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Constitutionalising Polycontexturality

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I. The New Constitutional Question

During the past few years, a series of political scandals has raised the ‘new constitutional question’.¹ Multinational corporations violated human rights; the World Trade Organization made decisions that endangered the environment and human health in the name of global free trade; private intermediaries in the internet threatened freedom of opinion; and recently, with particular impact, global capital markets unleashed catastrophic risks. Each of these scandals poses constitutional problems in the strict sense. At stake are not just policies of state regulation, but foundational processes of social dynamics. Today’s constitutional questions may be different to those of the eighteenth and nineteenth centuries, but they are 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, according to the rule of law. With the new constitutional question, the concern is to release quite different social energies and to limit these effectively. Today, these energies – productive and destructive – are unleashed in social spaces beyond the nation-state. Constitutional problems arise outside the limits of the nation-state in transnational politics and at the same time outside institutionalised politics, in the ‘private’ sectors of global society.

The political scandals mentioned above have sparked a debate which diagnoses a crisis in modern constitutionalism and lays the blame at the door of transnationalisation and privatisation. The debate involves arguments pro and contra a transnational constitutionalism whose status – social theory, issue of constitutional law, political manifesto, social utopia – remains unclear. Broadly speaking, the terms of the debate are as follows. One side heralds the decline of modern constitutionalism.² Modern constitutionalism, so the argument goes, took its historically fully-developed form in the political constitutions of the nation-state. At the same time, its foundations were being eroded, through European union and transnational regimes, on the one hand, and through the transferral of political power to private actors, on the other. Alternatives to the national constitution cannot be found in the transnational space. Because

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¹ For the “demonstration effects” of such scandals sparking a global public debate and subsequent political reactions Walter Mattli und Ngaire Woods (2009) “In Whose Benefit? Explaining Regulatory Change in Global Politics”, in: Walter Mattli und Ngaire Woods (Hrsg.) *The Politics of Global Regulation*, Princeton: Princeton University Press, ??.

² Especially: Dieter Grimm (2005) “The Constitution in the Process of Denationalization”, 12 *Constellations*, 447-463; Ulrich Haltern (2003) “Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende”, 128 *Archiv des Öffentlichen Rechts*, 511-557; Martin Loughlin (2009) “Constitutions, Constitutionalism, Constitutionalization”, in: Martin Loughlin und Petra Dobner (Hrsg.) *The Twilight of Constitutional Law: Demise or Transmutation*, Oxford: Oxford University Press, ??.

transnational politics suffers from chronic deficiencies – from the non-existence of a demos, cultural homogeneity, a deliberating public, political parties – it is even said that such alternatives are structurally impossible. If this double crisis of constitutionalism can be counteracted at all, then it is at most through its re-nationalisation and re-politicization.

The opposing side in the debate juxtaposes a similar story of decline with the demand for a compensatory constitutionalisation of world society itself.³ Trends towards globalisation and privatisation are again held accountable for the crisis of the nation-state, and a weakening of the nation-state's constitutional institutions is, again, asserted. It is argued that a new democratic constitutionalism could function in a compensatory mode by bringing the unbridled dynamics of global capitalism under the domesticating power of a constitutionalised global polity. A constitutionalised international law, a deliberative global public, a policy formulation on a global scale, a transnational system of negotiation between collective actors, a limitation of social power by global politics: each of these is said to open up possibilities for realising new forms of democratic constitutionality.

But the constitution is too important to be left to constitutional lawyers and political philosophers alone. In opposition to these two sides of the debate, a third position must be staked out – by no means a middle position. This third position casts doubt on the premises of the first two and formulates the new constitutional question in a different way. The obstinate state-and-politics-centricity of the first positions is counteracted by sociological theories that have remained so far unheard in the constitutional debate.⁴ These theories project the constitutional question not only onto the relationship between politics and law, but also onto the whole society. In doing so, they change the whole problematic: in addition to the role which constitutions play in international politics, it becomes clear that they also play a role in other sectors of world society. Just as constitutionalism has the potential to react to the expansionist tendencies of the global political system, it also has the potential to react to those of other subsystems when they endanger individual or institutional autonomy. With such observations, sociological theories cast doubt over the basic assumptions of the first two positions in the constitutional debate. They replace these assumptions with others capable of identifying new problematics and suggesting different practical consequences.

