.

[46] Luhmann (1973) 'Politische Verfassungen im Kontext', 178.

[47] Luhmann (1973) 'Politische Verfassungen im Kontext', 182.

for the possibility of dissent to be backed up by economic constitutional norms. In the past it has been the system of collective bargaining, co-determination, and the right to strike that have in particular enabled new constitutionally supported guarantees of dissent within society to exist within the economy. Ethics commissions and external mechanisms of support for 'whistleblowers' in enterprises play a similar role.[48]

Societal constitutionalism sees its point of application wherever it turns the existence of a variety of 'reflection-centers' within society, and in particular within economic institutions, into the criterion of a democratic society.[49] The internal differentiation of function systems into an organized-professional sphere and a spontaneous sphere plays a key role in the interplay between these reflection-centres. Within the organized-professional sphere, a further differentiation can be observed between decentralized organizations and centralized self-regulating institutions. The political constitutions have already given shape to the corresponding internal differentiation of politics. In their organizational parts, they enacted detailed sets of norms, procedural rules for elections and for parliamentary and governmental decisions. Yet even the other function systems are constitutionalizing different internal areas, not only the organized-professional area (ie corporations, banks, Internet intermediaries, health organizations, professional associations, and universities) but also their spontaneous area (ie the various function-specific constituencies).[50]

1. Spontaneous sphere

The internal differentiation into an organized-professional sphere and a spontaneous sphere is most clearly manifested in the economy (corporations/consumers) and in politics (government/public opinion), but is also evident in the law, in the media, and in the health system. It is the starting point for societal constitutionalism, as reflexive politics is realized

[48] On this from a legal theoretical perspective, Calliess (1999) *Prozedurales Recht*, 224 ff.

[49] Sciulli (2001) *Corporate Power in Civil Society*; Sciulli (1992) *Theory of Societal Constitutionalism*; Sciulli (1988) 'Foundations of Societal Constitutionalism'.

[50] On the differentiation between the spontaneous sphere and the organized-professional sphere of function systems and their relevance for democratization of (world) social sub-areas, Teubner (2003) 'Global Private Regimes'. The concept of 'partial publics' developed by Habermas approximates to the phenomenon here termed spontaneous sphere, but underestimates the link to the rationality criteria of different function systems, Habermas (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 359 ff.

in different ways in each of the two spheres. The democratic quality of each social sector depends on their mutual interplay. In politics, the organized sphere consisting of political parties and state administration is mirrored by the spontaneous sphere, ie the electorate, associations, and public opinion. Analogously, the relation between the spontaneous sphere of the market and the organized sphere of the corporations is firmly established in the economy. Although organized business has been able to enhance their technical expertise, organizational capacities, and financing techniques to a huge extent, the corporate sector has not succeeded in bringing the economic sphere as a whole under its control. This means that, in both politics and economics, there is a highly rationalized domain of decision-making exposed to a chaotic challenge that it ultimately cannot control. The organized sphere of decision-making certainly does not receive any clear signals from the spontaneous sphere. It is condemned to freedom—and only once the critical decisions have been made, the specific mechanisms of responsibility begin to work that reside in democracy or in the market.

This 'spontaneous/organized' difference is the focal point for a constitutionalization which extends beyond the current constitutional situation. The precarious balance between the spontaneous and the organized sphere needs to be continually recalibrated, particularly countering the tendency of the organized sphere to dominate the spontaneous sphere. If one wants to enhance the democratic potential beyond the classical constitutional institutions (participation, deliberation, electoral mechanisms in politics, and decentralized market mechanisms in the economy) then one would need to extend the means by which the spontaneous sphere can control the organized sphere.

The dualism between spontaneous and organized spheres is a basic principle of functional differentiation. Its constitutional and democratic dimensions, however, are rarely recognized. Although in each social system decision-making potential is specialized, organized, and rationalized to a high degree, democratic constitutionalism relies on the inability of the organized-professional sector to assume total control. Instead, it is itself exposed to the control of numerous decentralized, spontaneous processes of communication. In the American and French Revolutions, this critical difference was deliberately worked into the state constitution in the form of the spontaneity of democracy and of human rights in contrast to the formal organization of the highly rationalized state. In other areas, by contrast, constitutional efforts to support the precarious relationship between the spontaneous and the organized sphere are rather weak.

Is it possible to institutionalize constitutional guarantees that will grant the spontaneous spheres greater controls over the organized sphere? The opportunities associated with globalization suddenly become visible here, in stark contrast to the numerous fears that globalization will generate nothing but risks to democracy and the rule of law. The dynamic of globalization opens chances to reshape the relation between the spontaneous and organized spheres. This is because globalization frees many societal sectors from the constraints of nation-state-based politics. The pack is now reshuffled. Research, education, healthcare, the media, the arts—globalization offers the opportunity to strengthen their autonomy and to institutionalize the 'spontaneous / organized' difference in a dual constitution.

Global research appears to display a remarkable tendency towards developing a global spontaneous sphere. The catchwords here are depoliticization, de-bureaucratization, forms of non-economic competition, pluralization of research financing, and competition between institutions funding research. Similar tendencies can be seen in the education sector, where global competition between universities is forcing them away from their political and bureaucratic patronage, exposing them more fully to the controlling dynamics of their own spontaneous sphere.

Societal constitutions ought therefore to direct their attention towards safeguarding the internal politicization of the spontaneous sphere against the dominance claims of the organized-professionalized sphere. The global protest movements that can currently be observed in the various function systems offer increased re-politicizing, re-regionalizing, and re-individualizing opportunities that expose the organized sphere to stronger control by the spontaneous sphere. Current catchwords include Brent Spar, Gorleben, animal rights protests, companynamesucks.com, Stuttgart 21, WikiLeaks, indegnados, Occupy Wall Street. These civil-society protests are directed not (only) against the state but against the organized-professional core of the economic system and of other function systems.[51]

Constitutionalizing the spontaneous sphere in the economy would mean to protect the politicization of 'private' consumer preferences. If preferences are not simply taken as given but are openly politicized through consumer activism, consumer campaigns, boycotts, product criticism, eco-labelling, eco-investment, public interest litigation, and other demands for ecological sustainability, this should not be taken as

[51] Some authors see in these direct contacts a new political quality, Crouch (2011) *The Strange Non-Death of Neoliberalism*; O'Brien et al. (2002) *Contesting Global Governance*, 2.

external political intervention in a self-regulating economy. Rather, such politicization changes the internal constitution, as it touches on the most sensitive part of the payment cycle, namely, the willingness of consumers and investors to pay. One constitutional question is: What is the political legitimacy of this new 'ensemble politics'?[52] Other questions immediately arise about fundamental rights: How can autonomous preferences be protected from restriction by corporate interests? It is no coincidence that horizontal effects of fundamental rights have been thematized in cases to do with product criticism, exposure of harmful working conditions and ecological protest against environmentally damaging corporate policies, whistle-blowing against organized irresponsibility. Economic citizens' fundamental rights have been developed against repeated attempts by corporations to restrict them. In the future—again, conjured by catchwords such as companynamesucks.com and WikiLeaks—such economic fundamental rights will become politically more explosive and will require greater legal protection.[53] Such economic rights should not be oriented solely to market efficiency (as in concepts of market failure, information asymmetry or incomplete contracting),[54] but rather to their social and environmental compatibility.[55]

2. Organized-professional sphere

In the organized-professional sphere of social subsystems, the main constitutional problem is to deal with what can be called the motivation-competency dilemma: Actors outside the professional organizations—in particular the general public, the courts, and state politics—are usually highly motivated to achieve the limitation of function systems, but they lack the knowledge, the practical competence, and the enduring energy to actually implement such changes. By contrast, these competences are highly developed in the organized-professional sphere; however, given the interest in system

[52] Elaborate public consultation procedures have in practice been developed to legitimatize such social processes that politicize consumer preferences towards ecological sustainability, see Perez (2011) 'Private Environmental Governance as Ensemble Regulation'.

[53] In general on the horizontal effect of fundamental rights in the transnational sphere, Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte'. Particularly on the protection of fundamental rights on the Internet, Karavas (2006) *Digitale Grundrechte* and on corporate criticism, Karavas and Teubner (2005) 'The Horizontal Effect of Fundamental Rights on "Private Parties" within Autonomous Internet Law'.

[54] Argumentation in this narrow perspective, Rühl (2007) 'Party Autonomy in the Private International Law', 177 ff.; Schäfer and Lantermann (2006) 'Choice of Law', 87, 104.

[55] More on this in the next chapter which addresses the transnational third-party effect of fundamental rights.

maintenance, the motivation to seriously engage in self-limitation is largely lacking. In this situation, the only possible strategy for the political public is to 'besiege' the professional organizations, that is, to put sufficient political pressure on them.[56] An adequate reaction of constitutional law would be to increase the organizations' irritability towards the demands of the public, the courts, and state politics.

In the economy, this means an 'ecologization' of the corporate constitution, ie to increase its environmental sensitivity (with regard to nature, society, and humans). Corporate governance, which is currently primarily concerned with the relation between corporations and capital markets, needs to be redirected towards Corporate Social Responsibility. This does not mean a new management ethic, but rather a change in internal corporate structure—brought about by pressure from the outside by parliaments, governments, trade unions, professions, social movements, NGOs, and the media—which will constrain speculative tendencies, excessive growth imperatives, and environmental damage.[57] A sustainability-oriented corporate constitution would promote environmental concerns and regulate internal implementation as well as external controls. In labour relations, arrangements to counter untenable working conditions would

> ... combine ... external (countervailing) pressure—be it from the state, or unions or labour rights NGOs, comprehensive and transparent monitoring systems and a variety of 'management systems', interventions aimed at eliminating the root causes of poor working conditions.[58]

Here again, direct interventions from outside ought to be replaced by indirect pressures. They would take the form of *learning pressures*, ie external influences that compel transnational organizations to engage in learning adaptation. Both elements are needed to facilitate interaction between external pressure and internal adaptation: *a change in cognitive*

[56] Habermas (1986) 'The New Obscurity', 12 ff.

[57] Binswanger (2009) *Vorwärts zur Mässigung,* 150 ff., 157 ff. explicitly makes this correlation. He proposes concrete company law reforms: 'The joint stock company is a product of the 19th century that must be modernised. My proposal is to divide their capital into registered shares with restricted transfer and bearer shares. Registered shares are of infinite duration but cannot be traded on the stock exchange and may only be sold over-the-counter at the earliest after three years. Bearer shares however will have a life of 20 to 30 years and will then be redeemed at their original purchase price. They may be traded on the stock exchange ..., This would significantly reduce speculation, slow the senseless maximisation of profits and help prevent future economic and financial crises.' Binswanger, 'Die deutsche Wirtschaft wächst zu schnell', *Spiegel-Online* dated 12 December 2010.

[58] Locke et al. (2006) 'Does Monitoring Improve Labour Standards?', 3.

structures and pressure directed at achieving this. Otherwise, the demands from society will remain ineffective external impulses. This is where the reciprocal closure of social systems becomes relevant. *'L'ouvert s'appuye sur le fermé.'*[59] The closure requires, for its part, a new kind of reciprocal opening. There is little prospect of a direct transfer of norms then; instead, learning pressures are built up—that is, other mechanisms of reciprocal opening.

An important transformation in the course of globalization becomes visible at this point. Luhmann characterized this as follows:

> that, at the level of the self-consolidating world society, it is no longer norms (in the form of values, prescriptions or purposes) that steer the prior selection of knowledge but that, conversely, the problem of learning adaptation acquires structural primacy, *so that the structural conditions of all subsystems' capacity to learn have to be supported*.[60]

As a consequence, imposing legal rules from the outside will no longer be the typical communication between corporations and their various stakeholders. Rather, non-legal media, expert knowledge, political power, social pressure, as well as monetary incentives and sanctions will induce learning processes in the corporate codes, indeed almost force them to occur.[61] Cognitive primacy does not mean that the corporate codes lose their normative quality, functioning only as cognitive expectations. Rather, what is de-normatized are the communicative relations between stakeholders and corporations, because they switch from the normative to the cognitive; the corporate codes themselves retain their normative quality.

What does the first element of the learning pressures—cognitive learning—look like? The impulses sent out from the stakeholders are only 'templates' for the corporate codes—behavioural models, principles, best practices, recommendations. They trigger learning processes over and beyond the boundaries of different communicative media.[62] It is their separation that brings about cognitive added value and this is always generated whenever the sparks of perturbation leap across the boundaries

[59] Morin (1986) *La méthode: 3 La connaissance*, 206.

[60] Luhmann (1975) 'Weltgesellschaft', 63 (my emphasis, GT).

[61] In detail on the learning processes, Crouch (2011) *The Strange Non-Death of Neoliberalism*; Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 518; Amstutz and Karavas (2009) 'Weltrecht', 655 ff.

[62] Murphy (2005) 'Taking Multinational Corporate Codes'.

between the systems involved and are able to lead to normative innovations there.

The special learning effect is: The stakeholders formulate norms from which the corporations can read which societal expectations are being directed at them without having to take every single one on board. The demands of society and the state compensate for the tunnel view developed by the private codes and prompt them to develop an orientation towards transnational public policy. In this indirect manner, state agencies, protest movements, and civil society organizations provide constitutional learning impulses.

What does the second element—pressure—look like? Legal sanctions do not play a decisive role as learning pressures. Instead, non-legal sanctions are responsible for forcing corporations to take the protests of NGOs and state soft law as learning impulses to change their codes. To begin with, inter-organizational power—one-sided pressure and political exchange—coerces corporations into developing their codes of conduct. It is here once more apparent that external pressure is an indispensable condition for external norms of soft law exerting any impact whatsoever.[63] Nation states and international governmental organizations alike have been able to generate power resources to do this, albeit only to a limited extent. The powerful pressures exerted by protest movements, NGOs, unions, non-profit organizations, professions, and public opinion have proven much more effective to date. Often it is economic sanctions that make the crucial difference in the end—the sensitivity of consumers on whose purchasing behaviour the corporations depend, and that of certain investor groups who use their investment decisions to exert economic pressure on the corporations.[64] As for the recent financial crisis, it remains to be seen whether governments will adopt an effective lead role in placing external pressure on the corporations. The latest news on this front gives more cause for scepticism than optimism.

Thus, behind the metaphor of 'voluntary codes' lies anything but voluntariness. Transnational corporations adopt their codes neither because they accept the appeal to the public interest nor because they are

[63] Abbott and Snidal (2009) 'Strengthening International Regulation', 506 summarize: 'These norms are "voluntary" in the sense that they are not legally required; however, firms often adhere because of pressure from NGOs, customer requirements, industry association rules, and other forces that render them mandatory in practice.'

[64] A detailed analysis of the correlation between external pressure and internal corporate structure in Howard-Grenville et al. (2008) 'Constructing the License to Operate'.

motivated to do so by corporate ethics. They act 'voluntarily' only when subjected to massive learning pressures from the outside. The learning process does not occur within the legal system, running from state norms to corporate codes via a validity transfer, but only in a roundabout way via other function systems. It is not yet sufficient to describe this as legal sanctions being replaced by social sanctions. This would be to conceal the important consequences brought about by such roundabout learning pressures. Rather, system boundaries are transgressed in complicated 'translation processes'and a cycle of perturbation emerges between social and political expectations, pressures exerted by political and societal power, the knowledge operations of epistemic communities, and economic sanctions, and the enactment of corporate codes.[65] When the UN, ILO, and EU formulate soft law recommendations on the conduct of transnational corporations, they do not have a direct legal effect, rather they are transformed in a complicated 'translation process'. The original content of the soft law norms is radically altered when they are 'translated' into the language of expert knowledge that devises models and organizes monitoring; into the inter-organizational power of political negotiations between international organizations, NGOs, and transnational corporations; into the power of the reputation mechanisms of the public sphere and the power of monetary incentives and sanctions; and, finally, into the legal language of the hard law of internal corporate codes. This indirect link between external and internal processes illustrates the self-constitutionalization of corporations. It comes about not via intrinsic, voluntary motivations, nor via the sanction mechanisms of the law, but rather on the basis of external learning pressures alone.

3. The self-regulatory sphere of the communicative medium

Alongside the spontaneous sphere and the organized-professional sphere, there is a third constitutional arena within function systems. There are institutions responsible for the self-regulation of the communicative media—power, money, law, and truth. Constitutionalization establishes rules for those institutions, their competences, and procedures for internal reflection.

We shall illustrate this with an example—plain money reform—which has been proposed in recent years as a means of combating the growth excesses of the global financial system. As a response to the global financial

[65] In an empirical case study on the Marine Stewardship Council, Ellis (2009) 'Sustainable Development and Fragmentation' identifies such translation process as responsible for the success of corporate constitutionalism.

crisis, a variety of regulatory mechanisms have been proposed. They include abolishing bankers' bonuses, increasing banks' equity, the Tobin tax, quality controls on financial products, increased national and international state supervision of banks (especially hedge funds), stricter controls on capital and stock transactions, better accounting regulations and risk assessment.[66] Typically, they are based on a factor analysis in which individual factors are isolated via causal attributions and made responsible for the crisis. The regulatory aim is to introduce countervailing factors into the causal chain in order to rule out that the crisis is repeated. Their chances of success shall not be disputed here, but they do share one problem: *fatta la legge trovato l'inganno*, ie no sooner has the law been passed than strategies are devised for circumventing it. The Achilles heel of such regulations is that national and international rules alike are constantly being dodged to great effect. Given the enormous energies invested in evading them, it is not possible to implement ex ante mechanisms.[67]

A more fundamental approach sees the factors in a factor analysis merely as interchangeable conditions and seeks to uncover the underlying dynamics themselves. If one wants to tame the underlying dynamic which produces the increasingly sophisticated strategies of evasion then the 'inner constitution' of the global financial economy itself needs to be changed. One instructive example is the above-mentioned plain money reform proposed by economists and social scientists.[68] In the UK, in Switzerland, and in Germany, political initiatives have been established which confront the public with concrete proposals for the financial constitution.[69] Their starting point is the monetary mechanism at the heart of the economic constitution. Money creation has long ceased to be a monopoly of the central banks, which create money by printing paper currency not tied to the gold standard. The rapid and widespread increase in money on deposit in current accounts, the spread of non-cash transactions, the triumphal march of the new communications technologies and—a particularly powerful factor—the globalization of

[66] See eg 'Der Erreger lebt weiter', *Der Spiegel* dated 14 September 2009, 108 ff.

[67] Discussed in detail in Streeck (2009) *Re-Forming Capitalism*, 236 ff.

[68] Originally proposed by Fisher (1997 [1935]) *100% Money*; today led by Binswanger (2006) *Wachstumsspirale*; Huber and Robertson (2008) *Geldschöpfung in öffentlicher Hand*. See also Creutz (2002) 'Vollgeld'; Zarlenga (2002) *Lost Science of Money*; Robertson (2009) *National and International Financial Architecture*; Senf (2009) *Bankgeheimnis Geldschöpfung*.

[69] UK: 'Positive Money', <http://www.positivemoney.org.uk/draft-legislation/>; Switzerland: 'Monetative', <http://www.monetative.ch/>; Mastronardi (2011) *Monetäre Modernisierung*; Germany: 'Monetative' <http://www.monetative.de/>.

money and capital transactions have all helped wrest the monopoly on money creation from the national central banks.[70] As a result, it is now the global commercial banks which, for their part, have *de facto* acquired the ability to create money, independently of the central banks, even if money on deposit is euphemistically described merely as a money surrogate. In Europe the ratio of money deposits to paper currency is 80:20 while, in the UK, deposit money accounts for 92% of total money in circulation. The website of the German *Bundesbank* states: 'The main source of money creation today is loans issued by the commercial banks (active money creation): the borrower's current account is credited with the amount of the loan taken out (sight deposit), thereby immediately increasing the overall money supply in the economy.'[71] This is effectively *creatio ex nihilo*, because the loans issued via money deposits by the commercial banks are not covered by existing savings in the banks; rather, they can be disbursed more or less at will in line with the banks' sovereign calculations of risk. The public central banks can influence this private money creation only indirectly, in particular by raising or lowering the prime lending rate.

The massive money creation by private banks is now being held responsible for the excessive growth pressures in the global finance sector. In effect, it uses advance financing to compel the real economy to grow to an extent that creates negative externalities to society. At the same time, private money creation is instrumentalized for an unheard-of increase in self-referential financial speculation.

> The banks behave like any other economic actor: pro-cyclically and self-interestedly, without any macro-economic strategy and without any political or social responsibility. As a result, the banks create money with excessive pro-cyclicality. This gives rise, at times, to extreme excesses in the economic and stock market cycles:
>
> — in the ups and highs of an oversupply of money and the consequent price inflation as well as, increasingly, capital market price inflation (speculation bubbles, asset price inflation),
> — in the downs and lows of crises—as a result of imploding stock market capitalisation/asset values and payment defaults—scarcity of money and monetary drain from the economy. The

[70] Graziani (2003) *Monetary Theory of Production*, 82 f., referring to Schumpeter (1926) *Theorie der wirtschaftlichen Entwicklung*, 153.

[71] <http://www.bundesbank.de/bildung/bildung_glossar_g.php>.

> finance institutes themselves are just as prone to this as are state governments, corporations and societies.[72]

The punch-line to the theory, however, is this: the alternative cannot be zero growth, but rather a constraint on the excesses of the growth imperative. This is because 'stability and zero growth are not tenable in today's monetary system'.[73] Money creation forcibly brings about an increase in profits by way of value added, and this increase in profits inevitably leads in turn to money creation and value added. This necessarily gives rise to a spiral of growth. The alternative would be economic shrinkage, which in the long term is not compatible with the current economic system based on money. A functioning money economy rests upon a certain imperative to grow. In this scheme, though, it is not the growth imperative that becomes the centre of attention, but rather the *difference between necessary growth and self-destructive growth excesses*, which trigger adverse developments.[74]

What are the mechanisms responsible when, through the recursivity of operations, the self-reproduction of a social system takes on this kind of communicative imperative towards repetition and growth, with all the self-destructive consequences this entails? In the example we have just looked at, the mechanism would be the money on deposit created *ex nihilo* by the commercial banks, because it links payment operations so closely to one another that this triggers excessive growth in the financial and the real economies. The increased profit expectations generated by the commercial banks in creating money through lending fuel a growth imperative in the real economy, which in turn causes profit expectations to rise in the financial economy, thus triggering a dynamic that can no longer be seen in terms of a stationary economic cycle but rather has to be described as an accelerating spiral of growth. In parallel to this, as part of the dynamic of money creation, bank loans are taken out which serve not to finance productive investments but rather to purchase speculative asset values. If however the interest rates for bank loans exceed the expected increase in asset values, the speculative deal collapses and there ensues a financial crisis, which then becomes an economic crisis. Clearly, both communicative growth imperatives can occur quite independently of any individual's greed or addictive

[72] Huber (2009) Geldordnung II.

