

## **Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?**

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I.

In the current globalization debate the law appears to be entangled in economic and political developments which move into a new dimension of de-politicization, de-centralization and de-individualization. For all the correct observations in detail, though, this debate is bringing about a drastic (polit)economic reduction of the role of law in the globalization process that I wish to challenge in this paper. Here one has to take on Wallerstein's misconception of "worldwide economies" according to which the formation of the global society is seen as a basically economic process.<sup>1</sup> Autonomous globalization processes in other social spheres running parallel to economic globalization need to be taken seriously. In protest against such (polit)economic reductionism several strands of the debate, among them the neo-institutionalist theory of "global culture", post-modern concepts of global legal pluralism, systems theory studies of differentiated global society and various versions of "global civil society" have shaped a concept of a polycentric globalization<sup>2</sup>. From these angles the remarkable multiplicity of the world society, in which tendencies to re-politicization, re-regionalization and re-individualization are becoming visible at the same time, becomes evident<sup>3</sup>. I shall contrast two current theses on the globalization of law with two less current counter-theses:

First thesis: globalization is relevant for law because the emergence of global markets undermines the control potential of national policy, and therefore also the chances of legal regulation.

First counter-thesis: globalization produces a set of problems intrinsic to law itself, consisting in a change to the dominant lawmaking processes.

Second thesis: globalization means that the law institutionalizes the world-wide shift in power from governmental actors to economic actors.

Second counter-thesis: globalization means that the law has a chance of contributing to a dual constitution of autonomous sectors of world society.

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<sup>1</sup> Wallerstein 1979.

<sup>2</sup> "Global Culture": Meyer 1997; global legal pluralism: Santos, 1995; Friedman; global society: Luhmann 1998: 373ff.; global civil society: Shaw 1998.

<sup>3</sup> Drori 2000.

## II.

The narrow view sees above all a crisis of law sparked off by the globalization of the economy: world markets are taking the control instruments away from national politics, entailing an evaporation of expectations of control through law too, which is seen as only an instrument for the political regulation of society<sup>4</sup>. The corresponding hopes are concentrated on political responses to the de-nationalization of politics, energetic pushes toward political unification processes at European and global levels, and on concepts of cosmopolitan democracy or global policy-making, strengthening the democratic potential of supranational political processes systematically, *inter alia* by making extensive use of legal norms<sup>5</sup>.

In Streeck's cold critique of such "concrete utopias"<sup>6</sup>, this view hopelessly over-estimates not just the democratization potential of global political processes and the chances for global policy-making, but also the control capacity of transnational law and the guarantees of individual action through fundamental rights. At the same time, however, the inherent range of problems for law itself in globalization are overlooked<sup>7</sup>. For the deconstruction to which law is exposed in processes of constituting a global law comes not just from outside, from the shrinking control potential of politics *vis-à-vis* the economy, but also and especially from within, from an erosion of fundamental validity claims of law itself. A process of globalization of law itself is taking place in relative distance from political globalization, and in it the traditional forms of law are deconstructed through its norm-producing routines themselves<sup>8</sup>.

For the source of the new global law is no longer only institutionalized politics which is still not really global but only inter-national politics, but also and especially other social systems that in the race to globalization have long overtaken politics<sup>9</sup>. The economy, not just the economy but other social sectors such as science, technology, the mass media, medicine, education or transport are, on their specific path to globalization, developing a massive requirement for norms that is met not by governmental and intergovernmental institutions but by themselves in direct action upon the law. Increasingly, global private regimes are producing substantive law without the State, without national legislation or international treaties<sup>10</sup>. Everywhere the cancerous spread of private regulation, agreements and dispute resolution is growing; in short, lawmaking is happening "alongside the State"<sup>11</sup>. The requirements of global societies' self-created laws are then not at all primarily political control of social processes, but derive from original needs for security of expectations and solution of conflicts.

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<sup>4</sup> e.g. Dahrendorf 1998: 42ff.

<sup>5</sup> Most clearly in Held 1995; Held, 1998.

<sup>6</sup> Streeck 1998: 17.