³ Especially: Jürgen Habermas (2008) "A Political Constitution for the Pluralist World Society?", in: Jürgen Habermas (Hrsg.) *Between Naturalism and Religion*, Cambridge: Polity, 312-352, at 322 ff. In international law, Jochen A. Frowein (2000) "Konstitutionalisierung des Völkerrechts", in: Klaus Dicke, Waldemar Hummer, Daniel Girsberger, Boele-Woelki, Christoph Engel und Jochen A. Frowein (Hrsg.) *Völkerrecht und internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, Heidelberg: Müller, 427-447; Erika de Wet (2006) "The International Constitutional Order", 55 *The International and Comparative Law Quarterly*, 51-76; Anne Peters (2006) "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", 19 *Leiden Journal of International Law*, 579-610.

⁴ Protagonists are the classical texts on social differentiation by Emile Durkheim, Max Weber, Talcott Parsons and Niklas Luhmann. The concept of societal constitutionalism (as opposed to a narrow political constitutionalism) has been developed by Philip Selznick (1969) *Law, Society and Industrial Justice*, New York: Russell Sage and David Sciulli (1992) *Theory of Societal Constitutionalism*, Cambridge: Cambridge University Press.

II. False Premises in the Current Debate

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

Societal constitutionalism as a consequence of globalisation?

The uncontrollable dynamic of global capital markets, the obvious power of TNCs and the unchecked activities of epistemic communities in the 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 be explained, for the most part, with reference to globalisation. In particular, the weakness of politics in transnational relationships is said to be responsible for the disarray that governs global society. Three phenomena are prominent. (1) Nation-states are 'de-constitutionalised' by the transferral of governmental 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 legitimization. (3) There is no democratic mandate for transnational governance.⁵ To compensate for these deficiencies, interventions of transnational politics are discussed, but are then assessed as having diametrically opposed odds.

In truth, what we are concerned with here is the basic failure of modern constitutionalism. Even at the time of its nation-state beginnings, it was faced with the unanswered question, whether and how the political constitution should also capture non-state sectors of society. Are economic, scientific, educational, medical and other social activities to be subjected to the normative parameters of the state constitution? Or should social institutions act autonomously to develop their own constitutions? Since its very beginning, modern constitutional praxis has oscillated between these two poles. At the same time, the question arises – in empirical analysis and in normative programmes – of the aims of social sub-constitutions: are they intended to allow state regulation of society, or to defend their own autonomy? Or to assimilate social decision-making processes with political decision-making processes? Or to render social institutions politically capable?

It is at this point that sociological theories intervene, seeking the source of the constitutional question in processes of societal differentiation. The problematic of societal constitutionalism was not caused by globalisation, but earlier, by the fragmentation of the social whole and the autonomisation of the fragments during the heyday of the nation-state. It was then aggravated by globalisation. Analysing various concepts of societal constitutionalism can help to explain why it is that, in the era of the nation-state, institutional solutions remain in a peculiar condition of latency. In light of the enormous draw of the state and its constitution, social sub-constitutions always

⁵ Peters (note 2).

appear in a strange twilight. The reasons for this can differ. Liberal constitutionalism concealed the question in the shadow of individual rights. In sharp contrast, totalitarian political systems of the twentieth century attempted to eliminate the autonomy of social sub-constitutions: by subjecting all areas of social life to the state's authority, they concealed the question of independent social constitutions. The welfare states of the late twentieth century, in turn, never officially recognised autonomous social sub-constitutions; but, at the same time, they achieved a peculiar balance between a state constitutionalism, which progressively extended the principles of the political constitution to social spheres, and a constitutional pluralism, in which the state, as a matter of fact, respected social sub-constitutions.