[73] Binswanger (2009) *Vorwärts zur Mässigung*, 21.

[74] Binswanger (2009) *Vorwärts zur Mässigung*, 11 ff. differentiates between a necessary growth imperative and a socially harmful growth pressures.

behaviour. Indeed, to a large extent even individuals resistant to the lures of addiction have to conform to these imperatives upon pain of exclusion from the game. At the same time, however, individuals with the relevant psychological disposition are drawn to this game, so that individual and social addictive behaviour may then become mutually reinforcing.

As a tried-and-tested antidote, ecologically oriented economists propose plain money reform. The addictive drug of money on deposit must be taken away from the commercial banks—this promises an effective 'withdrawal treatment'. Commercial banks will be prohibited from creating new money via current account credits. They are restricted to arranging loans on the basis of existing money, while the creation of money becomes again the sole prerogative of the national and international central banks.

> The most important long-term measure for preventing excessive speculation on the financial markets, which is harmful to the public interest, is to end the money-creating activities of the commercial banks. The aim is to put a stop to the excessive pro-cyclical expansion and contraction of the money supply and replace it with a stabilized money supply policy based on the real economy.[75]

The aim of seigniorage reform is:

(1) to allow only the central banks to create money—cash as well as non-cash credit;

(2) to put this money into circulation free of debt (without interest rates or amortization) through public expenditure; and, to this end

(3) to stop banks from creating money on the basis of sight deposits.[76]

Achieving this decisive reform would require a simple but fundamental change to the legal rules governing central banks at national, European, and international level. With regard to the European Central Bank's statute, the current Article 16 would have to be changed (see words in italics):

> The Governing Council shall have the exclusive right to authorize the issue of legal tender within the community. Legal tender comprises coins, banknotes *and sight deposits*. The ECB and the national central banks may issue such means of payment. The coins, banknotes *and sight deposits*

[75] Huber (2009) *Geldordnung II*, ad 4; Huber (2010) *Monetäre Modernisierung*.

[76] Huber (2009) *Geldordnung II*; Fisher (1997 [1935]) *100% Money*; Binswanger (2009) *Vorwärts zur Mässigung*, 139 ff.

> issued by the ECB and the national central banks shall be the only such tender to have the status of legal tender within the Community.[77]

Given the globalization of financial markets, plain money reform ultimately requires global constitutional solutions. However, even the protagonists of the idea think the chances of a uniform global solution are difficult, given the likely resistance of leading nation states. Nonetheless, they think that initiatives undertaken by individual nation states on their own (or, better still, co-operative arrangements among a few nation states)—at least for relatively strong states that have a stable government, a strong economy, and a stable convertible currency—are by all means conceivable and even realistic.[78] Regional solutions of this kind within economic blocs are most likely to occur in the euro zone, and to a lesser extent in the USA or Japan. The best possible solution today would be to see a global financial constitutional regime emerging from co-operation between the central banks in a 'coalition of the willing'.

Plain money reform plays a part, then, in two opposing thrusts towards constitutionalization on the global markets and which (in reference to Polanyi's ideas, mentioned above) can be described in terms of a 'double movement' of transnational constitutionalism.[79] It first supports the expansion of subsystems using constitutive norms, but then seeks to inhibit them through the use of limitative norms. As for financial constitutions, the expansion of purely economic orientations would trigger counter-movements throughout the world that seek to reconstruct the 'protective mantle of culturally specific institutions'.

The protagonists of societal constitutionalism have identified collegial institutions in different social spheres as suitable social bodies that can judge and decide over such self-limitations. They are pleading for their institutionalization qua constitutions.[80] Collegial institutions are reflexive bodies aimed at social self-identification in two senses: they establish the specific rationality and normativity of the social sphere and they seek to make them compatible with their environments. The collegial institutions function as a kind of think-tank for the sub-constitution, which for its part governs the ecological relations of the social system.

[77] Huber and Robertson (2008) *Geldschöpfung in öffentlicher Hand*, 24.

[78] Huber and Robertson (2008) *Geldschöpfung in öffentlicher Hand*, 61 ff.

[79] Polanyi (1944) *Great Transformation*.

[80] Sciulli (1992) *Theory of Societal Constitutionalism*.

Plain money reform shifts the weight of such collegial institutions from the commercial banks back to the central banks. In doing so, it can be seen as an incisive self-constraint of the growth imperatives of the economic payment cycle. Its protagonists herald it as an effective withdrawal treatment against the addictive behaviour of the credit sector. Three expansion-constraining effects are particularly prominent:

(1) Expansionism of private banks is limited by banning them from money creation *ex nihilo*. This is likely to have the effect of curbing the speculative use of current account credit.

(2) Expansionism of the global financial markets in relation to the real economy is limited so that their relationship is now determined by the central banks and no longer by the private banks. The coupling of the financial and the real economies is no longer dependent on the profit motivations of the commercial banks, but rather on the macro-economic considerations of the central banks.

(3) Expansionism of the financial and the real economies in relation to other social sectors and to the natural environment is constrained by eliminating the growth imperatives intensified by current account credit. 'This is not about abandoning growth, but about reducing exponential growth imperatives and pressures.'[81] Private banks will no longer create money as an unsecured bill of exchange on the future. If money creation is carefully tailored through by the central banks in terms of its overall social and ecological impacts then it will block the socially harmful growth imperative. This is the most important aspect of such an externally imposed self-limitation.[82]

III. CONSTITUTIONAL PROCESSES: DOUBLE REFLEXIVITY

Our interim result is: transnational constitutionalism goes far beyond a mere juridification of societal spheres, rather, it performs constitutional functions via constitutive and, and especially today, limitative rules. Furthermore, constitutional arenas can be identified in each social system, in parallel to the internal differentiation of the political system into a public sphere and an organized-professional sphere (itself divided into decentralized and centralized institutions). The next question is whether it is possible to identify genuine constitutional processes and structures

[81] Binswanger (2009) *Vorwärts zur Mässigung*, 12.

[82] See evidence in Fn. 68.

in the transnational sub-constitutions. We shall examine again the case of plain money to see whether such norms represent constitutional processes and structures—in the strict sense, not just metaphorically.

1. Reflexivity of the social system

Though lawyers may not like to admit it, law does not play the primary role in state constitutions and other sub-constitutions. The primary aspect of constitutionalization is always to self-constitute a social system: the self-constitution of politics, the economy, the communications media, or public health.[83] Law, in such processes, plays an indispensable yet merely supporting role. An exacting definition of societal constitutionalism would have to realize that constitutionalization is primarily a social process and only secondarily a legal process. A useful definition of social constitutions puts it as follows:

> . . . to view the entire objective and conceptual apparatus of constitutionalism (including rights, normative texts, and even constitutional courts) as a bundle of institutions produced from within political power itself—as the necessary yet self-generated preconditions of power's positive and differentiated autonomy.[84]

Not only in politics but also in other social fields, the constitution in the first instance serves to enable the self-foundation of a social system. Politics, the economy, science, and the mass media generate their own autonomy by, among other things, formalizing their own communicative medium.[85] Constitutional processes are a case of 'double closure' in the sense described by Heinz von Foerster.[86] Social systems develop first-order closure by linking their self-produced operations with one another and thereby setting themselves apart from the environment. They develop second-order closure by applying their operations reflexively to their operations. Thus, science secures its autonomy when it succeeds in establishing a second level of cognition in addition to the first-

[83] The correlation of constitutional norms and the self-foundation of social systems becomes particularly clear in sociological analyses, Prandini (2010) 'Morphogenesis of Constitutionalism', 316 ff.; Thornhill (2008) 'Towards a Historical Sociology', 169 ff. Similarly, some theories of transnational constitutionalism, in contrast to legal formalism, insist on the political character of constitutions and the creation of a constitutional 'mindset', in particular, Koskenniemi (2007) 'Constitutionalism as Mindset'; Klabbers (2009) 'Setting the Scene', 30.

[84] Thornhill (2010) 'Niklas Luhmann and the Sociology of Constitutions', 18.

[85] Prandini (2010) 'Morphogenesis of Constitutionalism', 310.

[86] Foerster (1981) *Observing Systems*, 304 ff.

order operations orientated towards the binary true/false code. The first-order operations are then tested against the truth-values of the second level—the level of methodology and epistemology.[87] Politics becomes the autonomous power-sphere of society when it directs power processes via power processes, and produces the double closure of politics through electoral procedures, modes of organization, delineation of competences, separation of powers, and fundamental rights. The economy becomes autonomous when, within the money cycle, payment operations are used not only to effect transactions but to steer the money supply itself.[88] In this way, when double closure defines external boundaries and internal identity, subsystems become autonomous in the strict sense. This 'medial reflexivity' produces for each function system the 'form in which the medium acquires distinctiveness and autonomy'.[89]

However, medial reflexivity together with cognitive and normative reflections on socially compatible identity formation[90] do not yet generate constitutions in the technical sense, but enable only the self-foundation—not yet the constitutionalization—of social systems. Epistemology, the over-(em)powering of power, and control of the money supply do not yet comprise social constitutions as such, but simply reflexive operations of their own system. The mere constitution of medial autonomy is not to be equated with its constitutionalization.[91] We should only speak of constitutions in the strict sense when the medial reflexivity of a social system—be it politics, the economy, or some other sector—is supported by the law or, to be more precise, by the reflexivity of the law. Constitutions emerge when phenomena of double reflexivity arise—the reflexivity of the self-constituting social system and the reflexivity of the law that supports self-foundation.[92]

[87] Luhmann (1990) *Wissenschaft der Gesellschaft*, 469 ff.

[88] Luhmann (1990) *Wissenschaft der Gesellschaft*, 289 ff.; Luhmann (2000) *Politik der Gesellschaft*, 64; Luhmann (1988) *Wirtschaft der Gesellschaft*, 117 f., 144 ff., 209.

[89] Luhmann (1997) *Gesellschaft der Gesellschaft*, 373.

[90] Reflexivity is limited neither to the application of operations to operations, nor to the process of social identification, but appears also as a medial reflexivity (self-application of communicative media) that is usually accompanied by both cognitive and normative reflexivity.

[91] The terms constitution/constitutionalization were provisionally defined in the previous chapter in order to make it plausible to transpose constitutional subjectivity from states to regimes. The question now is to make clear the particularities of both processes.

[92] On the 'double reflexivity' of constitutions see Teubner (2009) 'The Corporate Codes of Multinationals', 268 ff.; Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1014 ff.; Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 532, as well assumes double reflexivity in his definition of a transnational economic constitution, as does Kuo (2009) 'Between Fragmentation and Unity', 465 ff. Similarly Tuori (2010) 'Many Constitutions of Europe', 8 f., who defines a social constitution

2. Reflexivity of the legal system

Societal constitutions are thus defined as structural coupling between the reflexive mechanisms of the law (that is, secondary legal norm creation in which norms are applied to norms) and the reflexive mechanisms of the social sector concerned. This definition has the same starting point as Luhmann's concept of constitution, namely, that the state constitution is a structural coupling between politics and law.[93] However, structural coupling is merely a necessary and not yet a sufficient condition, as a whole range of political-legal phenomena, such as legislation and judicial decisions on political conflicts, are themselves structural couplings between politics and the law. We will need to frame the coupling relationship in more specific and yet also in more general terms. More specific: not every coupling between politics and the law generates constitutional qualities (eg regulatory legal norms that seek to achieve political goals), but only the coupling between medial reflexivity in both systems. More general: a constitution emerges not only in the political system, as imagined by Luhmann, but rather in each social system provided its reflexivity is supported by secondary legal norms. Moreover, a certain denseness and duration of structural couplings needs to exist, which distinguishes constitutions from the numerous situations in which law and a social sphere is only occasionally and loosely coupled. Then the typical constitutional dynamics emerge as an institutionalized co-evolution between the two social systems involved. In order to distinguish constitutions from other instances of structural coupling, it seems advisable to choose for them the more demanding term of 'binding institution' between law and social sphere.[94]

Secondary legal norms are thus required in every constitution.[95] Primary legal norms in a social sphere would represent merely its juridification, not its constitutionalization. In fact, no constitution at all is estab-

as the relation between law and the relevant social sphere. His definition of constitutionalization is however too close to juridification, as he goes on to define the relation as 'interaction with its object of regulation' and forgoes double reflexivity. His attempt to define constitutional law as 'a higher law relating to a distinct extra-legal action field' (24) ignores medial reflexivity in the social sphere. He accordingly relates social constitutions solely to power, ignoring other communicative media (money, truth, etc.).

[93] Luhmann (1990) 'Verfassung als evolutionäre Errungenschaft'.

[94] On 'binding institutions' in other contexts, Teubner (1998) 'Legal Irritants'.

[95] Although not exclusively: numerous constitutions contain not only secondary norms but rather substantive legal principles and norms, in particular fundamental rights.This has to do with the re-entry of fundamental principles of the social sub-area into constitutional law (more on this below).

lished if only primary norms for behavioural control were enacted.[96] The same is true for merely conflict-solving or regulatory norms. The situation becomes critical only when norms of norms—that is, secondary norms—prescribe how the identification, setting, amendment, and regulation of competences for the issuing and delegating of primary norms are to occur.[97] Political and civil society constitutions only come to be formed when these two reflexive processes are closely linked to one another—in other words, when reflexive social processes that render societal rationalities autonomous through their self-application are juridified via legal processes that are themselves reflexive.[98] We should only speak of an independent constitution in the strict sense when this sophisticated interplay arises, when a subsystem and the law are permanently and strictly (rather than merely temporarily and loosely) coupled. Here we encounter the curious doubling of the constitutional phenomenon that rules out the widespread understanding of a fusion in one constitutional phenomenon (ie one uniting the legal and the social order). The two extremes of constitutional theory, associated with the names of Hans Kelsen and Carl Schmitt, need to brought into an interrelation.[99] 'Constitution' can be reduced neither to a legal phenomenon nor to a social phenomenon. It is always a double phenomenon, a linking of two actual processes. From the point of view of law, it is the production of secondary legal norms, a process peculiarly interwoven with the fundamental structures of the social system. From the point of view of the constituted social system, it is the generation of fundamental structures of the social order, structures that at once inform the law and are themselves regulated by it.[100] Only

[96] This reflects Dieter Grimm's argument against transnational constitutionalism: a 'constitution' in Europe or in world society or in private orders is simply juridification, Grimm (2009) 'Gesellschaftlicher Konstitutionalismus'.

[97] Primary and secondary norms in the sense of Hart (1961) *Concept of Law*, 77 ff.

[98] Mattias Kumm sketches out a (transnational) constitutional pluralism that comes close to this. He stresses, in his 'practical conception of constitutionalism', that constitutional norms claim original rather than derivative authority. They achieve this in a deliberative process of free and equal individuals and they set out substantive principles. Kumm, however, somewhat one-sidedly stresses 'the justiciability of social processes'. And he does not sufficiently make clear the double reflexivity of constitutions. If so this would explain that the claimed original authority is established in the autonomy of the social system, and the substance of the constitutional principles (which have for Kumm almost natural law quality) results from reflection practices within the social system. Kumm (2010) 'The Best of Times and the Worst of Times', esp. 212 ff.; Kumm (2009) 'Cosmopolitan Turn in Constitutionalism'.

[99] In detail Lindahl (2007) 'Constituent Power and Reflexive Identity', 10 ff.: 'Kelsen and Schmitt on Collective Agency'.

[100] Wahl (2010) 'In Defence of Constitution' criticizes transnational constitutionalism to reduce the constitution to a mere hierarchy of legal norms, without support in social reality. Quite the opposite:

on this condition does it make sense, in terms of both legal sociology and legal doctrine, to speak of a political global constitution, of a global economic constitution, of a global constitution of the education and science system, or of the digital constitution of the Internet.

What is the reason, though, why secondary legal rules are supplementing social reflexivity? Law comes into the self-foundation processes of social systems when they cannot fully accomplish their autonomy. This happens either when the social system cannot be adequately closed by its own first-order and second-order operations, or when reflexive social processes are unable to stabilize themselves or, especially, when they are becoming paralysed by their paradoxes. In such cases, additional closure mechanisms come in to support the self-foundation of social autonomy. The law is one of them—not the only one, but one among several. The self-description of 'state' acts as one of these closure mechanisms: 'The political system is only differentiable at all when it describes itself as a state.'[101] The closure of institutionalized politics is not accomplished without formal limitation to collectively binding sovereign action. Similarly, the structural coupling of politics to law supports the autonomization of politics. The reflexive application of power processes to power processes cannot be exposed to the constant fluctuations of power itself. Legal norms have to stabilize the reflexive effects of the institutions for acquiring and exercising power.

More important still is how the law is defusing the paradoxes of political power. The paralysing paradox of the self-binding nature of the sovereign has been normalized (though not resolved) in the past by the establishment of the rule of law.[102] By analogy, the self-foundation of every social system necessarily has to cope with the paradoxes of self-reference, ie the paradox of its self-founding. One way of dealing with it is to externalize the paradox—among others, to the law. This, at any rate, is what happened in the political constitution. The same can be observed in other social systems: their paradoxes are externalized to the law. When a social system gives itself a legal constitution, it finds an escape from the deficiencies of self-foundation and its paradoxes. Thus the autonomy of a social constitution is never autonomy in pure

Structural coupling can more clearly capture the intensive reciprocal influencing of legal norms and social structures than can the 'material' concept of constitution.

[101] Luhmann (1984) 'Staat als historischer Begriff', 144.

[102] Luhmann (1990) 'Two Sides of the State Founded on Law', 191 ff.; Luhmann (2000) *Politik der Gesellschaft*, 35, 334 ff.

form; it always contains elements of heteronomy. The Self must first be defined heteronomously through legal norms in order to be able to define itself.[103]

Law's role in support of self-foundation varies quite markedly from one system to another. Science requires almost no support at all from stabilizing legal norms to achieve autonomy. Methodology, the philosophy of science, and epistemology are themselves capable of hammering in the boundary stakes that mark out the realm of science.[104] Despite all the worrying phenomena of corruption in the academic world, it seems superfluous to attach a legally binding self-description to science as a collective qua scientific community, or even for the scientific community to be incorporated in parallel to the formal organization of the state in order to secure the scientific credentials of knowledge. The law plays thus a relatively small role in the scientific constitution. Although law is needed to guarantee freedom of science and to secure the formal organization of universities, science basically has arrived at its autonomy without legal support.

The economy, by contrast, requires a huge amount of support from the law for its self-foundation, albeit not to the same extent as politics. As is well known, the institutions of property, contract, competition, and currency form the cornerstones of an economic constitution. These are all based on double reflexivity, that is, on the application of economic operations to economic operations and on the application of secondary norms to primary norms of the legal system.

Plain money reform illustrates how the economic constitution externalizes to the law its paradox that threatens to paralyse economic processes. Both solvency and insolvency are generated in the banking sector; the banking system is founded on the paradox of self-reference, on the unity of solvency and insolvency. 'The banks have the key privilege of being able to sell their own debts at a profit.'[105] This paradox can be defused when medial reflexivity comes in, that is, when money supply operations are applied to money operations. This reflexivity is however inherently unstable. It can only be stabilized by an internal hierarchization of the banking sector, which is in turn backed up by strict norms

[103] Lindahl elaborates this thought for political constitutions, but then transfers it onto other sub-constitutions, Lindahl (2007) 'Constituent Power and Reflexive Identity'; Lindahl (2010) 'A-Legality', 33 ff.

[104] Informative here, Stichweh (2007) 'Einheit und Differenz im Wissenschaftssystem'.

[105] Luhmann (1988) *Wirtschaft der Gesellschaft*, 145.

imposed through binding law. The parallels with the hierarchization of the political system and with the stabilizing role of state constitution are obvious. Legal norms of procedure, competence, and organization, which regulate the way the central banks are set up and work in their relations with the commercial banks, in this way contribute to coping with the paradoxes of the economic cycle.

However, the elimination of paradoxes from the money cycle is always precarious: there is a constant danger that new paradoxes will arise. The hierarchy between central banks and commercial banks, supported by economic constitutional law, has not removed the paralysis of the financial system for all time:

> The logical and empirical possibility of the entire system collapsing, and a return of the paradox and of a total blockage of all operations by the original equation 'solvent = insolvent' cannot be ruled out in this way, but it is rendered sufficiently improbable.[106]

Actually it is *not* 'sufficiently improbable'—this was revealed by the latest financial crisis. The excessive growth compulsion in global financial transactions has brought to light the possibility of the banking sector becoming insolvent. This is exactly the point where plain money reform comes in, relying on mechanisms of double reflexivity. Without this reform, central banks will not be able to exert sufficient control over the money market; they can only indirectly 'stimulate or de-stimulate [it] through interventionary events'.[107] At present, they can exert indirect control via the prime lending rate, which makes lending easier or more difficult. Their direct control of money supply is limited to creating paper currency but fails to get to grips with deposit money, which is now predominant throughout the world. Now, plain money reform transforms the reflexivity of the money medium. Money creation will be undertaken exclusively by the central banks. The secondary payment operations of the central banks (that is, money supply decisions, the creation of cash and deposit money, payments to the state, citizens or banks) are applied reflexively to primary payment operations (purchase and credit). Their juridical reflexivity (that is, the application of norms to norms) is in turn changed by plain money reform. The commercial banks are prohibited by law from creating deposit money. The central banks'

[106] Luhmann (1988) *Wirtschaft der Gesellschaft*, 146.

[107] Luhmann (1988) *Wirtschaft der Gesellschaft*, 117.

monopoly on money creation is prescribed by law. Restricting money creation competences, preventing the recurrence of paradox and total blockage, stabilizing the self-reflexive conditions of payment operations—this is how law in a plain money reform plays the limitative role of an economic constitution.