<sup>7</sup> Shapiro, 1993; Friedman, 1996; Teubner 1996a; 1996b; Albert, 1999a; 1999b.

<sup>8</sup> For more on this see Teubner 1996b;1999.

<sup>9</sup> For literature references see Fn. 2.

<sup>10</sup> Young, 1994.

<sup>11</sup> Ronge 1980.

In this dynamic, the most dramatic changes are as it were taking place at the edges of law, in the structural linkages of law with other social subsystems: A political constitution, formed in the history of the nation states as a linkage between politics and law, and at the same time claiming to govern law's relations to other social sectors, is not present at global level<sup>12</sup>. Instead, here there as it were naturally emerge a multiplicity of subconstitutions – linkages of global law to other global subsystems – that to date have escaped constitutional governance dominated by politics. It is no wonder, since the structural linkage to politics happens at global level now only through the cumbersome and not very efficient institutions of international public law.

The focus in lawmaking is shifting to private regimes, that is, to agreements among global players, to private market regulation through multinational enterprises, internal rulemaking within international organizations, interorganizational negotiating systems, and world-wide standardization processes<sup>13</sup>. The dominant sources of law are now to be found at the peripheries of law, at the boundaries with other sectors of world society that are successfully engaging in regional competition with the existing centers of lawmaking – national parliaments, global legislative institutions and intergovernmental agreements.

Justice in the narrower sense, the national and international courts, is seeing counterparts develop in quasi-private bodies for resolving conflicts in society<sup>14</sup>. International organizations, courts of arbitration, mediation bodies, ethical committees and treaty systems are developing into courts of private justice, acting as an organized subsystem of world law, but getting along without prior governmental infrastructural provision<sup>15</sup>. Autonomous global law is increasingly basing itself on its own resources. International organizations, multinational enterprises, global law firms, global funds, global associations, global arbitration courts, are legal institutions that are pushing forward the global lawmaking process<sup>16</sup>.

All in all, in globalization dominant lawmaking is shifting from the centers of law which had been politically institutionalized in the nation state (legislature and judiciary) to the peripheries of law, to the boundaries between the law and other globalized social sectors. The new world law is primarily peripheral, spontaneous and social law. Private government, private regulation and private justice are becoming central sources of law<sup>17</sup> - phenomena intrinsically legal that within the nation state had been successfully shoved off into the grey areas of non-legal factuality only because they were caught up in and disciplined by a comprehensive set of rules in national law. On a world scale, however, legal regulation of social activities by private actors is effectively escaping from the thoroughly institutionalized framework conditions of the

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<sup>12</sup> Luhmann 1993: 571ff.

<sup>13</sup> Muchlinski 1997; Robé 1997; Bianchi 1997.

<sup>14</sup> Higgins 1997: 216ff.

<sup>15</sup> Cf. e.g. for contractual systems Belley 1998: 155ff.; for associational systems Nafziger 1996. A detailed case study of global lawmaking in one specialized private regime is in Kellerhof 1998.

<sup>16</sup> Dezalay and Garth 1995; Flood and Skordaki 1997; Trubek, Mosher and Rothstein 1999.

<sup>17</sup> Henry 1983; Gerstenberg 1997.

nation state without comparable framework conditions growing up, or even being within sight. In the global private regimes an effective self-deconstruction of law is coming about that is quite simply setting essential basic principles of national law out of force: the derivation of validity of legal norms in a hierarchy of sources of law, the legitimation of law through a political constitution, the making of law by parliamentary bodies, the rule of law based on institutions, procedures and principles, and the guarantee of individual freedoms through basic rights that have been fought for politically.

### III.

Ought this sort of “spontaneous” global law to be seen as a hypermodern variant of traditional customary law? There are indeed attempts to equip this honourable, but false, category with new respectability, particularly in international public law<sup>18</sup>. What is there in the positivization decisions of the private governance regimes that can be seen as corresponding to the *consuetudo longa* of states as subjects of international law? Where is the *opinio iuris doctorum*?