Globalisation did not, then, create the problem of societal constitutionalism. But it did dramatically change it: it destroyed its latency. In light of the much weaker draw of transnational politics, compared to the draw of the nation-state, the acute constitutional problems of other global social sectors now appear in a much harsher light. On what legitimating basis do transnational regimes regulate whole spheres of social activities, right down to the detail of daily life? What are the limits of global capital markets in their impact on the real economy and other social sectors? Can fundamental rights and human rights claim validity in the state-free spheres of the global economy, particularly as against transnational organisations? Contrary to the terms of the current debate, it is absolutely *not* the case that the emergence of the global economy brings with it a wholly new constitutional problematic. In fact, there has been a real existing societal constitutionalism within nation-states for a long time. Today, however, this societal constitutionalism is faced with the question, whether and how it must transform itself under conditions of globality. The continuity of the problematic has to do with the advanced functional differentiation of society. Its discontinuity can be attributed to globalisation which has developed specific structures unknown to the nation-state. The normative question, then, is no longer how to compensate for the failures of national constitutions; in other words, how hitherto constitution-free social spheres might be constitutionalised. Rather the question is how the experiences of nation-states with institutions of societal constitutionalism can be transformed under the essentially different conditions of globality. In particular: how is the role of politics for transnational sub-constitutions to be formulated in the magical triangle of politics, law and social sector? Resignation? Guidance? Supervision? Complementarity?

Constitutional emptiness of the transnational?

The current debate is marked not only by false tabula-rasa assumptions in respect of societal constitutionalism within the nation state, but also in respect of its (non-)existence in the transnational sphere. While modern constitutionalism was able to take root in almost all nation-states, it was weakened, so it is said, by the increasing transferral of governmental responsibilities from nation-states to new transnational organisations, regimes and networks. At this transnational level, however, a constitutional emptiness is supposed to prevail. And it is only against the background of

this supposedly constitution-free global space that the argument arises, whether constitutionalism is at an end or, alternatively, experiencing a renaissance.⁶

I want now to sketch out briefly why it is wrong to assume a constitutional emptiness of the transnational, and, accordingly, to assume that it must be constitutionalised from scratch. Social scientific analyses of a 'new constitutionalism', together with long-standing investigations by economists and commercial lawyers of an emerging global economic constitution, suggest exactly the opposite. Already today, constitutional institutions have established themselves in the transnational sphere with an astounding density.⁷ Despite the failure of the constitutional referendum, it is now only rarely disputed that the European Union has its own independent constitutional structures.⁸ But it is also the case that other international organisations, transnational regimes and their networks are, in the meantime, significantly juridified; and that they have become, moreover, part of a global – if thoroughly fragmented – constitutional order. The global institutions that emerged from the agreements of the 1940s – the Havana Charter, GATT, Bretton Woods; the new arrangements of the Washington consensus – IMF, World Bank, WTO; and the recently initiated public debate concerning a 'global finance market constitution', all speak the language of a real existing global societal constitutionism which is undergoing a process of change.

The new constitutional question must be reformulated, then, for a second time. Not only have social sub-constitutions already emerged in the nation-states, as discussed above, it is also the case that 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, in a generalisation of Karl Polanyi's double movement, the transformation of an already existing transnational constitutional order. These transformative processes are not directed toward a stable balance, but follow, rather, the chaotic pattern of a 'dynamic disequilibrium' between contradictory developments – between the liberalisation and the limitation of the inner dynamics of subsystems.⁹ To date, the new global constitutional orders have, for the most part,

⁶ Grimm (note 2); Habermas (note 2).

⁷ On the new global constitutionalism see David Schneiderman (2008) *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge: Cambridge University Press; James Tully (2007) "The Imperialism of Modern Constitutional Democracy", in: Neil Walker und Martin Loughlin (Hrsg.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 315-338, 328 ff. On the global economic constitution: Peter Behrens (2000) "Weltwirtschaftsverfassung", 19 *Jahrbuch für Neue Politische Ökonomie*, 5-27.