IV. CONSTITUTIONAL STRUCTURES: HYBRID META-CODES

1. Coding and meta-coding

The ultimate question is whether the subsystems also develop specific constitutional structures that stabilize the above-described constitutional functions and processes in the three arenas. The end point of constitutionalization (be it in politics, in the economy, or in other social spheres) is not reached until an autonomous constitutional code—or, to be more precise, a *hybrid binary meta-code*—arises which guides the internal processes of both systems. The code is *binary* because it oscillates between the values 'constitutional/unconstitutional'. The code functions at the *meta level* because it subjects to an additional test decisions that have already been subjected to the binary 'legal/illegal' code. The decisions are tested as to whether they comply with the constitution. Here the constitutional hierarchy arises, the hierarchy between ordinary law and constitutional law, 'the law of laws'. The constitutional code (constitutional/unconstitutional) is given precedence over the legal code (legal/illegal). What is special about this meta-coding, though, is its *hybridity*, as it takes precedence not only over the legal code but also over the binary code of the function system concerned. Thus it exposes the binary-coded operations of the function system to an additional reflection regarding whether or not they take account of the subsystem's public responsibility.

This somewhat complex constellation can be observed most clearly in the modern state constitutions. Here, constitutional courts use explicitly the 'constitutional/unconstitutional' difference as the governing meta-code for two binary-coded systems, namely, law and politics. This does not result in law and politics merging into a single system, nor does the constitution itself become a social system in its own right. The constitution remains a process of structural coupling between two autonomous systems, politics and law. What the constitutional code does is to co-ordinate them closely, not to transform them in a unitary entity.

Such hybrid meta-codings also crop up—usually implicitly, occasionally explicitly—in the structural couplings of law with other social

systems in the form of their constitutional codes. Today's global economy also operates with such a hybrid meta-code. It serves as a fictitious unity formula for two quite different types of constitutional acts in the economy. While the economic constitutional code assumes hierarchical precedence over both legal and economic binary codings, it adopts a different meaning in each of these two aspects, depending on whether it controls the economic or legal code. On the economic side, it facilitates the reflection of the public interest and seeks forms of socially and environmentally sustainable economic activity. On the legal side, it introduces the division between ordinary law and constitutional law, judging legal acts whether or not they are in line with the values in the economic constitution.

Thus, although the economic constitutional code presents itself superficially as a single *distinction directrice* of 'constitutional/unconstitutional', it actually functions in two modes, either as the economic or as the legal meta-code. This is an interesting special case of an 'essentially contested concept'—the same term is interpreted in very different ways in different contexts.[108] The code's Janus-face results from the mutual closure of the economy and the law which excludes that the economic constitution creates one unitary social system. Instead of merging within one economic constitution, both systems remain separated and attached to their own operational mode, economic transactions, and legal acts. Accordingly, the 'constitutional/unconstitutional' difference is merely a common umbrella formula for different operations which take on quite different significance depending on their context. The constitutional code is an observational scheme that creates different worlds of meaning in the law and in the economy.

2. *Hybridity*

According to the double nature of the code, legal practice and economic practice each develop their own programmes for the economic constitution. These programmes first only emerge from the recursive application of a system's own operations to its own operations, yet then cause constant mutual irritations and thereby trigger a co-evolutionary dynamic of economy and law.[109] If, in law, the meta-code is given hierarchical

[108] This much-discussed formula goes back to Gallie (1956) 'Essentially Contested Concepts'. In our context it is not different theories, but rather different social systems that use the same binary code, attributing different meanings to it.

[109] On such a combination of structural coupling and co-evolution using the example of production regimes, Teubner (2002) 'Idiosyncratic Production Regimes'; generally on the co-evolution of law and economy, Amstutz (2001) *Evolutorisches Wirtschaftsrecht*.

precedence over the code 'legal/illegal', a re-entry of the 'law/economy' difference occurs within the law. Basic principles of the economic system are transformed into legal constitutional principles that vary, according to the historical situation: property, contract, money economy, competition, social market economy, ecological sustainability. The law reconstructs fundamental principles of the existing economy as legal principles and fleshes them out in individual economic constitutional norms.

This is where we find the real justification of the 'material' concept of constitution in contrast to the formal and the functional concepts: constitutional law cannot be reduced to certain decision-making procedures, but demands justification via substantive constitutional principles.[110] This would not be comprehensible without the re-entry of fundamental principles of the social system into the legal system. The principles are certainly not prescribed by natural law, but rather the result of historically changing reflection in the social system, which the law then reconstructs as substantive constitutional principles.[111]

Something comparable occurs in the opposite direction: the metacoding causes the re-entry of the 'law/economy' distinction into the economic system—again, in a historically variable way: the economic reconstruction of the principle of contract, the social obligations of property, limits to competition, principles of the rule of law in the economy, fundamental rights in corporations, the binding nature of principles of ecological sustainability. In this way economic operations are bound to the reconstruction of constitutional law.

The reciprocal re-entry of economy and law thus gives rise to two different 'imaginary spaces' of the economic constitution, two different constitutional programmes, one in the economy, one in the law. These are directed, jointly but separately, towards the constitutional code. That the same term means different things in each context becomes especially clear with property and contract, the classic constitutional principles. In

[110] This supports the abovementioned thesis advanced by Kumm (2010) 'The Best of Times and the Worst of Times', 214 ff. that transnational constitutional law must also legitimize itself via substantive constitutional principles and not merely via procedures. But how do these principles for their part legitimize themselves? Certainly not by declaring them as non-derivative norms; rather, recourse is needed to the reflexive practices in the globalized social system itself. And here again the paradox of self-reference is emerging. The constitution deals with it externalizing the ultimate justification for constitutional legal norms into discursive practices of the focal social system.

[111] See Wiethölter's concept of the 'legal constitutional law' possessed by 'the collision principle levels for Law./.Morals, Law./.Politics, Law./.Economy etc.', or in more exact and general terms: law as the 'structural coupling' of 'environment-systems'. In contemporary translation, 'legal protection' and 'institution protection' would then become 'legal production protection' for freedom functions. Wiethölter (1994) 'Argumentation im Recht', 119.

economic terms, property means 'the disjunction of the requirements for consensus', as a precondition for certain successful communications.[112] In legal terms, property is defined quite differently. Contract also takes on a different meaning as a transaction in the economy, as the binding consensual act in law.[113] The economic constitution uses both concepts according to context. It represents a language game with a peculiar dual structure that is subject to the *distinction directrice* of the unitary meta-code.[114] But the language game does not become an autonomous system with a unitary 'language', unitary structures, unitary boundaries, or unitary self-descriptions. Rather, as said above, it forms a peculiar 'binding institution' in which law and economy are closely coupled to and mutually irritate one another. It produces a bilingualism that requires continual translation efforts in both directions.

To return to our example: plain money reform would change both economic and legal constitutional programmes. In the economic context it would reformulate the public interest principles of money creation for the central banks. Toward which goals should the central banks direct the creation of money—toward averting inflation or toward limiting excessive growth imperatives as well? In the legal context, it would change the legal principles of an economic constitution. Under a plain money regime money creation by private banks, for example, would violate the economic constitution and not only ordinary law. The judgement would be supported not by the ordinary legal code but by the economic constitutional code and by the programmes of economic reflection developed in association with it.

Plain money reform would thus reach deeply into the capillary constitution of the global economy. It conforms to the definition of a social constitution presented here with respect to all four characteristics. First, plain money reform performs constitutional functions, of both a constitutive and especially a limitative kind. Second, it operates in the constitutional arena of the self-regulation of the economy. Third, it participates in the double reflexivity of law and the economy by determining the rules of money creation. And, fourth, it subjects the activities of commercial banks and central banks to the hybrid meta-code of the economic constitution by changing the constitutional programmes of both, the economy and the law.

[112] Luhmann (2004) *Law as a Social System*, 392.

[113] On the double character of institutions in structural couplings of law and economy, Teubner (1998) 'Legal Irritants'.

[114] Tuori (2010) 'Many Constitutions of Europe' comes close to this language game of two languages.

V. THE POLITICS OF SOCIETAL CONSTITUTIONALISM

1. La politique *versus* le politique

And what about politics? By promoting a high degree of autonomy for social sub-constitutions, does not societal constitutionalism de-politicize society?[115] Is the constitutionalization of the economy—in the three constitutional arenas, ie safeguarding civil society protest, promoting ecological responsibility of corporations, and introducing plain money—not itself a politically explosive affair?[116] The definitive answer to both questions is: Yes and No. As indicated above, social constitutions are paradoxical phenomena. They are not a part of society's political constitution and yet they are a highly political matter for society. The paradox can be made bearable when one uses a dual concept of the political, as is today advocated in various different forms—*le politique* versus *la politique*.[117] For example, cultural theorists argue that the political cannot be 'completely monopolized' by constitutional politics; the political may include 'formalizing' society in the medium of law, but it also includes something that 'remains external to' all political and legal form, something that 'societies carry with them constantly as their non-socialised Other'.[118]

The dual meaning of the 'political' will be conceived here as follows. First, it means institutionalized politics, the political system of states. The independent social constitutions distance themselves from this form of politics; they need a high degree of autonomy towards the political constitution. And as far as institutionalized politics participates in the making of social sub-constitutions, a marked degree of 'political restraint' is required. Second, the political refers to politics in society outside institutionalized politics, in other words, to the 'internal' politicization of the economy itself and that of other social spheres, ie the politics of reflection on their social identity. Here social systems are dealing with their own founding and decision-making paradoxes—a process that is always

[115] This is the most important criticism levelled at constitutions beyond the state, polemically put by Somek (2009) 'Transnational Constitutional Law'; Brunkhorst (2007) 'Legitimationskrise der Weltgesellschaft', 76 ff. Other authors indeed use the normative criticism to dispute the factual existence of such constitutions, eg Wahl (2010) 'In Defence of Constitution', 240 f.

[116] Focussing the difficult relationship between politics and societal constitutionalism, see the comments by Emilios Christodoulidis, Hans Lindahl and Chris Thornhill, all 20 *Social and Legal Studies* 2011, 209–252.

[117] On the extensive debate on *le politique* and *la politique*, Marchart (2007) *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau*, 61 ff.; Christodoulidis (2007) 'Against Substitution', 191 ff.

[118] Hebekus et al. (2003) *Das Politische*, 14.

problematic and can never be determined 'technocratically'. And in this respect the independent constitutions of society beyond the state are highly political.[119]

Let us again look at plain money reform. As far back as 1791, Jefferson demanded 'that the right to issue money should be withdrawn from the banks and restored to the people'.[120] But who are the people to whom this right accrues? How can the creation of money be restored to the people? After all that has been said, the answer can only be this: the creation of money belongs to the public sphere, but not to the sphere of the state. Nationalized money creation? No. Money creation localized in the public sphere? Yes. By public sphere, we do not mean an intermediate sphere between the state and society. Rather, a defensible concept of the 'public' nowadays rests on deconstructing the traditional public/private distinction (as a criterion for demarcating social sectors), while at the same time reconstructing it, but now within each individual social sector.[121] The creation of money is obviously one of the most important public functions of the economy. It is part of the public infrastructure of the economic sector. It is a public asset, at the core of the economic constitution. This is why it is necessary to withdraw the task of creation of money from the commercial banks, geared towards private profit, and to make it a monopoly of public—but non-state/non-governmental—institutions, namely, the central banks.

Why, though, should the political constitution of the state not have the privilege of regulating the fundamental structures of social sub-spheres?[122] Above, we discussed this as a question of internal versus external regulation, and now it is posed again in terms of democratic theory which claims the overall responsibility of democratic politics for society. After all, it is the most noble of privileges of the democratic sovereign to give society a constitution. Why, then, auto-constitutionalization rather than political *octroi*? The fundamental structures of modernity make it necessary to

[119] Emphasized by Lindahl (2010) 'A-Legality', 34: 'both "public" and "private" self-legislation are manifestations of political reflexivity'. Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 522 f. attempts to clarify the political dimensions of social sub-constitutions.

[120] Jefferson (1813) 'Thomas Jefferson to John Wayles Eppes'.

[121] On this in detail, Teubner (2008) 'State Policies in Private Law?'; Teubner (1998) 'After Privatisation? The Many Autonomies of Private Law'.

[122] Some authors indeed register a multiplicity of social sub-constitutions, then however postulate the primacy of the political partial constitution, Joerges and Rödl (2009) 'Funktionswandel des Kollisionsrechts II', 767, 775 ff. This diagnosis may have been adequate for the nation state, but is no longer so for transnational relations, Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 498.

determine anew the relationship between representation, participation, and reflection. In the functionally differentiated society, the political constitution cannot take on the role it is still expected to play—namely, to determine the fundamental principles of the other subsystems—without a problematic self-blocking of society, as actually occurred with the totalitarian regimes of the 20th century.[123] Social constitutionalization can proceed in modernity only by each subsystem developing reflexive mechanisms for itself, rather than these being ordained by politics. This reflexivity of subsystems is forcibly brought about. No longer do the *maiores partes* represent the society, with all parts of society participating (as in the stratified society); instead, the bourgeois society has made participation and representation identical and has simultaneously revoked them. We need to abandon the notion that politics represents society in the state and that the other parts of society—people or subsystems—participate in it. No subsystem of society—not even politics—can any longer represent society as a whole, even if political ideas still adhere to this. Instead, societal development is at a stage where

> . . . psychic and social systems must develop reflexive processes of structural selection—processes of thinking of thinking or of loving of love, of researching about research, of norming norms, of financing expenditure, or of overpowering those in power.[124]

And this is the very place to localize the symbolic dimension of the constitution as well, which was discussed in the previous chapter. Vesting correctly speaks of the need for a shared belief in the 'unity' of the constitution, in the idea of the constitution as a common bond that needs to articulate and draw attention to itself. He seeks to apply this to society as a whole and to grant the social subsystems only 'follow-on constitutions', for which the big questions of collective identity are not posed, but rather just technical issues regarding their application.[125] With this artificial separation, however, he fails to capture the reality of global constitutional fragments and the reflexive dynamics going on within them. It is not the world society as a whole, but rather the constitutional fragment which, to use Vesting's words, is 'dependent on a symbolically filled space'.[126]

[123] On this, Thornhill (2008) 'Towards a Historical Sociology', 188 ff. and above in chapter 2, under II.

[124] Luhmann (1997) *Gesellschaft der Gesellschaft*, 372.

[125] Vesting (2012) 'Ende der Verfassung?' (manuscript), 5, 17.

[126] Vesting (2012) 'Ende der Verfassung?' (manuscript), 11.

2. In the shadow of politics

Thoroughgoing state regulation of the economic or other social sub-constitutions is not socially adequate, while constitutional impulses by the state certainly are. From what has been said so far, it seems plausible that politics—in concert with other societal forces—needs to exert massive external pressure in order to force changes in the capillaries of money circulation. This indeed would be the appropriate division of labour between the social subsystems. Social systems have the best chance of acquiring an appropriate constitution when they develop it in the shadow of the political system.[127]

To do justice to the role of the political system, Renner has suggested that we regard the economic constitution as a trilateral structural coupling between economy, law, and politics.[128] Numerous structural couplings do indeed exist between politics, economy, and law, such as the tax system and the lobbying activities. But these are typically not compressed into the sort of above-described 'binding institution'. In reality there is not one trilateral, but just two bilateral 'binding institutions': one in the economy/law relation (via the institutions of property, contract, competition, and currency) and the other in the law/politics relation (constitutional legislation and constitutional jurisprudence). By contrast, the existing structural couplings in the relationship politics/economy are not so close that they would become a binding institution. Political interventions are never (or only seldom) undertaken directly as the translation of power processes into payment acts; instead, they are mediated via the legal system, through legal acts. Conversely the same is true for the levying of taxes. And in economic constitutions, the bonds between politics and the economy are occasional rather than permanent and are repeatedly loosened by a de-coupling of the economy from politics. Political interventions in the economic constitution, then, cannot be qualified as operations within a binding institution, but rather as external constitutional impulses.

The most important external impulses obviously occur during the founding act of a social constitution, as political decisions each mediated via the legal system. Establishing a financial constitution requires political impulses. Generally speaking, constituting an autonomous economy presupposes a strong political system. The mafia-like conditions that

[127] This formulation is close to the position of Grimm (2009) 'Gesellschaftlicher Konstitutionalismus', 81, who at least gives societal constitutionalism 'in the shadow of public power . . . a limited chance of success'.

[128] Renner (2011) *Zwingendes transnationales Recht*, 233 ff.

prevailed in Russia after the events of 1989 provide plentiful material for the negative consequences that ensue when a capitalist economy is created in one fell swoop, without introducing simultaneously the rule of law. Transnational politics has been most convincing in its response when, at the moment of financial crisis, an international co-ordination of initial rescue measures was set up. To this extent, we can certainly say that independent constitutions in society are politically imposed. However, whether or not an independent constitution is being effectively set up and will function in the long term depends on the social system itself. Here, the decisions are made, whether the external political impulses are accepted and transformed internally on a continuous basis. Without these, the constitutional irritations from politics dissipate and there is no chance of any lasting change in the economic constitution. It is not the external 'big decision' of politics, the mythical founding act that creates the constitution, but rather internal 'long-lasting chains of interconnecting communicative acts which successfully establish a constitution as the "supreme authority" '.[129] The irritations by political legislation need to be taken up by the economy in such a way that they can be fed into the capillaries of money circulation; only then does a constitution literally 'come into force' beyond its merely formal validity. The political constitutional impulse is limited to the founding act and to fundamental changes; otherwise, constitutional autonomy towards politics is required.

'In the shadow of politics' has an additional meaning. Establishing a constitution necessarily relies on the law; the law in turn necessarily relies on the monopoly of politics when it comes to the physical use of force. Economic and social sanctions on their own are often insufficient for stabilizing the norms of the economic constitution. Plain money reform, too, needs the sanctions of law backed by political power if any unauthorized money creation by commercial banks has to be banned and any evasion strategies to be thwarted.[130] However, such support by the law of the state does not transform an economic constitution into a state constitution. All that occurs is that the state's power is mediatized through the law; it is de-politicized to a certain extent and placed at the disposal of the economy's independent constitution.

The shadow must remain a shadow, though. Constitutional autonomy of the central banks towards politics is indispensable. A discretionary

[129] Vesting (2009) 'Politische Verfassung?', 613 criticizes rightly the constitutional 'big decision'.

[130] On details regarding evasion and countermeasures, Huber and Robertson (2008) *Geldschöpfung in öffentlicher Hand*, 51 ff.

intervention of politics in concrete decisions regarding the creation of money must be avoided at all costs. The political independence of the central banks is indeed in itself a constitutional requirement.[131] The fundamental principle is self-direction of payment flows by payment flows. The reason why the power games of politics in money creation needs categorically to be ruled out, is the acute risk of inflation which arises through the constant temptations of politics and particularly of democratic politics. 'It is more than doubtful that any democratic government with unlimited powers [can withstand inflationary pressure]'.[132] For once, Friedrich von Hayek may well be right, even if he is once more wide of the mark in his conclusion that the creation of money should be completely privatized.

3. Internal politics of social subsystems

Far from shadowy, by contrast, is the 'internal' politicization of the economy itself—indeed it is physically very evident. It is reinforced and simultaneously channelled via constitutionalization processes. Above we have already discussed the political dynamic outside of state politics, which is unleashed in the 'private' markets by politicizing consumer preferences and ecologicizing corporate constitutions.[133] Societal constitutionalism effectively calls for sites of political reflection to be firmly established in the spontaneous sphere and in the organized sphere of the economy. After all, with their monopoly on money creation, the central banks perform eminently political functions. What are the social consequences of expanding/constricting the money supply? In these public debates the 'internal politics' of the economy is realized—via the politicization of consumers, companies, and central banks.

This is where controversies are fought and binding decisions taken on whether the growth impulses by money creation have already become excessive or not. The socio-political decision on whether the financial system should be prescribed withdrawal treatment cannot be made dependent on private profit-making. Only public institutions within the economy, ie

[131] Binswanger (2009) *Vorwärts zur Mässigung*, 147; Huber and Robertson (2008) *Geldschöpfung in öffentlicher Hand*, 38 f.

[132] Hayek (1978) *Denationalization of Money*, 22 f.

[133] This extraordinary political dynamic outside of institutionalized politics, much more visible today, should make authors such as Brunkhorst (2007) 'Legitimationskrise der Weltgesellschaft', 76 ff. or Wahl (2010) 'In Defence of Constitution', 240 f. wonder whether they can maintain their vehement criticism of societal constitutionalism, ie that it de-politicizes society.

the central banks, can decide, motivated by the proper functioning of the money system and its compatibility with society as a whole.

Obviously central banks make socio-political decisions with far-reaching implications when they decide about the creation of money. Nonetheless, this does not make them part of the political system. They do not participate in the formation of power and consensus for establishing collective decisions and are not tied into the political power circulation running from the public, via the parliament, the administration, the associations, and back again to the public. Neither are they politico-economic hybrids comparable to parliaments, for example, executing both political and legal acts. Central banks do not have dual membership, in the economic and in the political systems. They are comparable to constitutional courts, which are situated at the hierarchical apex of the legal system and adjudicate highly political issues without themselves becoming part of the political system.[134] 'Guardians of the constitution' is perhaps the appropriate metaphor. Just as parliaments and constitutional courts are the guardians of the political constitution, so are central banks and constitutional courts the guardians of the economic constitution. Indispensable to their constitutional politics is a high level of autonomy.[135]

Even if central bankers like to portray themselves as apolitical experts who execute, *lege artis*, decisions that are strictly linked to their professional mandate, in reality they make genuinely political decisions. Decisions about money supply are no mere technocratic execution of predictable calculations.[136] Central banks have a broad range of political options available to them; they are exposed to the risk of great uncertainty; they have to justify their actions towards the public; and they are responsible for the correctness of the decisions they take. This is the eminently political content of reflexive practices within the economy; they adjudicate the relation between the economy's societal function and its contributions to the environment. Monetary policy that is independent of institutionalized politics has to be transparent and accountable.

The autonomy of the central banks is also a necessary precondition for the plain money reform. Alongside the executive and legislative of the political system and the judicative of the legal system, the central banks are

[134] But they will be transformed into hybrid institutions when they become involved in the power games of the political system. They then resemble politicized constitutional courts in nation states' insufficient separation of powers.