Admittedly, old customary law and the new private regimes do have something in common. Both bodies of rules have a social origin, and did not emerge from positive lawmaking by a national sovereign; indeed the sovereign is no longer even centrally involved in their legal recognition. And they have no central body to allocate validity. But the differences weigh much more. True customary law grows out of long-term processes of diffuse communication and recursive interaction that particularly in traditional societies constitute a dominant type of law-making. Social norms owed to silently operating forces of informal co-ordination of conduct are in certain circumstances taken over into the legal system as customary law<sup>19</sup>. By comparison with such diffuse communication processes the new private regimes are a typical product of social differentiation. They are highly specialized forms of explicit norm-making within functional subsystems in the modern world. They emerge not on the basis of informal co-ordination of conduct in a gradual process of repeated interactions, but through positive lawmaking in organized decision-making processes in specialized formal organizations.<sup>20</sup> That is why they cannot be celebrated as new “spontaneous rules” à la Hayek<sup>21</sup>, able to stand up against the constructivist excesses of the nation states on a world scale<sup>22</sup>. For against Hayek’s artificial separation of constructivist and spontaneous lawmaking and his unrestrained overestimation of habits and customs, the specificity of the neo-spontaneous law lies only in the fact that it is based not on governmental decision but on more or less thoroughly organized social processes that – and here is the problem for legal policies - each bring about a very specific selectivity of the norm-making.

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<sup>18</sup> Cf. Zamora 1989; Benson 1992 Fidler 1996.

<sup>19</sup> The best analyses are still Geiger 1964; on this see Raiser 1995: 138ff; 142f; cf. also Freitag 1976.

<sup>20</sup> Henry 1983; 1987.

<sup>21</sup> Hayek 1973.

<sup>22</sup> This is just what was said in a symposium on Hayek’s legal thinking: Cooter 1994.

How then are the new qualities to be understood, if not as resembling customary law? Calling them “spontaneous” lawmaking without further ado is certainly a false romanticism, in view of the “constructivistically” planned and implemented decisions in the private regimes on positivized rules in ISO standards, in standard business contracts, in thoroughly codified sets of rules in multinational enterprises, and international specialized associations. Obviously, though, what we are looking at is a new and peculiar mixture of spontaneous and organized processes. Its special feature seems to be that by contrast with traditional customary law there has been a reversal of the relationship between spontaneous and organized norm-making we have known till now. Increasing formalization, organization and positivization of social norms versus increasing spontaneization, fragmentation and chaoticization of their juridification – is this supposed to be the characteristic feature of neo-spontaneous law? An orderly world society *vis-à-vis* an disorderly world law?

Traditionally, while spontaneous rule-making (usages, social norms) was concentrated in society, on the periphery of the legal system, organized rule-making took place at the center of law (courts, legislation). This prefigured a strict conceptual and institutionalized separation of normativity and validity. The substantive constitution of norms in society was clearly separated from their validity-allocating transformation into law. Relative indeterminacy, diffuseness and vagueness of long-term norming processes in society were counterposed to clearly outlined procedures of validity allocation, organizational hierarchies of lawmaking bodies, a system of precedents and a thorough textualization of law. To this there corresponded a clear trend to minimize customary law in modern societies.<sup>23</sup> Legal doctrine tends to downplay it into a “possible inspiration” for official lawmaking<sup>24</sup>. Jurists usually look only at the legal validity allocation of the social norms in question by courts and legislators, but do not bother particularly about the social origin of the norms. It is only the (legislative or judicial) validity allocation that was of interest. But that means losing sight of one feature essential to legal decision-making: how ought the law to respond to the differing selectivity of diverse social norm-setting processes that distort the “justice” of social norms?

The category of customary law ended up by losing its shape entirely. As the act of judicial decision increasingly took center stage and social processes came to be regarded as merely sociological facts and therefore juridically irrelevant, lawyers began more or less to equate judge-made law and customary law<sup>25</sup>. Thus today in private law totally differently structured institutions like conditional bills of sale and commercial letters of confirmation, i.e. typical social norming of economic transaction on the one hand, and on the other such typical judicial innovations inspired by legal scholarship as *culpa in contrahendo* and breach of contract duties are equally treated as modern forms of customary law<sup>26</sup>. In this way customary law and judge-made law, two equally questionable ways of making law in the light of the official

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<sup>23</sup> Salmond 1966: 66f.