⁸ On this debate: Joseph H. Weiler (1999) *The Constitution of Europe: Do the New Clothes Have an Emperor? and Other Essays on European Integration*, Cambridge: Cambridge University Press, ??; Joseph H. Weiler und Marlene Wind (Hrsg.) (2003) *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press; Neil Walker (2008) "Post-Constituent Constitutionalism: The Case of the European Union", in: Martin Loughlin und Neil Walker (Hrsg.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 247-268.

⁹ Karl Polanyi (1991) *The Great Transformation: The Political and Economic Origins of Our Time*, New York: Beacon, (esp. 106 ff., 182 ff.) In generalised form, as the relation between releasing autonomy and legal prohibitions according to negative experiences: Rudolf Wiethölter (2005) "Justifications of a Law of Society", in: Oren Perez und Gunther Teubner (Hrsg.) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart, 65-77.

devised only *constitutive rules*, which have supported the freeing up of various systemic rationalities at the global level. Only after historical experience with their grave *effets pervers*, are counter-movements now appearing, which formulate *limitative rules*, in order to counteract self-destructive tendencies and to limit damage to social, human and natural environments. It is true that the manner in which limits had been imposed on the new global regimes (in ‘vertical’ relation to nation-states) was from the outset strongly contested. 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’.¹⁰

The agenda of a transnational constitutionalism is thus transformed in this context, too: the concern is not to create something new, but rather to transform what is essentially an already existing constitutional order. To limit the societal dynamics freed up by the constitutive rules is of particular urgency. The task, then, is to identify the real structures of the existing global constitutionalism, to criticise its shortcomings and to formulate realistic proposals for limitative rules.

Reducing transnational governance to institutionalised politics?

The first two theses attempted to correct two prevalent misconceptions: that nation-states did not recognise societal constitutionalism, and that transnational spheres are constitution-free. The third thesis is concerned with a further misconception, which causes parties to the current debate to underestimate the radicality of a societal constitutionalisation. This third misconception involves the attribution of the need for a constitution, in principle, only to the emergence of forms of political ‘governance’ particular to the global economy, quite different to ‘government’ and to traditional nation-state governmental practices. More particularly, it involves an identification of the networking of specialised bureaucracies from various nation-states with actors from the global community, transnational corporations, trade associations, NGOs and hybrid regimes as the novel problematic of global governance; a problematic which must now be surmounted with constitutional institutions.¹¹ The constitutional limitation of political power is given prominence, its particularity consisting in the fact that it is partially ‘privatised’.

Doubtless this partial privatisation of political power is one of the central elements of global governance. Nonetheless, the analysis does not go far enough. In suggesting

¹⁰ Niklas Luhmann (1997) *Die Gesellschaft der Gesellschaft*, Frankfurt: Suhrkamp, 1087. In detail, regarding the mutual burdens at the transnational level and political-legal reactions: Andreas Fischer-Lescano und Gunther Teubner (2006) *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, Frankfurt: Suhrkamp, 25 ff., 57 ff.; ders. (2004) “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, 25 *Michigan Law Journal of International Law*, 999-1045.

¹¹ A well thought through concept of governance is found in: Edgar Grande, Markus König, Patrick Pfister und Paul Sterzel (2006) “Politische Transnationalisierung: Die Zukunft des Nationalstaats - Transnationale Politikregime im Vergleich”, in: Stefan Schirm (Hrsg.) *Globalisierung. Forschungsstand und Perspektiven*, Baden-Baden: Nomos, ??; Jürgen Neyer (2004) *Postnationale politische Herrschaft: Vergesellschaftung und Verrechtlichung jenseits des Staates*, Baden-Baden: Nomos.

that the power constellations of global governance, comprising novel private actors, can be limited with constitutional norms, one trivialises the problem. Here, again, the blinkered nature of political-legal constitutional theories is apparent, focussed even in respect of transnational relationships only on political phenomena in the narrow sense. In contrast, a sociological view shows that the constitution of particular global social spheres of activity must be thematised outwith international politics and the constitutional role of legal norms in the process. The problems associated with a societal constitutionalism in the strict sense only become visible when we transcend transnational political processes in the narrow sense; when it is made clear that societal actors do not only participate in political power processes of global governance, but also establish their own global regimes outwith institutionalised politics. These regimes can, of course, then themselves become political actors, impacting on politics.