[135] Ladeur (1992) 'Die Autonomie der Bundesbank'.

[136] Such 'expertocracy' in the global economic constitution is rightly criticized by Harvey (2005) *Brief History of Neoliberalism*, 66.

the 'monetative', that is, the constitutional agency of the economy.[137] This is why the autonomy of the financial constitution becomes apparent: it has to obey its own logic and, despite its highly political character, must not be left to the mercy of the power processes of institutionalized politics. Here, too, the analogy with the constitutional courts proves its worth. It is a principle of the separation of powers, not in the political system but in society.

Deciding the amount of money creation appropriate is a task that belongs exclusively to the central bank. The question regarding how the profit gained from the money creation is to be used, however, is exclusively one for the democratically legitimated political system and not for the central banks. Whether these considerable profits (which at present accrue to the commercial banks without their giving anything in return) are fed into the state coffers, are made available to the banking system, are used to fund tax relief, or are added to the income for citizens is no longer to be decided by the central banks but by the general political process.[138]

Politicizing consumer preferences, ecologizing corporations, and placing monetary policy in the public domain—these three constitutional arenas illustrate to what degree the 'internal' politicization of social subsystems depends on the specificities of their communicative medium. For this very reason the difference to their 'external' politicization by state institutions must not be levelled. Many authors fall prey to this temptation when they (quite rightly) emphasize the 'political' in social processes as opposed to the 'technocratic', but then ignore the difference between *le politique* and *la politique*.[139] At any rate, we should not idealize disputes within institutionalized politics as 'ordinary politics' and dismiss such disputes in other social subsystems as technocratic calculation, as occurs time and again.[140]

Societal constitutionalism opposes the centralization of fundamental socio-political issues in the political system. Its concern is to multiply the sites where controversies are fought and decisions made about the

[137] Senf (2009) *Bankgeheimnis Geldschöpfung*; Binswanger (2009) *Vorwärts zur Mässigung*, 147.

[138] Binswanger (2009) *Vorwärts zur Mässigung*, 147 f.

[139] Seamless crossovers between both concepts of politics in Joerges (2011) 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form' and Koskenniemi (2011) 'Hegemonic Regimes'; but even systems theory oriented authors tend here to elision, Thornhill (2012) 'State Building, Constitutional Rights and the Social Construction of Norms', who uses a broad concept of power and Kjaer (2010) 'Metamorphosis of the Functional Synthesis' who sees in globalization an extension of the political system into social subsystems.

[140] In polemical style Koskenniemi (2011) 'Hegemonic Regimes', 324; Kuo (2009) '(Dis)Embodiments of Constitutional Authorship', 225.

'political' in society.[141] David Kennedy rightly highlights the connection between constitutionalization and decentralization:

> Our objective would be to carry the revolutionary force of the democratic promise, of individual rights, of economic self-sufficiency, of citizenship, of community empowerment, and participation in the decisions that affect one's life to the sites of global and transnational authority, however local they may be. To multiply the sites at which decisions could be seen and contested, rather than condensing them in a center, in the hope for a heterogeneity of solutions and approaches and a large degree of experimentation.[142]

The difference between the two concepts of the political becomes explosive when the question of democracy within society is explicitly raised. The institutions of society do indeed have to be legitimated not only in relation to their specific constituency, but in relation to the whole society. But this need not mean that it has to occur through institutionalized political channels.[143] This cannot be addressed in detail here. At any rate, one should not simply transfer democratic procedures that have been specially developed for political systems. It would have to be framed differently for the institutions of society, perhaps as described by Wolfgang Streeck:

> Democratisation . . . as a process by which local arenas of negotiation and decision-making are simultaneously empowered and committed to action by the state and society, as opposed to one in which state-implemented majority resolutions are produced on the norms and rules of a just co-existence.[144]

In this view, democracy in society will be realized through procedures which are oriented toward the social responsibility of decentralized collective actors. To give an example, it may suffice to mention the participation of transnational publics in private regimes.[145] The Aarhus Convention has enacted three principles of public participation: (1) access

[141] In a similar direction argues Crouch (2011) *The Strange Non-Death of Neoliberalism*.The argument comes close to the intentions of Buchanan (2006) 'Legitimating Global Trade Governance', 662 ff. in spite of her critical arguments against constitutionalist and pluralist approaches.

[142] Kennedy (2008) 'Mystery of Global Governance', 859.

[143] This would correspond to the above-mentioned insights of the early Habermas who, following a critique of parliamentarism, called for a realization of the democratic potential of social processes, an insight that the later Habermas (and his followers) has obviously lost sight of, Habermas (1992 [1962]) *The Structural Transformation of the Public Sphere*, 181 ff.

[144] Streeck (1998) *Internationale Wirtschaft, nationale Demokratie*, 54.

[145] Informative details of participatory processes in Perez (2011) 'Private Environmental Governance as Ensemble Regulation'. On the democratic experiments of ICANN, Klein (2001) 'Global Democracy and the ICANN Elections'.

to information; (2) public participation in decision-making procedures; and (3) access to the courts in environmental matters. This makes the administrative apparatus of public and private regimes more responsive

> to the social substrate, ie to world society itself (and not to its political system, the international community of states). It integrates it into the process of creating modes of action, and connects decision-making (in the legislative, executive and judicative apparatuses) and debate (among different global publics) with one another so that the duality between spontaneous and organised spheres in the formation of a social constitution—so significant in terms of the theory of democracy—can be established.[146]

The dynamics generated by external state-political constitutional impulses and by internal constitutionalization is, as mentioned, not an automatic consequence of functional imperatives. Instead, it only arises in phases of crisis and is triggered by protest against excessive growth. These are the constitutional moments in which social energies of such intensity may be activated that catastrophe can be averted. Looking back in history, the year 1929 was such a constitutional moment. Nation states were faced with the constitutional decision of whether to abolish the autonomy of the economy and pursue a totalitarian politics of either a socialist or fascist kind—or to establish, a 'New Deal' and a welfare state as limitative constitutions of the economy. And what about today? Was the banking crisis of 2008 a systemic jolt so threatening that it triggered a new constitutional moment, only this time one for the interconnected global economy? Was it a moment that lifted self-restraint of the global financial constitution into the realm of possibility? Or has the bottom not after all yet been reached, enabling the old addictive behaviour to return throughout the world?

[146] Fischer-Lescano and Renner (2011) 'Europäisches Verwaltungsrecht', 370 f.

5

Transnational Fundamental Rights: Horizontal Effect

I. FUNDAMENTAL RIGHTS BEYOND THE NATION STATE

As regards fundamental rights, transnational constitutionalism is completely plausible. Who could deny the worldwide validity, higher right, and constitutional rank of universal human rights? The alternative would be the hard-to-swallow opposing view of comprehending fundamental rights in nation-state law as higher-ranking constitutional law 'in accordance with their nature', but qualifying the same fundamental rights in the various agreements on transnational human rights as ordinary law, denying them priority over other legal rules. Therefore it is plausible to attribute international human rights *ex ovo* constitutional status.[1] It would be equally difficult to make the validity of fundamental rights in the various transnational regimes dependent on the contingencies of agreements under public international law.[2] Their claim to universality demands worldwide legal validity. Finally, it will be difficult to deny the effects of fundamental rights in non-state areas against private transnational actors. The numerous scandals involving breaches of human rights by transnational corporations that have been brought before national or international courts, have frequently—despite considerable uncertainty as to their legal source—seen the courts protecting fundamental rights against private actors.[3]

[1] Gardbaum (2008) 'Human Rights and International Constitutionalism', 238 ff.

[2] The major differences between guarantees of human rights under international law are documented by Hamm (2003) *Menschenrechte*.

[3] For detailed analyses: Oliver and Fedtke (2007) *Human Rights and the Private Sphere*; De Schutter (2006) *Transnational Corporations and Human Rights*; Joseph (2004) *Corporations and Transnational Human Rights Litigation*.

Does this mark another return of natural law? Natural law arguments are quite successful in justifying the worldwide validity of fundamental rights.[4] Sober legal positivism has little chance against the pathos of human rights, even where this involves the technical question of their legal validity. But given the incontestable pluralism of world cultures, particularly interreligious conflicts, constructing universally valid human rights under natural law will always lead to a swift collapse.[5] If then natural law and positive law are equally doubtful, what is the basis for the global validity claim? It cannot depend on the outcome of the philosophical controversy between universalists and relativists. Is simply '*colère publique*' at work here as a source of global law, producing human rights via scandalization?[6] But how then would such social norms be transformed into positive law? Constitutional rights in transnational regimes raise two questions: (1) How, starting from the nation states' fundamental rights and the positivization of human rights in public international law agreements, can fundamental rights claim validity in transnational regimes, whether these are public, hybrid, or private? (2) Do fundamental rights within such regimes oblige also private actors, ie do fundamental rights also have a horizontal effect in the transnational sphere?

1. *Extraterritorial effect of national constitutional rights?*

Ladeur and Viellechner extend the validity of fundamental rights to transnational 'private' regimes.[7] They are sceptical of the view that they will spontaneously emerge via scandalization; they are equally sceptical of a general constitutionalization of public international law. Their solution in contrast is: nation states' fundamental rights 'expand' into transnational 'private' regimes. They give three reasons: intensified porosity of national and international law, networking of national constitutional courts, and increasing exchangeability of private and public law.

The construction is suggestive, as it straightforwardly founds transnational validity of fundamental rights on secure nation-state sources

[4] A sophisticated neo-natural law conception of transnational human rights can be found in Höffe (2007) *Democracy in an Age of Globalisation*, 38 ff.; for a different human rights theory, based on Chomsky's universal moral grammar, Mahlmann (2009) 'Varieties of Transnational Law'.

[5] On ways to escape the alternatives of universalism and relativism, see the subtle argumentation of Menke and Pollmann (2007) *Philosophie der Menschenrechte*, 71 ff.

[6] Thus apparently Luhmann (2004) *Law as a Social System*, 469 ff. and Fischer-Lescano (2005) *Globalverfassung*, 67 ff.

[7] Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte', 46 ff.

of law. At the same time it transfers well-developed constitutional doctrines from nation states to transnational regimes. But their category error cannot be ignored. 'Expansion' is an ambivalent term, concealing the distinction between two fundamentally different processes. In the language of sources of law, the authors equate the sources of the content of fundamental rights with the sources of their validity.[8] Or, in another language, the authors do not take into account that decisions and argumentations in law form closed cycles, which may well be reciprocally irritating but do not merge into one another.[9] There is no doubt that national fundamental rights provide the model for the content of their transnational equivalents; nor is there any doubt that the content of the national standards, principles, and doctrines of basic rights is transferred in a transnational argumentation cycle. This however tells us nothing about whether—and if so how—fundamental rights actually achieve normative validity in transnational regimes. This requires a decision, an act of validation within an institutionalized law production, the need for which cannot be concealed by referring to substantive similarities in national and transnational contexts. It is only a detailed analysis of their sources of validity, as Gardbaum does, that can clarify their validity, scope, and enforcement. A bold general assertion of human rights expansion beyond national boundaries cannot achieve that. Nor, in view of numerous differences between nation states in their fundamental rights catalogues, is it possible to speak of an 'expansion' of these standards: at best we can speak of a choice between them.[10] Nor do the porosity of national and international law or the exchangeability of public and private law help here. A legally structured and constitutionally(!) legitimized process must be identified that positivizes fundamental rights as valid and binding within a transnational regime. Here, however, the authors simply lead us into the mysteries of 'interlegality'.[11] In sum, 'expansion' might simply be a transitional semantics. It realizes the

[8] On the sources of law, for instance Röhl and Röhl (2008) *Allgemeine Rechtslehre*, 519 ff.

[9] Luhmann (2004) *Law as a Social System*, 338 ff.

[10] Klösel (2012) *Prozedurale Unternehmensverfassung* (manuscript), 62. This moves the positivization decision within the regime to the forefront.

[11] Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte', 45. The term, introduced by Santos, marks the problem of the difficult relationship between plural legal orders rather than its solution: 'different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life', Santos (2003) *Toward a New Legal Common Sense*, 437. See on this Amstutz and Karavas (2006) 'Rechtsmutationen'; Amstutz (2005) 'In-Between Worlds'.

horizontal effect of fundamental rights in transnational regimes, but cannot yet admit the regime's own constitutional contribution. Such transitional semantics are well known from the debate on judge-made law in nation states.[12] As an effective palliative, this semantics exploits the validity of national constitutional law, whose 'expansion' over two borders (national/transnational, public/private) would not seem to cause any great uneasiness.

The same objection applies to authors who base transnational fundamental rights upon universal legal principles (of the 'civilized peoples'?). Kumm, for instance, argues that general constitutional principles are governing the transnational space, but he does not clarify which lawmaking processes carry their positivization. Nor does he distinguish clearly between argumentation and decisions.[13] Similarly, the comparative law method, loved by all, is exposed to this objection when it is supposed to found the validity of transnational standards.[14] Neither differentiates clearly enough between the incontestable exemplary function of principles, the differing content of legal orders, and the legal decision-making process regarding their validity.

2. *Global* colère publique

Does this then mean that the *colère publique*, defined by Emile Durkheim as a source of law, directly validates fundamental rights?[15] Luhmann calls it the 'contemporary paradox' that globally, given the turbulent world situation and the vanishing relevance of nation states, fundamental rights are not, as is usually the case, first set as norms of law that may subsequently be breached, but are rather validated by their very violation and the subsequent outcry.[16] The actual existence of this paradox is confirmed by a familiar sequence of events: protest movements and NGOs uncover

[12] Despite the pioneering work of Josef Esser (1956) *Grundsatz und Norm*, here too the transitional semantics (*Rechtserkenntnis*, case law as *Gewohnheitsrecht*) are not yet dead, even if they are on their deathbed, see the amiguities in Röhl and Röhl (2008) *Allgemeine Rechtslehre*, 571 f.

[13] Kumm (2010) 'The Best of Times and the Worst of Times'. On the application of general legal principles in the *lex mercatoria*, see Stein (1995) *Lex mercatoria*, 171 ff.

[14] It is intended to prove the universal validity of an *ordre public transnational* in which fundamental rights play an important role, but it says nothing about the lawgiving role of the conflict resolution body which, having compared various legal orders, implements a concrete norm: see for example Lalive (1987) 'Transnational (or Truly International) Public Policy', 295.

[15] Durkheim (1933) *The Division of Labor in Society*.

[16] Luhmann (2004) *Law as a Social System*, 487. For a detailed analysis of the paradoxes in fundamental rights, Verschraegen (2006) 'Systems Theory and the Paradox'.

dubious practices by multinational corporations; a scandal develops; the media decry these practices as violations of human rights; the courts finally recognize a human rights violation.[17] Ladeur and Viellechner are of course right when they object to the jurisgenerative force of scandals and argue that 'normative expectations of global society' cannot alone create law. Institutionalization is required to anchor such expectations, and this cannot solely be attributed to the *colère publique*.[18] But Luhmann expressly calls this practice a paradox, and paradoxes cannot of themselves constitute legal validity. Only a de-paradoxification will permit law to arise from scandalization. And here we need to observe closely how today's legal practice will cope with this paradox, and which distinctions it will draw on to validate fundamental rights in the face of such scandalization. And here again, valid law can only arise where the condemnation of dubious practices is for its part reflexively observed by operations governed by the legal code and incorporated into the recursiveness of legal operations.[19]

3. Regime-specific standards of fundamental rights

Rather than assuming an expansion of national rights or designating social norms as legal rules, it is far more plausible to rely on the concrete decisions which establish validity in regime-specific institutions. Renner follows this line in detailed analyses of private global regimes.[20] Taking as examples transnational arbitration under the *lex mercatoria*, the tribunals on international investments, and the Internet panels of the ICANN, he shows in detail how these instances, step by step, positivize concrete standards of fundamental rights and do so within a legal procedure that

[17] See for example the case study of the Argentine Madres by Fischer-Lescano (2005) *Globalverfassung*, 31 ff. Further detailed studies in Fn. 2.

[18] Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte'. Their argument works, however, against their own solution of the nation-state expansion of fundamental rights, as they cannot substantiate the 'institutionalization that will ensure expectations' in the expansion as such.

[19] Social norms become law when they are integrated into the global legal system in such a way that operations guided by the binary legal code are in turn observed by operations guided by the binary legal code and incorporated into the legal system. More details in Teubner (1997) 'Global Bukowina', 11 ff. Similarly Köndgen (2006) 'Privatisierung des Rechts', 508 ff.; Calliess (2006) *Grenzüberschreitende Verbraucherverträge*, 182 ff.; Schanze (2005) 'International Standards'. Nor does Fischer-Lescano (2005) *Globalverfassung*, 67 ff. simply equate the expectations raised by the *colère publique* with legal norms. Hart's concept of secondary rules is open to the interpretation that a rule of recognition can develop as a legal custom and thus serve as the basis for genuine law, see Collins (2012) 'Flipping Wreck'.

[20] Renner (2011) *Zwingendes transnationales Recht*, 91 ff., 199 ff.

is, for its part, enacted by private ordering. Neither national fundamental rights, nor rules of international private law, nor mere social norms form the legal source for fundamental rights in these regimes. Nor is the increasing networking of national courts, cited by Ladeur and Viellechner, capable of creating their validity in transnational regimes. While this networking strengthens the existing global legal system, strict internal borders of legal validity exist within global law, and these can only be crossed by an explicit validity decision—in these cases, private arbitration.

It is the decision practice of transnational regimes themselves that enacts fundamental rights within their borders. Thus, beyond state positivization, a 'social' positivization of fundamental rights is the driving force behind their gradual universalization. In public international law regimes, it is a matter of course, that fundamental rights gain validity, but only when human rights conventions positivize them. Otherwise, for example, they cannot claim validity against international organizations or transnational regimes.[21] A more difficult situation arises where, as in the World Trade Organization, judge-made law creates human rights. Genuine court institutions have developed from simple panels designed for conflict resolution, which, in the Appellate Body, even have a second instance. If fundamental rights are recognized here, it is these conflict resolution bodies and not the international agreements which, in a process similar to common law, positivize the standards of fundamental rights that are valid within the World Trade Organization.[22] The same can be said of the private arbitration tribunals of the International Chamber of Commerce (ICC), the International Center for the Settlement of Investment Disputes (ICSD), and the ICANN when they positivize fundamental rights. They of course are influenced by different nation-state orders, general legal principles, doctrinal models, and even philosophical arguments. But the actual validity decision is made by the arbitration tribunals themselves when they select between different standards of fundamental rights and specify which fundamental rights are binding in the particular regime. And scandalization by protest movements, NGOs, and the media are indeed involved in such lawmaking processes where the scandalized norms are, via secondary rules, integrated into global law.

National courts are considerably involved. In the lawmaking processes of transnational regimes, they are often called upon to recognize and enforce arbitral decisions. They influence regime constitutions when

[21] Gardbaum (2008) 'Human Rights and International Constitutionalism', 257.

[22] See for example Trachtman (2006) 'The Constitutions of the WTO', 640 ff.

they invoke *ordre public* and refuse to enforce transnational arbitral rulings because they violate fundamental rights.[23] Thus, national courts participate in the gradual development of a common law of transnational fundamental rights. We should not succumb here to the positivistic temptation and argue that 'in the last instance' national law becomes the source of the fundamental rights in transnational regimes. This argument has already been demonstrated as false in the debate about the *lex mercatoria*, when exequatur decisions of national courts were supposed to anchor the *lex mercatoria* in national law.[24] The whole argument is based on an incorrect demarcation of the national and the transnational and cannot comprehend the entwining of the two.[25] These courts' decisions have dual membership; they participate in the decision chains of two autonomous legal orders. The court decisions are and remain operations of the relevant national law, but they participate at the same time in the lawmaking of the autonomous regime. This dual membership in different chains of operations is not unusual.[26] It is practically the rule where autonomous systems develop structural and operational linkages. This leads to an entwinement—but not a fusion—of national and transnational legal orders. The judicial sequences only 'meet' for a moment in the concrete judicial ruling; their validity operations otherwise have very different pasts and futures in their respective legal orders.

'Common law constitution' appropriately describes how fundamental rights are positivized in transnational (public and private) regimes: an iterative decision-making process occurs between the rulings of arbitration tribunals, decisions of national courts, contracts of private actors, social standardizations, and the scandalization actions of protest movements and NGOs.[27] Klabbers aptly formulates the answer to the choice posed here:

> . . . is constitutionalization a spontaneous process, a bric-à-brac of decisions taken by actors in a position of authority responding to the exigencies of

[23] Berman (2007) 'Global Legal Pluralism'. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 5, 2(b), 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 42 permits review by national courts in cases 'contrary to the public policy of the enforcing state'.

[24] See for example Stein (1995) *Lex mercatoria*, 99, 163.

[25] Subtler ideas on the entwining of the two spheres are developed by Sassen (2006) *Territory-Authority-Rights—From Medieval to Global Assemblages*.

[26] Luhmann (2004) *Law as a Social System*, 381; see also in other theory contexts Lyotard (1983) *Le différend*, 51.

[27] Several authors argue towards a common-law-like development of transnational fundamental rights: Kumm (2010) 'The Best of Times and the Worst of Times'; Karavas (2010) 'Grundrechtsschutz im Web 2.0.'; Walter (2001) 'Constitutionalizing (Inter)national Governance'.

the moment, or is it rather the result of a top-down process, in which a constituent authority designs a constitution? The latter is unlikely to occur on the global level; the former, almost by default, might be more likely. This is not to suggest that the global constitution will be the aggregate of a number of sector constitutions; it is rather to suggest that the global constitution will be a patchwork quilt, and will most likely be identified rather than written in any meaningful sense: a material rather than a formal constitution. In Hurrell's term, it will be a 'common law constitution' rather than a more continental type of constitution.[28]

II. FUNDAMENTAL RIGHTS BINDING 'PRIVATE' TRANSNATIONAL ACTORS

1. Beyond state action

Even if transnational regimes, public and private, positivize their respective standards of fundamental rights, the question nevertheless remains of whether these fundamental rights bind only state actors or whether they also apply to private actors.[29] Their effect on private actors is much more acute in the transnational than in the national sphere. This is because multinational corporations regulate whole areas of life so that we can no longer avoid the question. It is however extraordinarily difficult to invoke the state action doctrine here which is probably the best-known solution in the nation states.[30] According to this doctrine, private actors can only violate fundamental rights if an element of state action can be identified in their activities. It may be discovered either because state bodies are somehow involved or because the private actors perform some public functions.[31] In the transnational sphere, however, there is none of the

[28] Klabbers (2009) 'Setting the Scene', 23 with reference to Hurrell (2007) *Global Order*, 53. To avoid misunderstanding, contrary to Klabbers, the position here is that a global constitution will indeed dissolve into numerous sector constitutions.