<sup>24</sup> Adomeit 1969: 57.

<sup>25</sup> Esser 1967.

<sup>26</sup> Röhl 1995: 555.

legislative monopoly on lawmaking, were able to support and legitimate each other. But at the same time there was a loss of the sense that the legal transformation of social norms has to be subject to quite different procedures and criteria than the constitution of norms through the judicial dispute-settling process itself.

By contrast today in the process of globalization one can note a reversal of the relationship between the spontaneous and the organized. Since there is no global political body to underpin the institutionalization of an organized sphere of decision in law politically, the genuinely legal norm-setting process becomes fragmented in the wide open spaces of the Brave New World, uncoordinately and uncontrollably. To that extent this justifies the talk of the “New Middle Ages” in global post-modernity<sup>27</sup>. So does the observation that “the world legal system looks more like the types of order in tribal societies, meaning that it has to renounce organized sanctioning power and authentic definition of infringements of law on the basis of known rules”<sup>28</sup>. On the other hand, however, the thorough rationalization of social subspheres on a world scale has the consequence that social norms are based increasingly less on spontaneous co-ordination of conduct but are increasingly positivized, i.e. brought into validity on the basis of highly organized “private” decision-making processes. Both together amount to the tendency to have organized norm-making in social subspheres at the periphery of law and spontaneous norm-making at the center of law.

This changes the relationship between normativity and validity. Since at global level clear-cut fully institutionalized procedures and centralized decision-making bodies are lacking, the validity criteria for law are extremely diffuse. This is connected with one typical feature of global society, for which “heterarchical, connectionistic, network-type linkage of communications at the level of organizations and professions”<sup>29</sup> is typical. In view of the uncoordinated multiplicity of decentrally organized legal deciding bodies, the question of what legal rule actually applies can be answered unambiguously now only for the already decided individual case. Establishing the validity of a rule in world law that extends temporally and spatially is, however paradoxical it may sound, extremely difficult if not impossible. For on a world scale there is no decision-making hierarchy, no established body of precedents, but only heterarchical, spontaneous co-ordination among various lawmaking bodies<sup>30</sup>. This explains the phenomenon, extremely irritating to jurists trained in national law, of the only weak identification of norms. Hence the remarkably old-fashioned appeal to diffuse “customary law” (but without *consuetudo* and without *opinio juris*), the rather unrealistic recourse to such corporatist legal forms as the *lex mercatorum*, the natural-law invocation of generally valid legal principles of the international legal community, the relying on the harmonizing of national systems, the exaggerated hopes for convergence in comparative law, the reliance on legal scholarship and the secret but legally authoritative negotiating processes at international conferences of experts.

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<sup>27</sup> Bull 1977.

<sup>28</sup> Luhmann 1995:234.

<sup>29</sup> Luhmann 1998:375.

<sup>30</sup> Stein 1995:164ff.

At the same time, however, it also becomes remarkably indefinite where the locus of the positivization of law, the locus where binding decisions on normativity and validity are taken, is to be found. Wherever you look, the relevant validity decision appears always being taken somewhere else. In the global private regimes where the typical combination of organized social norm-making and spontaneous processes of lawmaking occurs, the norm production is decentralized to a multiplicity of political and private actors without it being possible to make out any clear decision-taking center. The lawmaking process is at the same time remarkably circular: the actors constantly appeal to the validity of legal norms the basis for the validity of which is however questionable. And just this ongoing practice of pretension to be law – or even swearing by legal myths – and not, say, a decision, influenced by a lobby of private actors, of a central lawmaking body is what brings the new law into validity<sup>31</sup>. A striking example is the *lex mercatoria*, so reproached for its phantom nature<sup>32</sup>. It is on the same mechanism that standardization is based, coming about silently in a sequence of very wordy international expert conferences. And a current example of such “neo-spontaneous” lawmaking in non-economic fields is the law of humanitarian intervention, where the persuasive role of the media in the “emerging international law” cannot possibly be overestimated. It is not the breach of law that makes the scandal, but the scandal that makes the new law. Another example are such NGOs as Greenpeace or Amnesty International, which appeal continually to the validity of human rights although these have not in any way been made positive through treaties or court judgments. A whole range of really non-legitimated private actors is involved in this peculiar invocation of law: media, professional associations, non-governmental organizations and multinational enterprises<sup>33</sup>.