The differences between social sub-constitutions and a political constitution come, then, to the fore. It is not the case that the constitutionalisation of transnational political processes need only be modified in relation to national constitutions because they also integrate private actors in political processes. Rather, a sociological analysis of the global subsystems – the economy, science, culture and mass media – raises more difficult questions. Are there analogies, in this context, with the dynamics of the *pouvoir constituant* and *pouvoir constitué*, with the self-constitution of a collective, with the political separation of powers? At a more basic level still: to what extent must we generalise the principles of political constitutions in order to avoid the pitfalls of ‘methodological nationalism’? How must we re-specify those principles for the particularities of a social institution in the global sphere?

Reducing horizontal effects of fundamental rights to bare duties of care of the community of states?

The debate about the horizontal effect of fundamental rights within transnational social spaces suffers from similar deficiencies as the debate about global governance. It thematises fundamental rights within the private sector but remains, at the same time, fixated with the state. The scandals outlined at the beginning of the paper, triggered by breaches of fundamental rights by transnational corporations, are usually analysed as a problem of the horizontal effect of fundamental rights. Fundamental rights guaranteed initially against the state are supposed to become effective against breaches by ‘third parties’ – private transnational parties – if duties of care are imposed on the international community of states.¹²

This approach misinterprets the problematic of fundamental rights in “private” contexts in several respects. In its typical fixation with the state, it puts, in a manner of speaking, the cart before the horse. Instead of imposing duties on the transnational private actors who breach fundamental rights, it obliges the community of states alone to protect private actors from breaches of such rights. The contentious question of whether

¹² Gavin W Anderson (2005) *Constitutional Rights after Globalization*, Oxford and Portland, Oregon: Hart Publishing, 126 ff.; Andrew Clapham (2006) *Human Rights Obligations of Non-State Actors*, Oxford University Press.

private actors are themselves bound by fundamental rights is thereby obscured. And all this is done as if it were a question of the states' political power of definition, whether fundamental rights exist in social spheres, and who they are intended to protect. Ultimately, the most significant false assumption understands the horizontal effect of fundamental rights as purely a problem of political power within society and, for that reason, misinterprets its real tasks: the limitation by means of rights of *all* expansionist tendencies of social subsystems including those which do not function through the medium of power.

The real difficulty with fundamental rights in the social sphere becomes apparent only if we free ourselves from the fixation with the state. If the task is to use constitutional means to limit the expansionist tendencies of the particular logics of social subsystems, it is no longer possible to sustain the state-centricity of fundamental rights, their assignation to individual actors, their exclusive focus on social power, their definition as spheres of autonomy protected by subjective rights. The task at hand is to develop a perspective whereby fundamental rights are effective against social communicative media themselves, rather than against individual or collective actors. The concern is not only to protect the fundamental rights of individuals, but also those of social institutions against expansive social media. The horizontal effect of fundamental rights needs to be implemented through organisation and procedures, rather than through subjective rights.

A unitary global constitution?

A final problem with the new constitutional debate concerns its unitary bias; a bias which stems from an uncritical transfer of national constitutional concepts to world society. In international law, as in political philosophy, the notion is advanced that the constitutionalisation of international law could be capable of providing a unitary constitutional order for the whole world.¹³ It is true that the a unitary world state as the substrate of a unitary constitution is rejected as unrealistic. Instead, however, the 'international community' is presented as the reference point for an emerging global constitutional law: no longer, as in traditional international law, merely a community of sovereign states but now, rather, an ensemble of political and societal actors, and a legal community of individuals. The constitutionalisation of international law is conceived in parallel with nation-state constitutional law: a hierarchy of constitutional norms relative to lower-order legal norms, with the whole globe as a unitary jurisdiction, encompassing all national, cultural and social spheres.¹⁴

The very marked fragmentation of world society emphasized by sociological analyses causes real difficulties for such a unitary constitutionalism. In the debate, fragmentation

¹³ Bardo Fassbender (2007) ""We the Peoples of the United Nations": Constituent Power and Constitutional form in International Law", in: Neil Walker und Martin Loughlin (Hrsg.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 269-290, 281 ff.; Otfried Höffe (2005) "Vision Weltrepublik: Eine philosophische Antwort auf die Globalisierung", in: Dieter Ruloff, Christoph Bertram und Bruno Frey (Hrsg.) *Welche Weltordnung?*, Zürich: Rüegger, 33-53.