[29] On the third-party effect of transnational fundamental rights see Gardbaum (2008) 'Human Rights and International Constitutionalism'; Gardbaum (2003) '"Horizontal Effect" of Constitutional Rights'; Clapham (2006) *Human Rights Obligations of Non-State Actors*; Anderson (2005) *Constitutional Rights*; Clapham (1996) *Human Rights in the Private Sphere*; on the European-American discussion see Sajó and Uitz (2005) *Constitution in Private Relations*.

[30] See from the viewpoint of comparative law, Friedman and Barak-Erez (2001) *Human Rights in Private Law*; for the UK: Tomkins (2001) 'On Being Sceptical about Human Rights', 4; for Israel: Barak (1996) 'Constitutional Human Rights'; for South Africa: Cheadle and Davis (1997) 'Application of the 1996 Constitution', 44 ff.; for Canada: Weinrib and Weinrib (2001) 'Constitutional Values and Private Law in Canada'.

[31] On fundamental rights under private law see Canaris (1999) *Grundrechte und Privatrecht*.

general ubiquity of state action that can be found in the nation state, so that state action is only discernible in relatively few situations.

We should again consider the concept of generalization and respecification and now use it to horizontalize fundamental rights. The first step is to generalize the narrow application of fundamental rights in state contexts—only understandable in the historical context—and to transform it into a general principle with society-wide validity. In a second step the concrete content of fundamental rights, their addressees and beneficiaries, their legal structures and their implementation, must be carefully tailored to the independent logic and independent normativity of different social contexts.

The other currently widespread doctrine, which is called structural effects of human rights, has become generally established in differing variants in Germany, South Africa, Israel, and Canada in particular. Implicitly, this doctrine uses the concept of generalization and respecification.[32] It generalizes fundamental rights, from state-centred rules into general values, which are 'radiating' into non-state areas. It then respecifies these general values by adapting them to the particularities of private law.

From a sociological viewpoint, however, both generalization and respecification need to be re-oriented. If fundamental rights will be effective in different global domains with their peculiar social structures, hardly any guidance can be expected from a generalization drawn on the philosophy of values. And it is just as inadequate to orient their respecification only towards the peculiarities of private law. Neither value philosophy nor private law doctrine offer sufficient guidance for this task.

2. Generalization: communicative media instead of general values

The generalization should instead first identify what is the addressee of fundamental rights in the political system. This is not the state, but rather political power. Fundamental rights are directed against power, against the system-specific medium of political communication. They need to be freed from this narrow focus and to be generalized towards other communicative media that actually function in society. Luhmann and

[32] For a detailed comparative analysis of the horizontal effect of fundamental rights, see Gardbaum (2008) 'Human Rights and International Constitutionalism'. On the prevailing doctrine in Germany, see Herdegen in: Maunz/Dürig, Grundgesetz (2010) Art. 1 GG, paras. 59–65. For an analysis of the paradoxes of human rights, Verschraegen (2006) 'Systems Theory and the Paradox'.

Thornhill have clarified the relations between fundamental rights and the medium of power.[33] Formalizing the power medium is, as already discussed in the previous chapter, the main function of political constitutions. They ensure the long-term survival of political autonomy that has been wrung from 'external' religious, familial, economic, or military power sources. Law supports this autonomization, in which the medium of power gains its own forms. 'Fragmented' power positions are juridified: competences, subjective rights, and human rights. In these three structural components the power medium finds its decentralized forms. Power communication is staged in modern politics as a power game in the form of legal positions. The operations of the political process are carried out in the form of rights, the structural components of power. The compact medium of power is dissolved into rights as its individual components, which are then used as building blocks in the power formation process.

Fundamental rights, as legal forms of the power medium, take on a double role in politics. It is not sufficient only to emphasize the protection of the individual against the might of the state. Fundamental rights rather exercise simultaneously inclusionary and exclusionary functions.[34] They permit the inclusion of the overall population in the political process, taking the form of the right to political participation. These are the active civic rights, above all the right to vote, but also the political rights in the narrower sense of freedom of opinion, assembly, and association.[35] At the same time, however, fundamental rights have the effect of excluding non-political social spheres from the political field, marking the borders between politics and society and guaranteeing social institutions protection against their politicization. Such exclusion simultaneously ensures the operability of politics itself, by removing certain themes that would otherwise overtax it. This de-politicization thus not only serves to protect areas of autonomy within society but also the integrity of politics itself. Both the inclusionary and exclusionary dimensions of fundamental rights contribute to maintaining the functional differentiation of society:

[33] Thornhill (2008) 'Towards a Historical Sociology', 169 ff.; Luhmann (1990) 'Verfassung als evolutionäre Errungenschaft'; Luhmann (1973) 'Politische Verfassungen im Kontext'; Luhmann (1965) *Grundrechte als Institution*.

[34] Thornhill (2011) 'The Future of the State', 390; Luhmann (1965) *Grundrechte als Institution*, 138.

[35] Remarkably, that touchstone of modern political systems, the right to vote, does not have the status of a full-fledged fundamental right in Germany, Klein in: Maunz/Dürig, Grundgesetz Art. 38 GG, para. 135 f.

> The semantic fusion of sovereignty and rights might be seen as the dialectical centre of the modern state and of modern society more widely. On the one hand, these concepts allowed the state to consolidate a distinct sphere of political power and to employ political power as an abstracted and inclusive resource. Yet, these concepts also allowed the state restrictively to preserve and to delineate a functional realm of political power, and to diminish the political relevance of most social themes, most exchanges, and most social agents.[36]

This dual role of fundamental rights must be retained in their generalization and respecification. In contrast, discussion of their horizontal effect has so far concentrated excessively on 'negative rights', on the defensive role of fundamental rights.[37] *Both the inclusion of the entire population in all function systems and the exclusion of individual and institutional areas of autonomy from these function systems*—this would be the appropriate generalization from rights directed against the state to fundamental rights in society. On the one hand, fundamental rights support the inclusion of the overall population in the relevant social sphere. They perform the constitutive function of constitutions when they support the autonomization of social sub-areas. On the other, fundamental rights perform the limitative function of social constitutions when they restrain the relevant system dynamics. Fundamental rights then serve to secure boundaries, giving individuals and institutions guarantees of autonomy against expansionist tendencies.

3. Respecification in different social contexts

Respecification cannot mean simply adapting human rights to the particularities of private law.[38] Simply concretizing the 'objective value system' in terms of private law will ignore the particular qualities of the various social contexts. This does not do justice to the double reflexivity of law and social system, because it refers only to the legal side of the constitution and neglects its social side. Considerably greater modification of the fundamental rights is required. To 'adhere to the independent nature of private law in relation to the constitutional system of fundamental

[36] Thornhill (2011) 'The Future of the State', 392.

[37] All the authors in Fns. 30 and 31 formulate human rights, directed against third parties, as merely negative rights.

[38] And then placing restrictions on them that conform to private law. See for example Herdegen in: Maunz/Dürig, Grundgesetz (2010), Art. 1 GG, paras. 65 ff.

rights'[39] is correct, but not sufficient. Instead fundamental rights must be readjusted to the rationality and normativity of different sub-areas.[40]

An example will clarify the difference. If, as in the recent anti-discrimination legislation, the question arises whether the constitutional principle of equality is applicable in non-state contexts, it is absolutely insufficient simply to make recourse to the traditional equality principle in private law, because it reduces its applicability to group contexts.[41] Rather, the non-discrimination criteria for private schools and universities, for example, must be developed from their mission of education and research. These are clearly different from the criteria of equal treatment applying in commercial businesses or religious communities. The recent anti-discrimination legislation only tentatively addresses these differences and needs to be appropriately corrected by the courts.[42] More generally, if the constitutions of the economy, science, the mass media, and the health system now legally formalize their communicative media on a global basis, fundamental rights must be redirected to them.

Direct or indirect third-party effect? This difference is by no means as irrelevant as some authors would have us believe.[43] A sociologically oriented reformulation would be decidedly in favour of an *indirect* third-party effect of fundamental rights—even if in a sense other than the conventional. A direct third-party effect of fundamental rights appears in contrast mistaken. While the direct effect makes sure that fundamental rights should not be watered down into highly abstract values nor undermined by the norms of private law,[44] in the long run it nevertheless produces a short-circuit between politics and social fields.[45] Instead of falsely 'homogenizing' fundamental rights in the state and in society, it is in fact

[39] Dürig (1956) 'Grundrechte und Zivilrechtsprechung', 164.

[40] Sociologically oriented respecifications of the fundamental rights in corporations exceed by far their purely private-law oriented third-party effect. See the classic study by Selznick (1969) *Law, Society and Industrial Justice*, 75 ff., 259 ff.; more recently Schierbeck (2000) 'Operational Measures', 168.

[41] On the traditional equality principle in private law, Raiser (1948) 'Gleichheitsgrundsatz im Privatrecht' and Hueck (1958) *Grundsatz der gleichmäßigen Behandlung*.

[42] On the problems, Badura (2008) 'Gleiche Freiheit im Verhältnis zwischen Privaten'.

[43] See especially Alexy (1994) *Theorie der Grundrechte*, 473 ff.

[44] This is why Brüggemeier pleads for a direct third party effect, Brüggemeier et al. (2008) *Fundamental Rights*; Brüggemeier (2006) 'Constitutionalisation of Private Law'.

[45] This is the tenor of the criticism made by Amstutz et al. (2007) 'Civil Society Constitutionalism', 249 ff.

their 'indirect' effect that is important, but now in the sense that state-directed human rights need a context-specific transformation.

Finally, it is not sufficient to direct fundamental rights exclusively to phenomena of economic and social power as some authors indeed suggest. They bind fundamental rights too closely to the power medium and ignore the dangers that arise from other communicative media.[46] Similarly, Thornhill accepts constitutionalization in society if—and only if—communication in the various subsystems occurs via the power medium. He ultimately presents constitutional theory as a power theory and then understands the third-party effect of fundamental rights as 'transformations in constitutional rule as correlated with internal transformations in the substance of power and as adjusted to new conditions of society's power'.[47] That however ignores the subtler workings of fundamental rights in society. If they are supposed to guarantee possibilities of communication in various social fields, then they need to protect against the dangers to individual and institutional integrity posed by numerous communicative media, not only by power.

III. INCLUSIONARY EFFECT OF FUNDAMENTAL RIGHTS: RIGHT TO ACCESS

The discussion on third-party effect has, as mentioned, so far concentrated on the protective function of fundamental rights against social power phenomena while neglecting their inclusion function.[48] But this is exactly where a major problem of late-modern societies appears, whose socially harmful effects have only become visible in the most recent phases of globalization. The problem lies in the inclusion paradox of functional differentiation. On the one hand, function systems have as their members not strictly delineated population groups, as is the case in stratified societies (class, stratum, caste); each function system rather includes the entire population, but strictly limited to its function. The inclusion of the entire population in each function system represents

[46] Reducing fundamental rights to phenomena of 'social power' as an analogy to political power is widespread in labour law. This is understandable in view of organizational power, but reduces the third-party question to a mere phenomenon of power and ignores more subtle violations of human rights. See for instance Gamillscheg (1964) 'Grundrechte im Arbeitsrecht'. Similar reductions can be found in explicitly political concepts of the horizontal effect of fundamental rights, eg in Anderson (2005) *Constitutional Rights*, 33 ff. and in Tuori (2010) 'Many Constitutions of Europe', 11 f.

[47] Thornhill (2011) 'Constitutional Law from the Perspective of Power', 247.

[48] This function is not once mentioned in the leading German commentary, Herdegen in: Maunz/Dürig, Grundgesetz (2010), Art. 1 GG, paras. 65 ff.

the basic law of functional differentiation. On the other hand, it is the very internal dynamics of function systems that cause entire population groups to be excluded. Such function-specific exclusions moreover reciprocally reinforce each other 'if extensive exclusion from the function system (eg extreme poverty) leads to exclusion from other function systems (eg schooling, legal protection, a stable family situation)'.[49] Exclusions of whole segments of the population, as for instance in the ghettos of major American cities, are thus not the legacy of traditional social structures, but rather products of modernity. This poses the disturbing question of whether it is inherent to the logic of functional differentiation that the various binary codes of the world systems are subordinate to the one difference of inclusion/exclusion.[50] Will inclusion/exclusion become the meta-code of the 21st century, mediating all other codes, but at the same time undermining functional differentiation itself and dominating other social-political problems through the exclusion of entire population groups?

Here, societal constitutionalism aims at constructing constitutionally guaranteed counter-institutions in different social areas. Then, fundamental rights act not only as spaces of individual autonomy, but also as guarantees to include the entire population into the function systems.[51] Now it becomes clear what it means to orient the generalization and respecification of fundamental political rights towards function-system specific media instead of abstract values. In politics the right to vote and political rights of an active civic nature are intended to permit the entire population access to the political power medium. If this principle of political inclusion is generalized then access to the communicative media in all function systems is not only permitted, but is actually guaranteed by fundamental rights. However, this cannot be implemented in such general terms, for instance via a political access right to society. 'With functional differentiation, the regulation of the relationship of inclusion and exclusion is transferred to function systems and there is no longer any central authority (even if politics would gladly take on this role) to supervise the

[49] Luhmann (2000) *Politik der Gesellschaft*, 427.

[50] Luhmann (2004) *Law as a Social System*, 488 ff. On exclusion/inclusion in systems theoretical and poststructuralist perspectives see Stäheli and Stichweh (2002) *Exclusion and Socio-Cultural Identities*. For inclusion/exclusion in a policy perspective, Sen (2000) *Social Exclusion*.

[51] First steps in this direction, Verschraegen (2012) 'Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights' ; Holmes (2011) 'Rhetoric of Legal Fragmentation', 132 ff.; on a constitutionally guaranteed *status positivus* for participants in the Internet, Viellechner (2011) 'Constitution of Transnational Governance Arrangements', 453 ff.

subsystems in this regard.'[52] It is rather the task of a careful respecification to formulate the function-system specific conditions in order to permit access to diverse social institutions. Essential services in the economic system, compulsory insurance in the health system, and guaranteed access to the Internet for the whole population are cases where the third-party effect of fundamental rights would guarantee undistorted access to social institutions.

'Internet neutrality' is an informative example of a right to inclusion.[53] The technology of the Internet initially guarantees that no obstacles exist to freely accessing the markets for Internet applications. The right to free and equal access to the Internet as an artificial community asset is in principle guaranteed by technology and requires no additional legal support. In the meantime, however, this principle has become endangered through new digital tools that group different applications into classes, to which Internet services are then offered at varying conditions. Network neutrality will be violated if network operators differentiate between various classes and grant highest priority to the highest-paying users ('access tiering'). This is a clear case of access discrimination. Other cases are the manipulation of the search algorithm via Google or blocking actions by network operators.[54] Here, the technology-based neutrality of the Internet requires the additional law-based protection afforded by fundamental rights of inclusion. In its horizontal effect the fundamental right of non-discrimination—right of access to non-political institutions—would be respecified in the Internet as an obligation to enter into a contract: 'Access rules should ensure that all users of the medium in principle possess the same freedoms (possibilities of action).'[55] Internet operators would thus be forbidden to discriminate between comparable applications. Guarantees of fundamental rights would guarantee free access to the social institutions within the Internet by the overall population.

Finally, such rights of inclusion might also realize greater socio-political aspirations. Brunkhorst correctly argues that the project of constitutionalizing global civil society will remain only partial if it is not accompanied

[52] Luhmann (1997) *Gesellschaft der Gesellschaft*, 630.

[53] See Wielsch (2008) *Zugangsregeln*, 249 ff.

[54] See Karavas (2010) 'Grundrechtsschutz im Web 2.0.'; Karavas (2006) *Digitale Grundrechte*, 164 ff.; Karavas and Teubner (2005) 'The Horizontal Effect of Fundamental Rights on "Private Parties" within Autonomous Internet Law'.

[55] Wielsch (2008) *Zugangsregeln*, 254; for detailed proposals on the effect of fundamental rights in the Internet see Karavas (2006) *Digitale Grundrechte*, 179 ff.; a similar approach, Speta (2002) 'Common Carrier Approach to Internet Interconnection'.

by a strengthening of democracy. However, often stronger democratic legitimization tends to mean simply that social processes should be more closely bound to institutionalized politics. Brunkhorst himself demands that sub-constitutions should be legitimized by the political processes of the European Union. Others put their hopes for democratic legitimacy in a recourse to the politics of nation states.[56] Still others give primacy to a constitution of global politics above all other partial constitutions, with the consequence that democratic legitimacy can only be delivered from there.[57]

The arguments presented here tend in the opposite direction. Societal constitutionalism aims to strengthen the democratic potential in civil society itself. Wiethölter engages for the political in 'society as society'. The political is realized 'not just from the "democratic" unified will-formation of citizens in politics, but it also "organises" institutions for decision-making, communication and education processes' within civil society. Normative consequence is to translate the horizontal effects of fundamental rights into participation rights outside the political system, in different areas of society: 'The societal part of the human being is his or her "citizen's right", which overcomes the traditional private law/public law dichotomy.'[58] The normative guideline would be to transform rights of inclusion into active citizen's rights within the social sub-areas. In nation-state contexts, for instance, the co-determination movement was successful in institutionalizing active citizen's rights in enterprises as well as in other social organizations. It is currently an open question whether, in transnational contexts, the stakeholder movement will construct equivalent institutions in the context of Corporate Social Responsibility.

IV. EXCLUSIONARY EFFECT OF FUNDAMENTAL RIGHTS

While such rights of inclusion into diverse social spheres are still only rudimentary, the horizontal effect of fundamental rights in their protective function is already considerably further advanced. In the transnational context this concerns in particular the violations of fundamental rights by multinational corporations that are brought before the courts.[59]

[56] eg Renner (2011) *Zwingendes transnationales Recht*, 244 f.

[57] Joerges and Rödl (2009) 'Funktionswandel des Kollisionsrechts II', 777 ('not otherwise conceivable').

[58] Wiethölter (1992) 'Regelbildung in der Dogmatik', 238.

[59] In greater detail, Teubner (2006) 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors'.

In their exclusionary role, fundamental rights react as well to the differentiation of function systems and the autonomization of their communicative media. But now the problem is the expansion of function-specific boundaries and guarantees to exclude from the function system areas of autonomy are looked for. First, and visible everywhere since Macchiavelli, politics becomes autonomous. It becomes detached from the diffuse moral-religious-economic ties of the old European society, and extends to infinity the usurpation potential of its special medium, power, without any immanent restraints. Its operative closure and its structural autonomy let it create new environments for itself, vis-à-vis which it develops expansive, indeed downright imperialist tendencies. Absolute power liberates unsuspected destructive forces. Centralized power for legitimate collective decisions, which develops a special language of its own, indeed a high-flown rationality of the political, has an inherent tendency to totalize them beyond any limit.[60]

Its expansion goes in two divergent directions. First, it crosses the boundaries to other social areas of action. Their response in the resulting conflicts is to invoke their autonomous communicative spheres free from intervention by politics, whether as institutional or as personal fundamental rights. Fundamental rights demarcate from politics communicative areas of autonomy allotted either to social institutions or to persons as social constructs.[61] Here, it is the exclusionary rather than the inclusionary function of fundamental rights that becomes effective. Fundamental rights set boundaries to the totalizing tendencies of the political power medium by depoliticizing society's spheres of autonomy. Second, in its endeavours to control the human mind and body, politics expands with particular verve across the boundaries of society. Their defences become effective only once they can be communicated as protest in the forms of complaints and violence. These individual protests are translated into political struggles of the oppressed against their oppressors, and finally end up, through historic compromises, in political guarantees of the self-limitation of politics vis-à-vis people.

Orienting fundamental rights towards protection against the state worked only so long as the state could be identified with society, or at least the state could be regarded as society's organizational form, and politics as its hierarchical co-ordination. As other highly specialized

[60] The work of Luhmann (1965) *Grundrechte als Institution*, 24 ff., is again seminal here.

[61] On the relationship between individual and institutional fundamental rights see Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 77.

communicative media (money, knowledge, law, medicine, technology) gained in autonomy it became clear that the individual/state dualism is an insufficient description of modern society. It is exactly at this point that the third-party effect of exclusionary fundamental rights becomes relevant, as protection against the expansive tendencies of social institutions. The fragmentation of society multiplies the boundary areas between autonomized communicative media and individual and institutional spheres of autonomy.[62]

Thus the problem of human rights cannot simply be limited to the relation between state and individual, or the area of institutionalized politics, or even solely to power phenomena in the broadest (Foucault's) sense. Specific endangerment by a communicative medium comes not just from politics, but in principle from all autonomized subsystems that have developed an expansive self-dynamics. For the economy, Marx clarified this particularly through such concepts as alienation, fetishism, autonomy of capital, commodification of the world, exploitation of man by man. Today we see—most clearly in the writings of Foucault, Agamben, and Legendre[63]—similar threats to integrity from the matrix of the natural sciences, of psychology and the social sciences, of technologies, of medicine, the press, radio and television (keywords: Dr Mengele,[64] reproductive medicine, extending life in intensive care units, the 'Lost Honour of Katharina Blum'[65]).

Accordingly, the fragmentation of society is today central to fundamental rights as protective rights. There is not just a single boundary concerning political communication and the individual, guarded by human rights. Instead, the problems arise in numerous social institutions, each forming their own boundaries with their human environments: politics/individual, economy/individual, law/individual, science/individual.

[62] The institutional side of rights is emphasized by Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 64: 'Fundamental rights contribute to the self-reflection of the private law, when—as with the horizontal effect of communicative freedom—it is about the protection of non-economical interests and goods.'

[63] Agamben (2002) *Homo Sacer*; Foucault (1975) *Surveiller et punir: La naissance de la prison*, 200 f.; Legendre (1996) *La fabrique de l'homme occidental*, 31 ff.