Ultimately, the selectivity of rule-making changes by comparison with the traditionally political positivization of law. This is a challenge for legal policies to develop criteria and procedures which would compensate for this selectivity. It is no longer enough for the law to become sensitive to the selectivity of genuinely political institutions further and set up more or less openly compensatory procedures and criteria within the law for cases of “failure of politics”. Here, in the specific selectivity of neo-spontaneous global law, there lies the challenge for the theory of sources of law. For the law of the nation state disposed in relation to “private” normings of a range of political and administrative corrective mechanisms (judicial review of standard contracts, regulatory bodies, corporatist negotiations with decisive involvement of the state). But these are all largely absent on a world scale. If the theory of sources of law is to classify not just by origins of norms but according to social legitimation and legal monitoring of different types of lawmaking, then it has to distinguish the global norm-making processes strictly according to the various social rationalities involved and their various specific selectivities, in order to be able to develop differing procedures and criteria for their legal review.

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<sup>31</sup> Luhmann 1993: 579ff.

<sup>32</sup> Stein, 1995; Dezalay and Garth 1995.

<sup>33</sup> Bianchi 1997: 185ff.

In the relationship between law and politics the nation state tradition has set a model that still has to be developed in the relationship of law to other social sectors in analogous fashion. In what respect does the law have to adapt to the rationality of the other system, and in what respect clearly distance itself from it? In national legal systems typical techniques of distancing from law produced in institutionalized politics are developed: depoliticization and neutralization of party political decisions, reconstruction of result-oriented “policies” as universal legal principles, modified incorporation of political decisions in legal doctrine according to legal criteria of consistency, and most massively, of course, the constitutional review of legislative acts. But legal review of political legislation is, as the example of party financing shows, all the more present the less the political process is structurally capable of adopting regulations adequate to the matter. On the other side, however, there has also – and this is often overlooked – been a far-reaching adaptation of modern law to the logic of politics, in which the programmes of law, not just the contents of norms but also the methodological programmes, were drastically “politicized”: from teleological interpretation via policy orientation and interest balancing up to impact assessment and consequentialist orientation.

But where is the analogous policy-mix of distance and adaptation that global law would have to develop *vis-à-vis* non-political sectors if the latter are now increasingly responsible for non-legislative lawmaking? Global technological standards require different procedures and criteria of legal review than do international general terms of business or global conduct codes of international professional associations.

Global standardization processes, coming about partly through market forces, partly through being laid down internally in international organizations, partly through negotiations between private and public actors, are among the most important sources of global law<sup>34</sup>. If scientific, technical or medical cognitive standards are normed and ultimately juridified, then here too the law has develop an adequate mixture of distance and adaptation *vis-à-vis* science and technology. The depoliticization of legislative decisions corresponds to a “descientification” of standards. The borderline between lawful and unlawful is (necessarily) fixed “arbitrarily” without adequate scientific foundation. At the same time it is charged with political, moral and economic aspects. In this way standards turn into “trans-scientific issues”<sup>35</sup>. Procedures and criteria for this transformation are still largely *desiderata* that would go far beyond the usual call to involve the participation of interest groups concerned. On the other hand a scientization of law comparable to the politicization of legal methodology is coming about. Irrespective of whether the law makes exact threshold values positive or makes reference to the “state of knowledge”, it still makes itself dependent on scientific and technological development. Here too, procedures and criteria are available only in rudimentary fashion, and as the debate on “science courts” is showing have not yet got beyond legal policy approaches.