[64] The experiments carried out on people by Dr Mengele were once regarded as an expression of a sadistic personality or as an enslavement of science through totalitarian Nazi policy. More recent research reveals that the experiments are better regarded as the product of the expansionistic tendencies of science. They are propelled by its intrinsic dynamics, to seize absolutely every opportunity to accumulate knowledge, especially as a result of the pressure of international competition, unless it is restrained by external controls. See Schmuhl (2005) *Grenzüberschreitungen*.

[65] Böll (1992) *Verlorene Ehre der Katharina Blum*.

Everything then comes down to the identification of the various frontier posts, so as to recognize the violations that endanger human integrity by their specific characteristics. Where are the frontier posts? In the various semantic artifacts of 'persons' in the subsystems: *homo politicus, oeconomicus, juridicus, organisatoricus, retalis*, etc. While they are indeed only constructs within communication that permit attribution of action, they are at the same time real points of contact with individual human beings 'out there'.[66] It is through the mask of the 'person' that the social systems make contact with flesh-and-blood people; while they cannot communicate with them, they can massively irritate them and in turn be irritated by them. In tight perturbation cycles, communication irritates consciousness with its selective 'enquiries', conditioned by assumptions about rational actors, and is irritated by the 'answers', in turn highly selectively conditioned. It is in this recursive dynamics that the 'exploitation' of man by the social systems (not by the man!) comes about. The social system as a highly specialized communicative process concentrates its irritations of human beings on the social person-constructs. It 'sucks' mental and physical energies from them for the self-preservation of its environmental difference. It is in this specific way that Foucault's disciplinary mechanisms develop their particular effects.[67]

V. THE ANONYMOUS MATRIX

If violations of fundamental rights stem from the totalizing tendencies of sectorial rationalities, there is clearly no longer any point in seeing their horizontal effect as if rights of private actors have to be balanced against each other. But this is still the dominant opinion in constitutional law.[68] The origin of the infringement of fundamental rights needs to be examined more closely. The imagery of 'horizontality' unacceptably takes the sting out of the whole human rights issue, as if the sole point of the protection of human rights was that certain individuals in society threaten the rights of other individuals. Violation of the integrity of individuals by other individuals, whether through communication, simple perception, or direct physical action, is, however, a completely different set of issues that arose long before the radical fragmentation of society in our time. It must

[66] For details see Fuchs (2003) *Eigen-Sinn des Bewußtseins,* 16f., 28f., 30f., 33ff.

[67] For details on the personal constructs as junction between communication and mind see Hutter and Teubner (2000) 'Homo Oeconomicus and Homo Juridicus: Communicative Fictions?'.

[68] Influential Bundesverfassungsgericht BVerfG 89, 214 ff. (*Bürgschaft*); Alexy (1994) *Theorie der Grundrechte*, 484.

systematically be separated from the fundamental-rights question.[69] In the European tradition it was formulated by attributing to persons, as communicative representatives of actual human beings, 'subjective rights' against each other. This was philosophically expanded by the theory of subjective rights in the Kantian tradition, according to which ideally the citizens' spheres of arbitrary freedom are demarcated from each other in such a way that the law can take a generalizable form. Legally, this idea has been most clearly developed in the classical law of tort, in which not merely damages, but the violation of subjective rights are central.

Now, 'fundamental rights', as here proposed, differ from 'subjective rights' in private law as they are not about mutual endangerment of individuals by individuals, ie intersubjective relations, but rather about the *dangers to the integrity of institutions, persons, and individuals that are created by anonymous communicative matrices (institutions, discourses, systems).* Fundamental rights are not defined by the fundamentality of the affected legal interest or of its privileged status in the constitutional texts, but rather as social and legal counter-institutions to the expansionist tendencies of social systems. The Anglo-American tradition speaks in both cases indifferently about 'rights', thereby overlooking from the outset the distinction between subjective rights and fundamental rights, while in turn being able to deal with them together. By contrast, criminal law concepts of macro-criminality and criminal responsibility of formal organizations come closer to the pertinent issues being considered here.[70] These concepts affect violations of norms that emanate not from human beings but from impersonal social processes that require human beings as their functionaries.[71] But these concepts conceive only the dangers stemming from 'collective actors' (states, political parties, business firms, groups of companies, associations) and ignore the dangers stemming from the anonymous 'matrix', from autonomized communicative processes (institutions, function systems, networks) that are not personified as collectives. Even human rights that are directed against the state should not be

[69] Certainly people can do far worse to each other by violating rights of the most fundamental kind (life, dignity). But this is not (yet) a fundamental-rights question in this sense, but a question of the Ten Commandments, the fundamental norms of criminal law, and the law of tort. Fundamental rights in the modern sense are not opposed to perils emanating from people, but to perils emanating from the matrix of social systems.

[70] See for instance Jäger (1989) *Makrokriminalität*; Gómez-Jara Díez (2005) *La culpabilidad penal de la empresa*, 109 ff.

[71] For clarification it has to be emphasized that here the individual responsibility does not disappear behind the collective responsibility, but rather that both exist in parallel, although subject to different conditions.

seen as relations between political actors (state versus citizen), ie as an expression of person-to-person relations. Instead, such human rights are relations between anonymous power processes, on the one hand, and tortured bodies and hurt souls on the other. This notion is expressed in communication only very imperfectly, not to say misleadingly, as the relation between the state as 'person' and the 'persons' of the individuals.

It would be repeating the infamous category error of the tradition were one to treat the horizontal effect of fundamental rights in terms of the weighing up of subjective rights between individual persons.[72] That would just end up in the law of tort, with its focus on interpersonal relations. And we would be forced to apply the concrete fundamental rights directed against the state wholesale to the most varied interpersonal relations, with disastrous consequences for elective freedoms in intersubjectivity. Here lies the rational core of the excessive protests of private lawyers against the intrusion of fundamental rights into private law, though these complaints are in turn exaggerated and overlook the real issues.[73]

The category error can be avoided. Both the 'old' state-centred and the 'new' poly-contextural human rights question should be understood as people being threatened not by their fellows, but by anonymous communicative processes. These processes must in the first place be identified. Foucault has seen them most clearly, radically de-personalizing power phenomena and identifying today's micro-power relations in society's capillaries in the discourses/practices of 'disciplines'.[74]

The human rights question in the strictest sense must today be seen as endangerment of individuals' integrity of body and mind by a multiplicity of anonymous, autonomized, and today globalized communicative processes. The fragmentation of world society into autonomous subsystems creates not only new boundaries outside society between subsystem and human being, but also new boundaries between the various subsystems inside society, on which the expansionist tendencies of the subsystems

[72] Very critical towards the consideration of subjective rights in the range of the horizontal effect, Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 58 ff.

[73] Diederichsen (1998) 'Bundesverfassungsgericht als oberstes Zivilgericht'; Diederichsen (1997) 'Selbstbehauptung des Privatrechts'; Zöllner (1996) 'Regelungsspielräume im Schuldvertragsrecht'; Medicus (1992) 'Grundsatz der Verhältnismäßigkeit', 35.

[74] Foucault's problem is however that he is obsessed with the phenomenon of power, which leads him to inflate the concept of power meaninglessly. As a consequence he cannot discern the more subtle effects of other communication media.

work in their specific ways.[75] It now becomes clear how a new 'equation' replaces the old 'equation' of the horizontal effect. The old one was based on a relation between two private actors—a private perpetrator and a private victim of the infringement. Now, on one side of the new equation there is no longer a private actor as the violator of fundamental rights, but the *anonymous matrix of an autonomized communicative medium*. On the other side there is no longer simply the compact individual. Instead, owing to the presence of new boundaries, the protection of the individual, hitherto seen in unitary terms, splits up into several dimensions. On this other side of the equation, the fundamental rights have to be systematically divided into three dimensions:

— *institutional rights* that protect the autonomy of social processes against their subjugation by the totalizing tendencies of the communicative matrix. By protecting, for instance, the integrity of art, family, or religion against totalitarian tendencies of science, media, or economy, fundamental rights take effect as 'conflict of law rules' between partial rationalities in society.[76]

— *personal rights* that protect the autonomous spaces of communications within society, attributed not to institutions, but to the social artefacts called 'persons'.

— *human rights* as negative bounds on societal communication where the integrity of individuals' body and mind is endangered by a communicative matrix that crosses boundaries.

It should be stressed that single fundamental rights are to be allocated to these dimensions not on the basis of one-to-one, but with a multiplicity of overlaps. Some fundamental rights are mainly to be attributed to one dimension or the other (eg freedom of art and property primarily to the institutional dimension, freedom of speech primarily to the personal dimension, and freedom of conscience primarily to the human dimension). It is all the more important, therefore, to distinguish the three dimensions carefully within the various fundamental rights and to pay attention to their various legal forms and conditions of realization.

[75] In more detail see Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1004 ff. Not the therapy, but the diagnosis is followed by Koskenniemi (2005) *Global Legal Pluralism*, <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf>.

[76] Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 60, 69f., 71f.; Teubner (2000) 'Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken'; Graber and Teubner (1998) 'Art and Money'.

VI. JUSTICIABILITY?

The ensuing question for lawyers is: Can 'horizontal' effects of human rights be reformulated from a focus of conflicts within society (person versus person) to conflicts between society and its ecologies (communication versus body/mind)? In other words, can horizontal effects be transplanted from the paradigm of interpersonal conflicts between individual bearers of fundamental rights to that of conflicts between anonymous communicative processes, on the one hand, and concrete people on the other?

The difficulties are enormous. To name but a few:

How can a system/environment conflict 'between' the universes of communication and consciousness be addressed at all by communication as a conflict, as social conflict or indeed as legal conflict. A real Lyotard style of problem: If not as *litige*, then at least as *différend*?[77] Failing a supreme court for meaning, all that can happen is that the individual experience endures the infringement and then fades away unheard. Or else it gets 'translated' into communication, but then the paradoxical demand will be for the infringer of the right (society, communication) to punish its own crime! That means expecting poachers to turn into gamekeepers. But bear in mind that by institutionalizing political fundamental rights, nation states have managed, however imperfectly, precisely this gamekeeper-poacher self-limitation.

How can the law describe the boundary conflict, when after all it has only the language of 'rights' of 'persons' available?[78] Can it, in this impoverished rights talk, in any way reconstruct the difference between conflicts of fundamental rights that are internal to society (person-related) and external to society (human-related)? Here we reach the limits not only of what is conceivable in legal doctrine, but also the limits of court proceedings. In litigation there must always be a claimant suing a defendant for infringing his rights. In this framework of mandatory binarization as person/person-conflicts, can human rights ever be asserted against the structural violence of anonymous communicative processes? The only way this can happen—at any rate in litigation—is simply to re-use the category error criticized above, but immanently correcting it, in an awareness of its falsehood, by introducing where possible a difference. That means individual suits against private actors, whereby human rights are asserted: not the rights of persons against persons but of flesh-and-blood human beings against the structural violence of the matrix. In traditional

[77] Lyotard (1983) *Le différend*.

[78] For a good criticism of rights talk, see Glendon (2000) 'Rights Talk'.

terms, the conflict with institutional problems that is really meant has to take place within individual forms of action. We are already familiar with something similar from existing institutional theories of fundamental rights, which recognize as their bearers not only persons, but also institutions.[79] Whoever enforces political freedom of expression is simultaneously protecting the integrity of the forming of the political will. But the point here is not about rights of impersonal institutions against the state but, in a multiple inversion of the relation, about rights of individuals outside society against social institutions outside the state.

Is this distinction, plausible in principle, so precise that it is in fact justiciable? Can person/person-conflicts be separated from individual/individual-conflicts, on the one hand, and these separated in turn from communication/individual-conflicts on the other, if after all communication is enabled only via persons? Translated into the languages of society and the law, this becomes a problem of attribution. Whodunnit? Under what conditions can the concrete endangerment of integrity be attributed not to persons or individuals, but to anonymous communication processes? If this attribution could be achieved, a genuine human rights problem would have been formulated even in the impoverished rights talk of the law.[80]

In an extreme, almost irresponsible simplification, the 'horizontal' human rights problem can perhaps be described in familiar legal categories as follows. The problem of human rights in societal contexts governed by private law arises only where the endangerment of body/mind integrity comes from social 'institutions' (and not just from individual actors, where the traditional norms of private law then apply). In principle, institutions include private formal organizations and private regulatory systems. The most important examples here would be national and international business firms and other private associations; and private standardization and similar private rule-setting mechanisms as private regulatory systems.[81] We must of course be clear that 'institution' represents only imperfectly those chains of communicative acts, representing a danger to integrity, that are really intended through their characterization

[79] Clearest in the impersonal fundamental rights conception of Ridder (1975) *Soziale Ordnung des Grundgesetzes*, 85ff. See Ladeur (1999) 'Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie'.

[80] This problem is comparable to the demarcation of sovereign and fiscal actions in public law or of actions of agents and personal actions in private law.

[81] The renaissance of the concept of the institution in the various disciplines is no coincidence. Its relevance to jurisprudence is discussed by Black (1997) 'New Institutionalism and Naturalism'.

as a special medium: the term does not fully grasp the expansive dynamics which is the whole sense of the metaphor of the anonymous 'matrix'. But for lawyers, who are oriented toward rules and persons, 'institution' has the priceless advantage of being defined as a bundle of norms that can at the same time be personified. The concept of the institution could accordingly provide a signpost for the respecification of fundamental rights in social sectors (much as it can be employed for the state as institution and as person in the field of politics). The outcome would then be a formula of 'third-party effect' that would also seem plausible to a black-letter lawyer. It would not regard the horizontal effect as a balancing between the individual bearers' fundamental rights, but instead as the protection of human rights, personal rights, and rights of discourse vis-à-vis social institutions.

These difficulties with justiciability show how inappropriate the optimism is that the human rights problem can be solved using the resources of legal doctrine. Even institutional rights confront the law with the boundaries between other social subsystems. Can one discourse do justice to the other? This dilemma has been analysed by Lyotard.[82] But it is at least a problem within society, one Luhmann sought to respond to with the concept of justice as socially adequate complexity.[83] The situation is still more dramatic with human rights in the strict sense, located at the boundary between communication and the individual human being. All the groping attempts to juridify human rights cannot hide the fact that this is, in the strict sense, impossible. How can society ever 'do justice' to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them? In the light of grossly inhuman social practices, the justice of human rights is a burning issue—but one which has no prospect of resolution. This has to be said in all rigour.

If the positive construction of justice in the relation between communication and human being is definitively impossible, then what is left—if we are not to succumb to post-structuralist quietism—is only second best. In legal communication, we have to accept that the problem of system/environment can only be experienced through the inadequate sensors of irritation, reconstruction, and re-entry. The deep dimension of conflicts between communication on the one hand and human beings

[82] Lyotard (1983) *Le différend*, 9 ff.

[83] Luhmann (2004) *Law as a Social System*, 211 ff.; Luhmann (1981) *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, 374 ff.

on the other can at best be surmised by law. And the only signpost left is the legal prohibition through which a self-limitation of communication seems possible.[84] But even this prohibition can describe the transcendence of the other only allegorically. This programme of justice is ultimately doomed to fail, and cannot, with Derrida, console itself that it is 'to come *(à venir)*',[85] but has instead to face up to its being in principle impossible. The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of 'humanly just' communication might be.

[84] This may explain the high value that is ascribed to the prohibition in law by authors with such different theoretical backgrounds as Rudolf Wiethölter and Pierre Legendre: Wiethölter (2005) 'Just-ifications of a Law of Society'; Legendre (1994) *Le crime du caporal Lortie*, 145 ff.

[85] Derrida (1990) 'Force of Law: The Mystical Foundation of Authority', 969.

6

Inter-constitutional Collisions

I. THE LACK OF A THIRD-PARTY AUTHORITY

Constitutional fragments—that is the image offered by societal constitutionalism in the context of globalization. As we have seen, specialized transnational regimes are today competing with the nation states as constitutional subjects. Because they do not communicate in the power medium of politics, but rather in the media of other function systems, they develop independent constitutions, whose norms of organization and fundamental rights clearly differ from one other, as they do from those of the nation states. In this situation collisions between constitutions are a foregone conclusion. And indeed, in legal practice it is the constitutional conflicts between transnational regimes that predominate.[1] The following four conflict situations have again and again exercised legal practice:[2]

(1) Norms of two or more international regimes conflict in the same case constellation. An example is the conflict between the international human rights regime and the international humanitarian laws of war.[3]

(2) A court in a legal regime is faced with the question of whether to use the norms of another regime. As an example, a World Trade Organization panel is confronted with norms from international environmental law.[4]

[1] The discussion on the fragmentation of global law is summarized by International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (13 April 2006) (Martti Koskenniemi).

[2] Drawing on the typology used in Dunoff (2011) 'New Approach to Regime Interaction', 139 ff.

[3] Orakhelashvilli (2008) 'Interaction between Human Rights and Humanitarian Law'.

[4] See eg European Communities—Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R (29 September 2006) (conflict with Convention on Biological Diversity and the Biosafety Protocol); Mavroidis (2008) 'No Outsourcing of Law?'

(3) The same legal question is raised before different arbitral institutions, for example: the Swordfish case, which was submitted to both the World Trade Organization and ITLOS.[5]

(4) Different international tribunals interpret the same legal norm in a different way. Example: the dispute between the ICJ and the ICTY regarding the conditions determining when the behaviour of non-governmental actors must be attributed to a state.[6]

As shown elsewhere, these disputes cannot be reduced to simple norm or policy disputes.[7] If the regime constitutions are the result of a double reflexivity—of the function system and of the law—then they will reproduce the fundamental rationality conflicts of world society as a collision of constitutional rules. Cosmopolitan theories of a global constitution here once more attempt to find their application.[8] Their hopes for a world state have in the meantime faded, while progress towards a Global Court of Justice to decide on disputes between economic, political, and social constitutions remains stalled for the foreseeable future, if not forever.[9] But, as second best, they still have a unified world constitution (without a world state) to take over the necessary co-ordination of these centrifugal forces.[10] Instead of a global state, it is now the 'international community' that has become the reference point for an emerging world constitutional law: this no longer consists, as in traditional international law, of a community of sovereign states, but of an ensemble of political and social actors including individuals, governed by the rule of law.[11] And at this point all of the voices can once more be heard of those who regard it as the fundamental task of politics, if not to direct

[5] Orellana (2002) 'Swordfish Dispute'.

[6] Goldstone and Hamilton (2008) 'Bosnia v. Serbia'.

[7] In detail in Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1002 ff. Kumm, too, analyses regime conflicts not simply as disputes between different legal orders, but expressly as conflicts between different transnational constitutions, Kumm (2012) 'An Integrative Theory of Global Public Law' (manuscript), 35.

[8] A recent pleading for a world state in Scheuerman (2005) 'Review of Hauke Brunkhorst, Solidarity'. For a unified world law Berman (2005) 'World Law'.

[9] Conflicts between the many constitutions of Europe (the economic, political, legal, social constitutions of the EU) are today decided by the ECJ, see Tuori (2010) 'Many Constitutions of Europe', 28 f. But there is no equivalent on the global level.

[10] See the contributions in Albert and Stichweh (2007) *Weltstaat und Weltstaatlichkeit*.

[11] Brunkhorst (2007) 'Legitimationskrise der Weltgesellschaft'; Brunkhorst (2005) 'Demokratie in der globalen Rechtsgenossenschaft'. Criticism of the concept of the international community in Kennedy (2007) 'One, Two, Three, Many Legal Orders'.

society, then at least to assume the co-ordination of its subsystems—for the whole world.[12]

Yet empirical evidence and theories of world society tell a different story. *Within* the subsystems of world society—in international politics, in the global economy, in law, and in science—central co-ordination authorities have a feeble presence. The co-ordination *between* function systems is weaker still. Hegemonic regimes may well repeatedly attempt to force their partial rationalities upon other regimes.[13] In the recent financial crisis, however, the ambitious attempt to install the capital markets as co-ordination authorities for the subsystems of world society was an utter failure. And the renewed attempts after the crisis to achieve overall social co-ordination by means of international politics once more demonstrate the limits of its efficacy. Nor in global law is any hierarchical authority visible that has formulated the 'redemptive narrative' to solve constitutional disputes using, as Cover says, jurispathic means, ie by destroying the identity of a legal order in favour of the higher principles of another legal order.[14]

> Rather, judicial practice reflects the reality that international courts inhabit a world that is overflowing with international law, a world of multiple nomoi—but cannot be jurispathic. Turning Cover's argument upside down, international courts inhabit a world of nomos without narrative.[15]

In a world society with neither apex nor centre, there is just one way remaining to handle inter-constitutional conflicts—a strictly heterarchical conflict resolution. This is not just because of the absence of centralized power, which could be countered by intensified political efforts, but is rather connected with deep structures in society which Max Weber called the 'polytheism' of modernity.[16] Even committed proponents of the 'unity of the constitution' are forced to agree that the unity of the nation-state constitution is now moving toward a 'clash of civil constitutions', toward mutually conflicting rationalities to be defused by a new conflict of laws. And in today's situation we could then turn to a conflict-laden 'interaction of overlapping "constitutional law circles", the arising of an "interlegal" network of state constitutional law, local sub-constitutional laws,

[12] Scheuerman (2005) 'Review of Hauke Brunkhorst, Solidarity'.

[13] Informative on the various attempts, Koskenniemi (2011) 'Hegemonic Regimes'.

[14] Cover (1983) 'The Supreme Court, 1982'.

[15] Dunoff (2011) 'New Approach to Regime Interaction', 156.

[16] Weber (1968) *Gesammelte Aufsätze zur Wissenschaftslehre*, 605.

European constitutional law and transnational constitutionalism'.[17] The unity of the constitution can only then be addressed as an 'imaginary fabrication' on a symbolic level 'behind' the actually existing multiplicity of constitutions, appearing where necessary as a 'necessity for a collectively shared faith in the "unity" of the constitution'.[18] The rest is conflict.

These conflicts, then, are different from the way Kant thought of them: they are not just casuistic questions. They are 'existential questions which, in their solution, cause the reference to the (formal) unity of reason to fail'.[19] The way out, if indeed there is one, can then only be sought in the internal perspective of the worlds of meaning involved. For resolving these rationality conflicts there exists no objective, neutral standpoint: neither revelation nor reason offers a solution. Only in the relevant subsystem can the conflicts be dealt with. The rationality conflict is not 'removed', but is to be 'endured': a chain of final decisions produces not abolition, but a conscious compromise made without illusion. Rationality premises of one system are to be exposed to those of the others. Because modern society has no central authority, all efforts at conflict resolution should be decentralized, they should put pressure on 'the function systems to develop a stronger regard for the overall social environment. Because nobody else can do this.'[20]

Heterarchical dispute resolution basically knows only two forms: internalizing disputes into the decisions of the conflicting regimes themselves, or externalizing them to inter-regime negotiations. The disputes are either shifted to the independent constitutions of the regimes, or to the co-operation between them. Both cases are today being realized institutionally: on the one hand in the case law of regime courts and, on the other, in the co-operative procedures between regimes. Constitutional pluralism needs to choose between these two approaches of a 'meta-constitutionalism' in order to achieve at least a minimum integration of regime laws.[21]

[17] Vesting (2012) 'Ende der Verfassung?' (manuscript), 6.

[18] Vesting (2012) 'Ende der Verfassung?' (manuscript), 8.

[19] Schluchter (1988) *Religion und Lebensführung*, 286. An echo can be heard in the constitutional pluralism of Walker (2002) 'Idea of Constitutional Pluralism', 338 f. He stresses the radical differences between various 'epistemic communities' that cannot be abolished by any super-authority.

[20] This is the step that Luhmann takes beyond Weber, the 'chain of tragic compromises' is not only relinquished to individuals, but especially to the function systems, Luhmann (1997) *Gesellschaft der Gesellschaft*, 186.

[21] Walker (2002) 'Idea of Constitutional Pluralism', 358 uses this expression to mark the difference with regime-internal questions. It should nevertheless be clear that the problem cannot be mastered by any super-authority, but only by the regimes themselves.

And, in both cases, constitutions react differently to the collisions. In the first case—internalization—norms of the other regimes are reconstructed before the forum of the own constitution. This opens up avenues for a new conflict of laws. The disadvantage of internalizing is the further fragmentation of the law. In the second case—externalization—the conflicts are addressed, relocated, and decided in regime co-operation.[22] There may be no obligation to reach a decision, but the chances of consensus are increased. This opens up other perspectives for a legal constitutionalization. The role of the law here is to structure co-operation procedures.[23] Legal norms contribute to societal, non-legal forms of conflict resolution. They can ensure the participation of other interests and diverging rationalities. The normative orientation in both cases is a question of whether counter-institutions in societal regimes—conflict of norms or negotiation arrangements—can defy the imperialism of hegemonic regimes.

II. INTER-REGIME CONFLICTS

A lively debate has recently developed aiming to design a conflict of laws specially tailored to inter-regime conflicts. While first impulses sketched out the particular features of the new conflict problematic, the outlines are now gradually appearing of suitably adapted conflict norms.[24] Neither the collision rules of international public law nor those of international private law offer an appropriate solution for the new inter-regime conflicts.[25] Both are tailored to conflicts between national legal orders, not to conflicts between transnational regimes, which run perpendicular to them. Until now, traditional international private law (IPL) has only inadequately perceived conflicts of national law with regime law. The narrow state-positivistic concept of conflict laws could only conceive of regime rules as 'facts' or as social norms, but not as genuine law. Their conflicts with national law were displaced to other legal areas and given inappropriate terms—incorporation,

[22] Detailed analysis of regime co-operation as alternative to conflict-of-laws solutions in Dunoff (2011) 'New Approach to Regime Interaction', 156 ff.

[23] Joerges develops wide-ranging normative perspectives in Europeanization (comitology) and globalization (WTO and GAL), Joerges (2011) 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form'.

[24] The most important impulses towards the extension of collision theories stem from Wiethölter (1977) 'Begriffs- oder Interessenjurisprudenz'; Wiethölter (2005) 'Just-ifications of a Law of Society'. On the need for a conflict of laws for global function systems, Teubner (1993) *Law as an Autopoietic System*, 100 ff.; Michaels (2009) 'Global Legal Pluralism'.

[25] Michaels and Pauwelyn (2011) 'Conflict of Norms or Conflict of Laws?', 19 ff.

delegation, deference.[26] Inter-regime conflicts themselves were completely outside the focus of IPL.[27] But under the pressure of actually existing regime conflicts, the problematic is today being increasingly discussed as to whether and how IPL principles can be used for regime conflicts.[28] Since comparable heterarchical conflicts exist between national legal orders without a third-party authority, the thought patterns of IPL are in principle a suitable starting point for an inter-regime law. But everything depends on the modifications to do justice to the peculiarities of transnational regimes.

1. Modifications of the traditional conflict of laws

As a first step, territorial borders of nations are replaced by the functional borders of transnational regimes. Both international jurisdiction and international conflict of laws are to be switched from conflicts between national legal orders to conflicts between sectorial regimes. Replacing territoriality by 'function regime affiliation' means jurisdiction and choice of law would not be inferred from the territorial legal orders.[29] In both areas, the question is no longer the 'seat' of a legal relationship in one of the territories involved, but rather the closer connection to one of the functional regimes. The answer would be 'primary coverage', developed by Trachtman from the perspective of institutional economics, to address the problem of delimiting overlapping areas of jurisdiction.[30]

The next question causes greater difficulties: can such an inter-regime law easily take over the reference techniques of IPL? Should we here design collision rules that refer either to the one or to the other legal order involved? This would determine the substantive law which is to be applied in the dispute. While some authors indeed plead that transnational regimes should use this reference technique,[31] other authors who, in view of the special character of regime conflicts, suggest a substantive law

[26] Michaels (2005) 'Re-State-ment of Non-State-Law', 1227 ff.

[27] See their inadequate treatment in Kegel and Schurig (2004) *Internationales Privatrecht*, 36 ff.

[28] Michaels and Pauwelyn (2011) 'Conflict of Norms or Conflict of Laws?', 26 ff., 31 ff.; Teubner and Korth (2011) 'Two Kinds of Legal Pluralism', 35 ff.; Berman (2007) 'Global Legal Pluralism', 1229 ff.; Dinwoodie (2001) 'The Development and Incorporation of International Norms in the Formation of Copyright Law'.

[29] Berman (2002) 'Globalization of Jurisdiction', 311 ff.; Dinwoodie (2000) 'New Copyright Order', 469 ff.

[30] Trachtman (2002) 'Institutional Linkage: Transcending "Trade and . . . " ', 90 f.

[31] Michaels and Pauwelyn (2011) 'Conflict of Norms or Conflict of Laws?', 35 ff.

approach, may have the better arguments on their side.[32] They propose a 'substantive law approach' which replaces the reference norms of IPL by substantive norms. In a collision, substantive norms need to be developed to decide the substantive arguments underlying the conflicting norms. Such substantive norms will mean that, step by step, a kind of mixed law will develop where each regime in good measure incorporates the norms of the 'foreign' regime.

The substantive law approach is justified by the differences between nation-state and function regime constitutions. Grimm and Walker have repeatedly stressed these differences, albeit in other contexts.[33] National constitutions are indeed all-embracing or 'holistic' orders in which even highly specialist regulations form an intrinsic part of a dense fabric of national norms arising from the most varied areas of life. This produces an 'internal balance' between the divergent norms, principles, and policies that all claim validity in the nation state. This justifies, when national legal orders collide, assigning the dispute en bloc to either one or other of the legal orders involved. In contrast, transnational constitutions, as highly specialized self-contained regimes,[34] only establish law for the single functional sector of society to which they are connected. Their constitutional norms and principles unilaterally follow the rationality criteria of this societal sector. They are simultaneously solipsistic and imperialistic.[35] The tunnel vision of function regimes makes it difficult to orient them to the public interest of a polity: this is by contrast more feasible in the contextualized norms of a nation-state constitutional order.[36]

This difference between function regime and nation-state constitutions is frequently ignored in the constitutionalization debate. A conflict-of-laws form of regime hegemony follows from this ignorance. Critics of over-hasty analogies made between nation-states and regimes have justly demanded that the regimes must be prepared to open themselves to the normative concerns of conflicting orders. This particularly applies to the

[32] Berman (2002) 'Globalization of Jurisdiction', 311 ff.; Dinwoodie (2004) 'Trademarks and Territory'; Dinwoodie (2000) 'New Copyright Order', 469 ff.

[33] If with the dubious consequence that their lack of 'holism' excludes their constitutionability, Grimm (2005) 'Constitution in the Process of Denationalization', not so decidedly Walker (2011) 'Beyond the Holistic Constitution?'; see chapter 3, under IV.

[34] On 'self-contained regime' Koskenniemi (2003) *Outline of the Chairman of the ILO Study Group*, 9.

[35] Koskenniemi (2011) 'Hegemonic Regimes', 317 f. He takes up Kelsen's critique of unlimited state sovereignty and applies it to transnational regimes.

[36] In detail on this tunnel vision and its consequences for conflict of laws, Teubner and Korth (2011) 'Two Kinds of Legal Pluralism', 36 ff.

World Trade Organization, which is with some reason accused of hegemonic tendencies:

> Instead of presupposing that that the treaty text is animated by a constitutional *telos* of freer trade, or looking primarily *within* the WTO for the relevant structural principles, we emphasize the importance of non-WTO institutions and norms in treaty interpretation, which represent values other than free or freer trade. The WTO dispute settlement organs must display considerable deference to substantive domestic regulatory choices as well as draw on and defer to other international regimes whose rules, policies, and institutions represent and articulate such values, whether in respect of health, labor standards, environment, or human rights.[37]

Substantive norms must therefore be developed to react to this lack of 'internal balance' in regime constitutions. Any future constitutional collision will have to consider this difference. The merely horizontal viewpoint of international private law would produce inadequate results. If the primary coverage lies in an issue-specific transnational regime, the conflict of laws should apply its rules but at the same time ensure that, to offset its tunnel vision, contextualizing elements are introduced to allow competing or opposing principles to be applied. The primary candidate for this is the *'ordre public transnational'*.[38] The application of the regime law would be measured using the yardstick of the *'ordre public transnational'*. In contrast to the traditional *'ordre public'* of IPL, however, this *ordre public transnational* would have to play not just a corrective, but a dominant role. And, in contrast to the 'special connection' and *'application immédiate'* of more recent IPL, this is not a question of the policies of one or other regimes that would have to be considered as a priority, but an orientation towards a global public interest.

It needs to be stressed that such an *'ordre public transnational'* has not yet been formed and there is no neutral third-party forum with its own yardsticks and procedures. The norms of an *'ordre public transnational'* are simply projections of the conflicting regimes aiming, from their own perspective, at the global public interest. It is only with this qualification that Vesting's ideas about the symbolic dimension of the one overall constitution make sense. Vesting consciously speaks in 'as if' mode.

[37] Howse and Nicolaidis (2003) 'Legitimacy through "Higher Law"?', 308. Extensively on the conflict of WTO with other regimes, Pauwelyn (2009) *Conflict of Norms in Public International Law*, 327 ff., 440 ff.

[38] Collins (2012) 'Flipping Wreck'. Kumm's cosmopolitan constitutional pluralism leads to similar results, Kumm (2012) 'An Integrative Theory of Global Public Law'(manuscript), 35. Detailed analyses on *ordre public* in transnational private regimes in Renner (2011) *Zwingendes transnationales Recht*, 91 ff., 126 ff., 169 ff., 271 ff.

The 'unity' of the constitution is then only to be understood as a product of an 'imaginary fabrication' in the cultural sphere and as a 'fictional reality'.[39] Each regime develops its imaginary world constitution as it were 'holographically' (ie from a perspective in which the public interest appears differently depending on the viewpoint), to which it orients its own operations and limits its options.

In place of the venerable *comitas* of international private law, it is the principle of 'constitutional tolerance' that applies to inter-constitutional collisions.[40] This obliges the regimes to reciprocally acknowledge the other constitution and to directly apply the other constitutional rules. But each regime will always tend to interpret an assumed common '*ordre public transnational*' from its own constitutional perspective. Rightly then a regime will refuse to recognize the other constitutional order 'so long as' the other constitution does not correspond to the '*ordre public transnational*'.

2. *Normative networks*

Joerges has developed a conflict model for the integration of national legal orders in Europe that comes close to meeting these requirements, much closer than models based on federal principles or international private law.[41] First, Joerges attributes the responsibility for reconciling conflicting legal orders not to a superordinate authority, but to the conflicting entities themselves. His requirements however subsequently exceed those of international private law by some considerable distance. In his view, because the European Union represents a complex structure of multilevel governance, all conflicts at the various levels have to be addressed in the decentralized conflict calculus. This cannot be accomplished using the purely 'horizontal' view of IPL, but—paradoxical as it may sound—nor can it be handled by the hierarchical methods of federalism. A strictly heterarchical treatment is required in which the collision rules of the regimes involved would have to address not only 'horizontal' conflicts between the various national laws but also 'vertical' conflicts with European law and even with 'diagonal' conflicts between different norm matters at the various levels.

[39] Vesting (2012) 'Ende der Verfassung?' (manuscript), 8.

[40] On this principle in collisions of the EU and nation-state constitutions, Kumm (2006) 'Beyond Golf Clubs', 528 ff.

[41] Joerges (2011) 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form'; Joerges and Rödl (2009) 'Funktionswandel des Kollisionsrechts II'; Joerges (2007) 'Europarecht als Kollisionsrecht neuen Typs'.

If we take this model out of its context of European integration, we can use it for the disputes between transnational regimes. In neither situation is the purely horizontal viewpoint of IPL adequate, nor are the hierarchical conceptions of a superordinate legal order up to the task. This then leads us to network-like structures, which are at hand in both cases—in the European Union and in transnational regimes (albeit in a different format). The self-contained regimes are forming networks that are exposed, not just to 'horizontal' conflicts but also to 'vertical' and particularly 'diagonal' conflicts. It is a matter of the heterarchical relations between the various semi-autonomous levels of multi-level governance, for which network theory provides a fitting concept.

Networks as a peculiar combination of bilateral individual relations and multilateral overall co-ordination come up (in the case of the European Union and of transnational function regimes) as the result of a fragile co-existence of different, mutually contradictory normative orders of the network nodes.[42] Networks are an institutional answer to rationality conflicts that result from the differentiation and autonomization of systems, in our context of transnational function regimes.[43] Networks offer an institutional answer to conflicts of norms by transforming these external contradictions into internal imperatives of the network nodes which can be made situatively compatible with one another. This produces a 'paradoxical structure' of inter-institutional interweaving based on 'contradictory requirements' that are nevertheless 'functional'.[44] Networks translate the external contradictions manifested in conflicts of norms into the internal perspective of the individual nodes, which internally reflects the relations between various levels, subsystems, network nodes, and the overall network.[45] In conflict of laws terms, this means that the network nodes (nation states in Europe or function regimes in a global context), each internally develop their own conflict of laws from which perspective they can decide conflicts of norms.

Network categories illustrate more clearly what distinguishes Europeanization from globalization, in respect of norm collisions. They

[42] On this precarious relation in other contexts, Bieber (1997) 'Probleme unternehmensübergreifender Organisation', 116 ff.

[43] On these contexts, Bommes and Tacke (2011) *Netzwerke*.

[44] Thus for regional policy networks, Benz (1996) 'Regionalpolitik zwischen Netzwerkbildung und Institutionalisierung', 24.

[45] Semlinger (1993) 'Effizienz und Autonomie in Zulieferungsnetzwerken', 332.

differ in the 'verticalization' of their largely heterarchical structures. One of the construction secrets of networks is that they can develop internal asymmetries that exhibit 'vertical' relationships, ie non-horizontal but nevertheless heterarchical relationships. This verticalization is one of the most successful strategies of a '*pluralisme ordiné*'.[46] The European Union represents a network with a particular feature: it has additionally developed a network centre linking to the nodes of the nation states that for its part produces an independent order, ie Community law, without however functioning as a hierarchically superordinate authority like the central authority of a federal order.[47] In network theory this is conceived as a centralized network. In contrast to the hierarchical centre of a formal organization, the network centre is only *primus inter pares*.[48] The network centre does not decide norm conflicts between nodes, rather, the nodes decide the issues for themselves in a decentralized way. The centre is to this extent nothing but one more node. Each node then has the responsibility to incorporate into its internal perspective the norms of the other nodes as well as those of the overall order. This is the essence of Joerges' conflict model for the regional constitution of Europe.

But in globality, in the relations between transnational regimes, there is no existing network centre that has developed its own 'community' law. Yet here too there is an all-embracing level: the nodes' connectivity creates the network architecture. This level emerges exclusively in the decentralized interactions of the nodes, the transnational regimes.[49] Here the construct of the 'international community' comes in, not as a firmly established institution (like the European Union) but as a 'narrative identity', an 'imagined community' created within the partial orders. The verticalization of constitutional pluralism thus follows a different logic in globality from that in Europe: a symbolic rather than an institutional logic. It addresses the unity of the numerous constitutions, but it will treat it 'on a symbolic and thus on a medial and cultural level, while it would have to engage much more strongly at the application-oriented level with the fragmentation and instabilities of the partial constitutions as "follow-on

[46] Delmas Marty (2009) *Ordering Pluralism*, 109 ff., 163 f.

[47] On the network character of the EU, Ladeur (1997) 'Towards a Legal Theory of Supranationality: The Viability of the Network Concept'.

[48] More in Windeler (2001) *Unternehmungsnetzwerke*, 105 ff.

[49] This aspect is particularly emphasized by Ladeur (2011) 'Die Netzwerke des Rechts', 163 ff.

constitutions" '.[50] The norms of the *'ordre public transnational'* which, in European integration, are to a large extent produced by the Community authorities, can in global networks only be formulated in a decentralized manner from the internal perspective of the individual transnational regimes.

Accordingly, 'vertical' and 'diagonal' conflicts have to be treated differently from those in the European Union. The regimes cannot rely on externally institutionalized rules that they then have to translate internally. Rather, the entire norm formation must be implemented internally, in the regimes themselves. Each regime must create the overarching *ordre public transnational* from its own perspective. According to the logic of networks, each transnational regime needs to combine two contradictory requirements. On the one hand the autonomous reflection of the network nodes must seek the compatibilization with conflicting norms of the other regimes. On the other, such reflections must counterfactually assume common points of reference and a necessarily abstract horizon of meaning to which they refer in their norm production. But it must be repeatedly stressed that this shared horizon of meaning does not 'exist': it is a construct produced by each regime.

The counterfactual assumption of a common normative core thus permits that different regimes formulate out of their perspective—varying—formulas of the public interest. They project norms of their own for a global *ius non dispositivum* that meet their pecularities and at the same time take account of the whole by transcending their individual perspectives. This is certainly not an automatic process: here too they must be stimulated—indeed forced—by external pressures. Very different processes have already taken on this role: scandalization by segments of public opinion,[51] the impact of international politics[52] and co-operation between autonomous law regimes.[53] The unity of a political formula of the public interest

[50] Vesting (2012) 'Ende der Verfassung?' (manuscript), 5, 17 analyses constitutional fictions which pretend constitutional unity in order to orientate sub-constitutions to the public interest.

[51] Brunkhorst (2005) *Solidarity: From Civic Friendship to a Global Legal Community*, 137 ff.

[52] See eg UN Sub-commission on the Promotion and Protection of Human Rights, Resolution v. 13.8.2003, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2; on this: Campagna (2004) 'United Nations Norms on the Responsibilities of Transnational Corporations'.

[53] On the Global Compact initiated by UN General-Secretary Kofi Annan: <http://www.unglobalcompact.org>; a first appraisal in Rieth (2003) 'Deutsche Unternehmen, Soziale Verantwortung und der Global Compact'.

must thus yield to a multiplicity of regime-related formulas of '*ordre public transnational*'.

III. INTERCULTURAL CONFLICTS

1. *Cultural polycentrism*

Quite different norm collisions come up in intercultural conflicts, particularly when functionally differentiated transnational regimes are confronted with indigenous cultures. Similarly to collisions of transnational regimes, also in these constellations non-state legal orders collide with each other. 'Bio-piracy' and 'land grabbing' scandalize social conflicts which broke out between the hyperstructures of modernity and the traditions of regional cultures. Pharma groups, science institutes, and cultural institutions have massive interests to appropriate traditional knowledge in peripheral societies, using specific exploration methods of the disciplines of modernity.[54] The large scale acquisition of land in developing countries by state institutions and transnational corporations produced intense conflicts which were intensified by the resistance of indigenous communities, social movements, and NGOs.[55] Frequently, in recent years civil society groups, in an attempt to combat the exploitation of traditional knowledge in peripheral societies through the exploration methods of the modern economy, science, technology, medicine, and the cultural industry, have submitted their cases to the legal forums at the centre.[56] If the traditional knowledge of indigenous societies is to be qualified as a legal problem, then again the fragmentation of transnational law makes itself felt. Under the influence of public protest, several transnational regimes have advanced regulations, only however perceiving each with their own tunnel vision.

The fragmentation debate has again turned its attention from the purely legal to the political dimension, ie to the policy disputes between international regimes. Numerous conflicts have occurred between the transnational regimes concerned with the protection of traditional knowledge. These include the World Intellectual Property Organization (WIPO) with its Intergovernmental Committee on Intellectual Property

[54] On the conflicts and their solution alternatives in more detail, Fischer-Lescano and Teubner (2008) 'Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?'.

[55] Prien (2010) 'Landgrabbing: Symptom einer postneoliberalen Rechtsordnung?'; Braun and Meinzen (2009) 'Land Grabbing by Foreign Investors'.

[56] On the legal constructs in more detail, Fischer-Lescano and Teubner (2008) 'Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?'.

and Genetic Resources, Traditional Knowledge and Folklore (IGC), the United Nations Environment Programme (UNEP), the Convention on Biological Diversity (CBD), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Working Group on Indigenous Populations, the International Labor Organization (ILO), the World Health Organization (WHO), the World Trade Organization (WTO) and several others.[57] But, against these attempts to subject traditional knowledge to the idiosyncratic regulatory logics of diverse transnational regimes, it is important to separate the issue from an over-close connection to regime policies and trace it back to the rationality conflicts of globalized society. The constitutional collisions have their basis not simply in policy disputes of regime, but in systemic conflicts. The guiding principles of economy, science, medicine, culture, and religion all argue for different access of Western institutions to traditional knowledge. And each perspective recommends different regulations to effectively restrict such access.