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<sup>34</sup> Joerges, Ladeur and Vos 1997.

<sup>35</sup> Majone 1984.



Rulemaking within international organizations are a further source of global law. Routines and hierarchical lawmaking within these organizations are rendered positive internally, and then juridified in conflict situations through relatively informal procedures<sup>36</sup>. Here too the law still has to find an adequate mixture of distance from and adjustment to the formal organization. Legal norms marked as valid must be separated clearly from the micro-politics of the organization, even if they have their origin there. On the other hand, lawmaking remains dependent on the processes in the international organizations. General clauses of “the interest of the organization” are suitable for legally combining aspects within the organization and outside.

*Mutatis mutandis* the same applies to the role of law in relation to rulemaking by international negotiating systems, organizational agreements and contractual agreements of various private actors, but also to general terms of business of multinational enterprises. If the law incorporates private regulation of markets by collective actors, then here too the point is a combination of de-economization of transaction expectations with a continuing dependence of law on economic processes.

Accordingly, instead of talking of a unitary “customary law” at global level, various types of social law linking up with various global sectors and typified by differing internal organization of norm production have to be distinguished, and differing requirements as to the law’s distance and adjustment have to be correspondingly clearly developed.

#### IV.

The standard repertoire of the globalization debate includes a second thesis: the law’s role in globalization consists essentially only in formalizing the new shift of power between governmental and economic actors in legal terms. The law is seen as recording the global primacy of the economy, and developing the appropriate concepts, norms and principles. Here again I should like to criticize the (polit)economic narrowing of the focus in the legal debate and raise a counter-thesis: globalization simultaneously opens the chance for law to institutionalize a dual constitution in sectors of global society.

Ought one in this connection to speak of a global civil society able to oppose the steering mechanisms of globalized markets and political arenas with a third aspect, a civil and democratic one? In fact, hopes for global potential for democracy are, along with a renewal of the political system, concentrating on the emergence of a civil society on a global scale, opening up new chances for re-politicization and re-individualization.<sup>37</sup>

“Finally new international systems have also arisen that are able more or less to escape the grip of the State: think only of the regulatory systems for international financial markets, the Internet, the networks of non-governmental organizations, the

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<sup>36</sup> Robé 1997.

<sup>37</sup> Shaw 1998: 238ff.

decision-making structures of transnational groups, but also, on the downside, of organized, globally organized, crime" ... "yet they also constitute a global potential for democratization."<sup>38</sup>

What are the catalysts of a global civil society that might be able to oppose the economic and political dynamic with a credible dynamic of its own? Right as it is to make clear that alongside politics and the economy other social phenomena are pursuing a globalization path of their own, it seems difficult to identify the new subjects of global society. Proposals for identification oscillate between the idealization of social movements and concentration on formal bureaucratic organizations.

In view of spectacular successes recently, protest movements are as it were the natural candidate for a democratic potential at world level<sup>39</sup>. Yet as an countervailing power to globalized economies and politics, they would no doubt be hopelessly out of their depth. Admittedly they are indispensable in their provocative focussing on pan-social problems that no specialized social institution is taking up. And these provocations ought to become steadily more important with the relative loss of power by national political institutions. Yet their activities are only irritations: they themselves have little potential to solve the problems they raise. Protest movements are at bottom parasitic. They presuppose specialized institutions with high problem-solving potential, which they accuse of over-specialized tunnel vision and can provoke into innovations.

Ought one then to identify the global civil society with interest groups on a world scale? Similarly to the interest group pluralism in nation states, they are able to politicize civil-society problems and exercise political pressure upon globally acting political institutions<sup>40</sup>. Yet this view suffers from its narrowing down to politics, something that given the glaring weakness of genuinely political institutions in world society has particularly fatal outcomes.

If not protest movements or lobby groups, then at least NGOs! The non-governmental organizations have been seen as the new successful type of global actor, between states and the multinationals<sup>41</sup>. The astonishing successes of Greenpeace, Amnesty International, environment groups and human rights organizations seem to support a certain view that sees the crystallization point of a global civil society here. For by contrast with the diffuse protest movements, they have at their disposal the punch and chances for rationalization of a formal bureaucratic organization that make them able to communicate with government organizations and multinational groups. Yet this organizational strength of theirs is at the same time their weakness in civil-society. The false starting point lies in their formal organization. Formal organization is no substitute for a social dynamic that might be comparable with globalized markets and politics.

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<sup>38</sup> Menzel 1998:258.

<sup>39</sup> Schulz 1998; Falk 1996.

<sup>40</sup> Streeck and Schmitter, 1985, 1991.

<sup>41</sup> Falk 1996.

The realistic candidate for a dynamic civil society is pluralism of autonomous global social subsystems. This is the point where theories on “global culture” and on global civil society, drawing attention to a plurality of global institutions between the economy and politics, converge with systems-theory analyses of the polycontextural world society<sup>42</sup>. Only here can one find a social dynamic that has a chance of autonomy *vis-à-vis* world markets and global political arenas. Social subsystems pursuing a globalization path of their own in their autonomous rationality are what at all in the first place forms the social basis relatively independent of political and economic processes, starting from which interest groups, non-governmental organizations and private governance regimes on the one hand and social movements on the other can develop their activities. The point is therefore a combination of social spheres of autonomy and corresponding formal organizations, if we wish to speak at all realistically of civil-society elements in global society.

Here chances are now becoming apparent for globalization that remain hidden from a political and economic view. The dynamic of globalization makes the peculiar relationship between a spontaneous and a formally organized sphere visible within the various social subsystems. Globalization means that many social sectors have the chance to free themselves from the restrictions that nation-state politics had imposed on them. In the relationship of the subsystems to each other, the cards are being re-dealt. Research, education, the health system, the media, arts – for these social sectors the globalization process is opening a chance not just to assert the autonomy of their activities but also to establish an autonomous regime.<sup>43</sup> For law there accordingly arises a new role of institutionalizing the dual constitution in the various sectors.

In the nation states, autonomous spheres of civil society were not able to develop any autonomous regimes worth mentioning. Research, education, medicine, art, media – these social activities were located either in private markets or in public hierarchies. Why were these autonomous activities always colonized by political and economic regimes? After all, it is obvious that their intrinsic rationality and their intrinsic normativity cannot fully develop either under political dominance or under the profit principle of the market.

The answer is that in none of these areas has it to date been possible to achieve a dualism of formally organized rationality and informal spontaneity as a dynamic interplay without institutionalizing the primacy of the one or the other. If spheres of civil society did conquer a certain autonomy *vis-à-vis* political hierarchies and economic markets, then they tended to lose it again by seeking a corporatist constitution. Attempting to institutionalize the whole social activity sector as a formal organization at large, they stifled in their own guild structures. They were, to be sure, able to establish a regime autonomous from politics and the economy, but built it up only as a formally organized sphere of bureaucratic decisions that had no adequate counterpart in a correspondingly dynamic spontaneous sphere.

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<sup>42</sup> Meyer 1997; Luhmann 1998: 373ff; Shaw 1998.

<sup>43</sup> For the distinction between activities and regimes, see Alford et al. 1988; Teubner 1998.

By contrast a dual social constitution, that is, the internal differentiation and recombination of a social subsystem into a spontaneous sector and an organized sector, has to date historically been at all partially successful only in the economy (enterprises/market) and politics (government/public opinion), even though their potential too is not yet remotely exhausted. In the economy, the relation between a market-constituted spontaneous sector and an organized sector of enterprises is firmly established globally too. Though highly organized economic enterprises can enormously enhance technical expertise, organizational capacities and financing techniques, the “corporate sector” has not succeeded in subjecting the economic sphere as a whole to its control. Globalization itself has exposed the largest corporate groups to a dynamic of world markets that is uncontrollable for them, and will not be removed even by the most recent mega-mergers. In similar fashion, in politics the organized sector of political parties and state administration are counterposed to the spontaneous area of the electorate, lobbying and public opinion. And here too globalization has enormously strengthened the spontaneous sector of politics. In both systems, accordingly, a highly rationalized decision sector is exposed to a chaotic challenge that it is unable to dominate and control. The organized decision sector perceives hardly any unambiguous signals from the spontaneous sector. It is, as it were, condemned to freedom in its decisions. But once the critical decisions are taken are the specific responsibility mechanisms of democracy and the market triggered. This spontaneous/organized counterposition seems to be one of the secrets of the success of liberal democracies. At the same time, though, its democratic deficit is the target of critique and point of crystallization for political reform movements. The need will always be to keep adjusting the precarious balance between spontaneous sector and organized sector. And the classical democratic institutions – participation, deliberation, election mechanisms – can serve to enhance the potential for democracy if they build up on mutual controls by the spontaneous sector and the organized sector.