Also in these cases, regime conflicts can be traced to systemic differences.[58] In the various attempts to create exclusive rights on territory or establish a global intellectual property law, traditional knowledge is drawn into the rationality conflicts within modernity.[59] But we must now go considerably beyond the previous discussion of fragmentation. Talking of rationality conflicts addresses only the *single* and not the *double* fragmenting of world society. Due to the first fragmentation, traditional knowledge is perceived differently from diverging perspectives of functional regimes, but this does not take into account the second fragmentation, ie the cultural polycentrism of global communication, the divergences of different world cultures.[60] The conflicts over traditional knowledge have arisen from this double fragmenting of world society—the fragmenting of

[57] Graber (2008) 'Using Human Rights to Tackle Fragmentation', 96 f.

[58] See Sassen (2006) *Territory-Authority-Rights—From Medieval to Global Assemblages*.

[59] See eg Art. 8(j) and Art. 10(c) of the Convention on Biological Diversity, <http://www.cbd.int/convention/convention.shtml>. See also Para. 19 of the Doha Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>. See also the *WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* with drafts produced and discussed for provisions for the protection of traditional knowledge, WIPO Publication WIPO/GRTKF/INF/1, <http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet.pdf>.

[60] See Sinha (1995) 'Legal Polycentricity'. Tully identifies a conflict between different constitutional cultures. Indigenous cultures dispose of constitutions that are characterized by informality, spontaneity and permanent changeability, Tully (2007) 'Imperialism of Modern Constitutional Democracy', 320.

function systems and the fragmenting of regional cultures.[61] Only once the conflicts have been identified as a result of these two phenomena, can sociological analyses assist in the search for adequate legal rules.

The difference between two types of social organization becomes crucial: social embedding of 'traditional' knowledge versus high specialization of 'modern' bodies of knowledge. The difference shapes the conflicts about traditional knowledge. If the knowledge institutions of modernity, each specialized on just one function, encounter diffuse knowledge structures in segmentary or stratified societies, their only response is to uproot the traditional knowledge generation from its social embedding and to transform it in their own metabolisms.

> To divorce 'science' from 'religion' and to tear away the 'cosmological' or spiritual gloss from an allegedly 'practical' core will undermine many forms of traditional knowledge.[62]

Highly specialized 'self-contained' systems of modernity use 'holistic' traditional cultural contexts for their special goals, removing them from the reproduction context on which traditional knowledge is, however, dependent for its further development. In brief, the multi-functionality of traditional institutions is undermined by the uni-functionality of modern hyperstructures.

The extent to which the hyperstructures of world society—function systems, formal organizations, networks, and epistemic communities—in their increased needs for information tear the bodies of knowledge of regional cultures from their living contexts and draw them inexorably into their maw is exemplified by modern science dealing with traditional knowledge.[63] That knowledge belongs in the public domain—one of the foundational principles of modern science—here loses its innocence. Following this principle inevitably destroys structures of communal knowledge in regional cultures. The modern principle of general access to knowledge harms religiously motivated secret spheres. Scientific methods of controlled verifiability require the cutting of the close connections of the bodies of knowledge with indigenous religion, culture, and environment, connections essential to their survival.

[61] On their interrelation in general, Stichweh (2007) 'The Eigenstructures in World Society and the Regional Cultures of the World'.

[62] Coombe (2005) 'Protecting Cultural Industries to Promote Cultural Diversity', 606.

[63] See eg Art. 1.1. and Art. 12.3 of the International Treaty on Plant Genetic Resources for Food and Agriculture, <http://www.planttreaty.org/content/texts-treaty-official-versions>. On the well-meaning projects to protect traditional knowledge via a 'global database' which at the same time subject it to access by modern science, Daes (2001) 'Intellectual Property and Indigenous Peoples', 144 f.

The conventional conflict of laws as developed between 'Western und Non-Western Law' is not suitable for such collisions.[64] If conflict norms are to be tailored to the clash of fundamental principles of social organization, they must set effective limits on modern hyperstructures in their expansion into regional cultures. In order to create compatibility with the stipulations of traditional knowledge, they must engage the expansive institutions of modernity and demand self-constraint from them, applying outside pressure. Self-constraint on the uni-functional interventions into bodies of knowledge embedded in society must be externally imposed. The hyperstructures of globalized modernity need to be forced to respect the intangibilities of regional cultures.[65]

Constitutional sociology might offer insights regarding the conflict of social construction principles (functional vs. segmentary/stratificatory differentiation). It has shown how in constitutional history the destructive tendencies of functional differentiation have been relatively successfully thwarted through social counter-institutions. As discussed above, this is because the counter-institutions force self-constraint upon expansive social systems.[66] Now, however, constitutional theory has to change its focus from conflicts between subsystems within functional differentiation to the conflicts between functionally differentiated globality and the social embeddedness of regional cultures.

As mentioned, the historical role of constitutions and particularly of fundamental rights is not simply restricted to protecting the individual, but consists primarily of securing the autonomy of social spheres. Constitutions developed in response to the emergence, typical of modern societies, of autonomous action spheres, particularly in relation to autonomous politics. As soon as expansionistic tendencies arose in the political system that threatened the integrity of other autonomous areas of society, turbulent social conflicts occurred. The positions fought over were formulated as fundamental rights and institutionalized as social counter-institutions within politics. Such expansionist tendencies manifest themselves in historically very different constellations: in former times mainly in politics, today in the economy, in science, technology, and other social sectors.

Now, how can constitutional theory deal with the conflicts between functionally differentiated globality and the socially embedded regional

[64] Kollewijn (1951) 'Conflicts of Western and Non-Western Law'.

[65] On the difficulties arising when traditional self-perceptions are translated into modern, particularly legal, categories, Coombe (2005) 'Protecting Cultural Industries to Promote Cultural Diversity'.

[66] In chapter 5, under IV to VI.

cultures? A further generalization with regard to the basic rights theory becomes necessary; this time in the other direction. If the matrix of functional differentiation not only threatens the integrity of areas of autonomy within modern society, but also the integrity of traditional knowledge in regional cultures, then it would correlate with the institutionalized logic explained here to expect that constitutional guarantees would protect a process in which external conflicts, spontaneous protests, organized resistance, and social movements in a 'juridifcation of protest'[67] would have the potential to compel the hyperstructures of modernity to limit their expansionist urges.[68] And institutional imagination is required to realize the coerced self-restriction of functional systems, organizations, networks, and epistemic communities in effective policies and legal norms.

Consequently, rules on the collision of laws that are to be unfolded in the context of a modified theory of basic rights, need to aim at the development of hybrid legal forms within modern law that represent a peculiar compromise between regional-cultural identities and modern-day legal mechanisms of protection. The compromise has to find a way past modern institutions' sensitivity to regional-cultural specialities on the one side and the operativity of modern law on the other since only by using the language of modern law is it possible to effectively protect the particularities of regional cultures.

2. Re-entry of the 'extrinsic' into the 'intrinsic'

This would imply that institutions of the modern age ought to be encouraged with the aid of collision rules to reconstruct the interests of indigenous cultures within modern law. Does this then mean that protecting traditional knowledge has to be facilitated using modern law that refers to 'customary law'? In the past, policy-makers influenced by anthropology have actually supported this option.[69] But that confronts the attempt to express the relation between global modernity and regional cultures as a question of basic rights with the fundamental problem of whether the extrinsic can authentically be reconstructed to be intrinsic.

If the goal is to limit the expansion of modern-day institutions, there is no way around reconstructing extrinsic factors using intrinsic concepts, in order to erect internal barriers in the appropriate positions. Otherwise,

[67] Eckert (2009) 'Rechtsaneignung', 203.

[68] In a similar direction albeit from a different starting point, Risse et al. (1999) *Power of Human Rights*.

[69] Daes (2001) 'Intellectual Property and Indigenous Peoples', 143 ff.; Taubman (2005) 'Saving the Village'; Coombe (2005) 'Protecting Cultural Industries to Promote Cultural Diversity'.

external protest and resistance in the name of regional cultures will rebound off them without any effect at all. But there are more and less responsive, more and less environmentally sensitive types of reconstructions, which is all that counts. These are always 'reconstructions', since 'indigenous law' does not 'actually' exist as formal law which one would have to construct in the modern age. It is a sheer construct of its modern inventors. Modern law picks out the elements of factual usages and customs of the regional cultures that it needs, drawing them together into a collage that it presents as 'customary law', that is, as normative ownership positions and obligations to act, that are supposed to be created by the regional culture. Modern law's reading of regional cultures is thus based on a single huge misunderstanding—possibly a creative misunderstanding. It is only creative, however, when it does not project new discoveries out of the blue and when it succeeds in tracing and transforming actually existing foreign cultural material into modern law.

When the collision law of global modernity refers to the 'customary law' of indigenous cultures, it systematically misunderstands certain communications within regional cultures as legal acts, capable of creating legal norms, and indeed has to misunderstand them if they are to become effective barriers to the expansion of modernity. Notably not only as legal acts through which law judges with the help of norms produced elsewhere, but as legal acts that produce norms themselves. Using this real fiction, law creates a new legal production mechanism in the institution of 'indigenous law' that is capable of counteracting modern expansionist tendencies by implementing prohibitions and other legal sanctions. This is where the opportunities lie for a global system to protect basic rights for indigenous peoples to develop responsiveness. The question is as follows: How can this hiatus be bridged and the responsivity of modern law in relation to traditional knowledge be increased without negating the primacy of human rights?[70] The attempt at understanding how these cultures see themselves appears to be a promising chance, in order to reconstruct this understanding as restrictions in the respective language of the fragmented systems of the modern age. The way in which the bearers of traditional knowledge perceive themselves—'the principle of indigenous self-determination'—should be the normative centre of gravitation.[71] The reference of modern law to indigenous law is not then simply a question

[70] Graber (2008) 'Using Human Rights to Tackle Fragmentation', 117.

[71] Coombe (2005) 'Protecting Cultural Industries to Promote Cultural Diversity'; Taubman (2005) 'Saving the Village', 525; Daes (2001) 'Intellectual Property and Indigenous Peoples', 146.

in abstracto, but a choice of modern legal forms that can effectively protect the cultural processes in which knowledge is produced.

It is not sufficient simply to protect the body of traditional knowledge as it exists. This is because the existence of such knowledge depends critically on the context of knowledge production, ie on maintaining the framework conditions of the local culture. As these conditions are diametrically opposed to the framework conditions of modern knowledge production, the conflict breaks out again between the highly specialized knowledge of modernity and the holistically traditional knowledge, just like the conflict between the formal law of modernity and the socially embedded law of regional cultures. Can modern law face up to this conflict? As one paradoxical answer puts it: 'Globalize diversity holistically'.[72] In practice this means that the protection of fundamental rights for indigenous cultures is not limited simply to results, but applies to the entire process of knowledge production. The requirement here is not just legal protection for specialized knowledge, but also for its embedding in the regional culture.

In the light of this requirement, the question must be answered as to which of the institutions of modern law exhibits the greatest responsivity in relation to indigenous culture. Previous attempts mainly commenced with three institutions: 'intellectual property', 'cultural heritage', and 'native title law'.[73] It cannot be denied that all three have had a certain success. But they are so limited by their cultural and legal presuppositions that none of them will achieve a comprehensive protection of indigenous cultures. Rather more promising appears to be the approach that refrains from bringing the relationship between traditional knowledge, territory, and the indigenous group under an extended concept of property, but refers instead to 'shared sovereignty'. This aims at the co-existence of modern political rule and an indigenous 'internal self-determination'. The economic, social, and cultural development of indigenous groups would not be exposed to the grasp of functional differentiation. It would instead enable a divided sovereignty and indigenous groups would choose how to organize their own social practices. Part of the self-organization of these groups is that they themselves would develop the appropriate rules to protect their cultural heritage.

[72] Taubman (2005) 'Saving the Village', 525.

[73] On the details of these legal forms and on their alternatives, Graber (2009) 'Wanjina und Wungurr', 289 ff., 294 f.

3. Intercultural conflict norms

If the fundamental rights of modernity are to internalize the realization conditions of traditional knowledge, their ratio legis cannot be restricted to maintaining cultural reservations in their current state of existence. A policy of 'species protection' would only aim at structural autonomy, not at process autonomy. The protection of fundamental rights must rather be designed so that it creates the framework to permit the independent development of indigenous cultures by limiting the specific invasions of modernity and, by way of compensation, arranges a transfer of resources to the indigenous population. A number of helpful approaches can here be outlined that will provide initial reference points for the further development of the global protection of fundamental rights.

(1) *Attribution of communal-collective rights*: who is the beneficiary of the legal protection? Modern law would answer: the author of the knowledge as an individual. Transnational intellectual property regimes also frequently have recourse to this principle when it deals with traditional knowledge. However, the local or collective character of traditional knowledge is opposed to this individualistic understanding. And even communal and collective property are in turn categories of modernity. In the Australian legal procedures, the courts tried to reconstruct the relationship of indigenous groups to their territory in terms of modern categories of 'property'; the conflicting preconceptions of legal cultures were dramatically exposed.[74] To resolve this we should free ourselves from the obsession that a personified collective to which to ascribe traditional knowledge is always required. We can instead make use of a whole range of ascription techniques to enable legal protection for traditional knowledge.[75] A sociologically based theory that understands fundamental rights as an institution will ascribe to the impersonal communication processes as such and not simply to individuals. Thus it would accommodate regional-cultural self-conception, albeit via completely different concepts. But it might be not simply be sufficient, in a strange intercultural compromise, to declare 'communities, associations, cooperatives, families, lineages', ie groups or collectives, as legal entities.[76] It would rather be the traditional knowledge itself, not its authors—neither individuals nor collectives—that is seen as

[74] Gervais (2003) 'Spiritual but not Intellectual?'

[75] See eg *Onus v. Alcoa of Australia Ltd*., C.L.R. 27 (1981) 149, Mason, J.

[76] This is the proposal of Cottier and Panizzon (2004) 'Legal Perspectives on Traditional Knowledge'; Kymlicka (1996) *Mutlicultural Citizenship*.

the subject of institutionally understood fundamental rights. The guideline for global law would be to de-individualize fundamental rights and to recognize indigenous communication processes themselves as the holders of fundamental rights, with appropriate legal protection measures designed to meet their needs.[77] This comes close to conceptions that ascribe fundamental rights not exclusively to individuals or collectives, but in certain situations to social processes.[78] It would then be a matter of recognizing the 'cultural rights of indigenous peoples' as a third, 'hybrid' form of rights that differ from individual rights and collective rights: *making cultural processes into the subjects of fundamental rights* will make it easier to resolve the attribution problems of traditional knowledge in indigenous cultures.

This process-orientation might also be able to overcome the culturalistic misunderstanding arising from a rigid dichotomy of tradition versus modernity. Instead of unhistorically fixating on a permanent clash of civilizations, it can also accept 'the simultaneity of different forms of neo-traditionalism, national laws, "unnamed law", transnational legal rules'[79] once fundamental rights protection aims directly at a process of change. It can then properly respond to the needs of the various absorption processes and to the development of hybrid cultural practices, aligning legal protection to them.[80]

(2) *Participation rights*: the guiding principle is to reserve to the indigenous groups themselves any decision on permitting others to access traditional knowledge. The idea is to use 'prior informed consent' to ensure that communal groups are involved in the decision-making processes relevant to them[81] and if necessary giving them the right to refuse access.[82]

[77] Collective and institutional concepts in Canadian constitutional law may accommodate this approach to fundamental rights: Art. 84 Canadian Constitution, see Gervais (2003) 'Spiritual but not Intellectual?', 491.

[78] Ridder created the concept of 'impersonal fundamental rights' that relates the right to free speech directly to the process of political will formation, Ridder (1975) *Soziale Ordnung des Grundgesetzes*, 85; linking to this Ladeur (1999) 'Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie'; Teubner (2006) 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors'.

[79] Eckert (2009) 'Rechtsaneignung', 193.

[80] Informative on the criticism of an unhistorical legal culturalism and on its alternative of a conflict-laden dynamic legal change, Eckert (2009) 'Rechtsaneignung', 201 ff.

[81] *Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations*, 22nd session, 19–13 July 2004, p. 5: 'Free, prior and informed consent recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent.'

[82] Details in Brand and Görg (2003) *Postfordistische Naturverhältnisse*, 75 ff.

It is important to establish exactly what to demand from the consent of the epistemic communities, especially in the matter of how to organize the agreement in procedural terms and which secondary liability should follow in the form of penalization or restitution obligations.[83] A certificate of origin is of crucial importance here,[84] as the obligation for the knowledge-using organizations to disclose the origin of the knowledge is not just aimed at guaranteeing that only real new inventions are patented, but at the same time makes it possible to identify the owners of the rights for validation by the established procedural laws.

(3) *Monetary compensation*: if the profit-sharing norms are to guarantee the indigenous groups the joint economic exploitation of the traditional knowledge with the usufructuary, contracts governing use do not appear to be an ideal solution as this would mean the protection of cultural autonomy through destruction of the cultural-religious content. From the intercultural point of view it would seem that fund solutions offer the better option.[85]

IV. GUIDING PRINCIPLES IN VARIOUS CONSTITUTIONAL CONFLICTS

In comparison to conflict of laws of the nation states, the conflicts addressed here—inter-regime conflicts and intercultural conflicts—both exhibit particular features that suggest that tailor-made conflict norms would be necessary for each. The differing ways in which the norms are designed depends on the differing degrees to which the three constitutional systems involved—nation states, transnational regimes, and indigenous groups—are socially embedded.

Transnational regime constitutions have the smallest degree of social embeddedness. They are tailored solely to a functionally differentiated sector of world society and as a consequence represent a 'self-contained regime' that develops specialized norms reflecting the independent rationality of the societal sector coupled to them. Regime constitutions are partial constitutions that are not based on overall social processes, ie those directed at the broader public interest.

[83] Thus liability regimes regularly refer simultaneously to customary law, see Lewis and Reichman (2004) *Using Liability Rules*.

[84] See finally *CBD*, Report of the Meeting of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance, 20 February 2007, UNEP/CBD/WG-ABS/5/2.

[85] *Report of the United Nations Conference on Environment and Development,* Rio de Janeiro, 3–14 June 1992, A/CONF.151/26 (Vol. I), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

Nation-state constitutions, on the other hand, are embedded into a national overall legal order. Like transnational regime constitutions, they form a sub-area of global law, they only constitute the political system, not society as a whole. As described above, however, they dispose of an 'internal balance' in the sense that their legal norms always exist in the context of other legal norms, ie the solutions to various social conflicts. The legal norms of the national constitutions, particularly fundamental rights, are in a relationship of constant mutual (self-)constriction.

Indigenous norm orders are more strongly embedded at the overall social level than nation-state law. The reason is that they appear in social areas in which no functionally differentiated legal system has been formed: their norms are inseparably interwoven with religious, political, and economic aspects.

Conclusions can be drawn from these differences between the three orders for the resolution of their conflicts of constitutions. The 'substantive law approach' is best suited to cases where each conflicting regime in interregime conflicts demands that only its own constitutional norms be used. It takes up elements from the conflicting constitutional norms in each case and reflects these in the shape of a new substantive norm oriented at the same time towards the *'ordre public transnational'*. This leads to a form of hybrid law as, from the viewpoint of the deciding authority, the substantive norm internalizes alien constitutional norms into its own law, but at the same time leaves their autonomy undisturbed. In intercultural conflicts, by contrast, the situation is characterized by indigenous fundamental norms. They need to be recognized in the form of areas protected by fundamental rights that limit the expansionist tendencies of the function regime.

Despite all differences, constitutional conflicts all exhibit the common feature that the classic conflict of laws appears unsuitable. Instead, in a kind of common law approach, substantive norms of a transnational constitutional law are to be developed, not by a hierarchical central authority for the overall order, but by the conflicting regimes themselves.

The justice principle required in such decentrally produced constitutional norms might be called 'sustainability'. Originally, the principle was intended to limit economic growth for the protection of the natural environment with a view to future living conditions, but now it needs to be generalized in two respects.[86] Sustainability cannot simply be limited to the relationship of the economy to nature, nor to the relationship of a social system to just one of its environments. Sustainability must be

[86] On the responsibility of social institutions for sustainable development, Sen (2010) 'Sustainable Development and Our Responsibilities'.

reconsidered in application to all function regimes; it must at the same time include not just the natural environment, but all relevant environments. Environment is to be understood here in the broadest sense, as the natural, social, and human environments of transnational regimes.

Regime-specific sustainability in principle requires that regimes limit their options in such a way that they prevent destructive tendencies and avoid the environmental damage they cause. This has been repeatedly described here as the limitative function of regime constitutions that today stands at the centre of societal constitutionalism. In contrast, a constitutional concept that aimed not just at the self-limitation of regimes but rather supported and even actively promoted their respective environments would be more complex and faces much greater difficulties of implementation. This is the reason why the previous chapters only cautiously supported such an ambitious concept of sustainability, at its clearest in the horizontal effect of fundamental rights and the guarantees of autonomy for indigenous cultures.

But ultimately societal constitutionalism aims at just such an intensified sustainability. The basis is always the co-variance of societal forms of organization and principles of constitutional law. Emile Durkheim could still state that the modern division of labour required a societal constitution of 'organic solidarity'.[87] If we lift our gaze from simple division of labour to the more complex functional differentiation of society, we can then see that the high autonomy of global function systems demands a new type of sustainability and a new sensitivity for their environments. It is no coincidence that this sort of tightrope walk, along the border between system and environment, considering both equally in order to balance their reciprocal effects, has been identified as the sole possible form of rationality—equidistant from its competitors, rational choice, and discursive rationality. Realizing rationality means that 'the irritability of the systems needs to be strengthened'.[88] If it is true that constitutions produce a double reflexivity, ie medial reflexivity of the respective social sphere and the reflexivity of law, it will then be their genuine task to create the normative preconditions for their internal politicization. And internal politicization means arguing and deciding about both its roles in society. This includes the fight against possible perils it creates for its natural, social, and human environments, as well as its positive contributions to these environments.

[87] Durkheim (1933) *The Division of Labor in Society*.

[88] Luhmann (1997) *Gesellschaft der Gesellschaft*, 171 ff., 182, 185 (quotation).

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