This dualism of spontaneous sector and organized sector as a principle of “successful” social differentiation is seldom looked at in its aspects of democratic theory. Democracy, understood as an organizing principle that goes beyond institutionalized politics, can work only if in different social fields on the one hand decision potentials are highly specialized, organized and rationalized, on the other hand, however, do not take over total control of their social sector but are in turn exposed to a control process through a decentralized multiplicity of spontaneous communication processes. Usually, theories of social differentiation see only the autonomy into which sectors of politics, the economy, law and religion develop since the late Middle Ages in various thrusts. The critical difference/recombination between spontaneous sector and organized sector within a subsystem by contrast is less well theorized. It emerged in the economic system for the first time in Britain in the Industrial Revolution. The economy was constituted neither as an atomistic market among individual actors nor yet as a sum of formal organizations, but as a complex interplay of formal organizations and spontaneously organized markets. The corresponding political difference was constituted in the American and French Revolutions as spontaneity of democracy and

fundamental rights against the formal organization of the highly rationalized state organization. In other subspheres, in contrast, there are only weak approaches to this sort of internal differentiation/recombination of spontaneous sector and organized sector. Perhaps closest, in the classical German academic system there was an institutionalized interplay of highly organized rationality in the universities and a spontaneous educated society.<sup>44</sup> Today's descendant of this is perhaps best found in the US university system, which has by contrast with the bureaucratized and politicized European universities succeeded in combining organized and spontaneous activities in a regime that is relatively autonomous *vis-à-vis* politics and the economy.

Accordingly, the thesis of globalization as a mere power shift from political to economic actors is going in the wrong direction. Also at stake are different social sectors and their autonomy. The stifling of social activities in political hierarchies and administrative bureaucracies is, to be sure, obvious. While the shift to the economy opens up the dynamic interplay of spontaneous market and organized enterprises, control through profit blocks the intrinsic rationality of civil-society areas no less than does control through political power. Their development becomes possible only once they manage to establish an autonomous regime of organized decisions and spontaneous control processes identical neither with the profit-controlled market nor with power-controlled political processes<sup>45</sup>.

Can constitutions for civil liberties in the globalization processes be identified as social structural opportunities, or indeed legally institutionalized? World-wide research, to the extent it does not get caught up entirely in the wake of economic market processes, seems to show certain tendencies towards the development of a global spontaneous area. The issues are: depoliticization, debureaucratization, forms of non-economic competition, pluralization of research financing, competition among research promotion institutions. Similar trends can be discerned in the education sector, where the world-wide competition of universities is driving them out of political and bureaucratic tutelage and increasingly exposing them to the control dynamic of their own spontaneous sector.

Globalization as opportunity for the law would, then, mean institutionalizing constitutions for global villages of social autonomous sectors, in relative distance from politics and the economy. Within the autonomous sectors there would be potentials for re-politicization, re-regionalization and re-individualization of norm-making processes. And the main attention of global law would then have to be directed towards underpinning the duality of social autonomy in the subsystems, i.e. a mutual control dynamic of spontaneous sector and organized sector, in normative terms too.

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<sup>44</sup> For thorough historical analyses in this perspective, Stichweh 1990; 1994.

<sup>45</sup> On this see Teubner 1998.

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