¹⁴ For a critique of such constitutional illusions, Andreas Fischer-Lescano (2005) *Globalverfassung: Die Geltungsbegründung der Menschenrechte*, Weilerswist: Velbrück, 247 ff.

is regarded, if at all, as a shortcoming to be addressed, and not as a factor necessitating the redefinition of the constitutional problems. The alternative view is this: if constitutionalisation must be limited to fragments of global society, then the idea of a unitary global constitution must be abandoned in favour of a global 'conflict of laws'.¹⁵ The social conditions which allowed the nation-state to establish a unitary constitution, in principle, do not obtain in the transnational sphere. A transnational constitutionalism will have to conform with the requirements of a doubly fragmented world society.¹⁶ As a result of the first fragmentation, the autonomous global social sectors of modernity insist stubbornly on their own constitutions, in competition with the constitutions of nation-states. Moreover, unitary standards of a global constitution are rendered illusory by the second fragmentation into various regional cultures, each based upon sets of social principles of organisation different to 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 global fragment – nations, transnational regimes, regional cultures – and the legal interrelation of these constitutions by means of a constitutional conflict of laws.

III. Self-Constituting Systems without Constitutionalisation?

Above all, globalisation means that the dynamics of functional differentiation, first realised historically in the nation-states of Europe and North America, now encompass the whole world. That is not to say that all subsystems globalise simultaneously, and with the same intensity, the world over. Religion, science, and the economy are all well-established as global systems, while politics and law remain mainly focused around the nation-state.¹⁷ Their cross-border communications are organised for the most part through inter-national relationships. Genuinely trans-national political and legal processes, in which communications network themselves globally directly with one another, without the need for intercession by nation-states, are emerging only incrementally. Inter-national political relations, inter-national public law and international private law are only slowly being over-layered with trans-national political and legal processes.

Because of this staggered nature of globalisation, the pressure for the constitutionalisation of the globalised subsystems is all the greater. The difference in degrees of globalisation exacerbates the coordination problematic. When the function systems go global and free themselves from the dominance of nation-state politics, there are no means of checking their centrifugal tendencies or regulating their

¹⁵ A first step in this direction: Fischer-Lescano und Teubner (2006) (note 10) 57 ff.

¹⁶ On the reaction of transnational law to the double fragmentation of world society: Gunther Teubner und Peter Korth (2009) "Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society", in: Margaret Young (Hrsg.) *Regime Interaction in International Law: Theoretical and Practical Challenges*, Available at SSRN: <http://ssrn.com/abstract=1416041>, .

¹⁷ Luhmann (note 10), 145 ff., 806 ff.

conflicts.¹⁸ The problems do not end with the question of coordination, however. As Prandini has shown, the question of coordinating autonomous systems (resulting in the forced limitation of their options) is only one part of the more comprehensive constitutional problematic, resulting from their high degree of autonomy.¹⁹ The prior question is how subsystems will achieve autonomy at the global level when there are no political-legal institutions capable of supporting this process; when, at the same time, nation-state organised politics and law act to hinder the process with their territorial validity claims. Here, the staggered nature of globalisation is the cause of an emerging hiatus between self-constituting autonomous global social systems, and their political-legal constitutionalisation.

In the nation-state, self-constitution and political-legal constitutionalisation occurred simultaneously. Autonomously operating closed subsystems developed in long historical processes of self-organisation. The growing independence of social subsystems was accompanied by their constitutionalisation through the politics and law of the nation-state; it was stabilised and strengthened by that constitutionalisation and, at the same time, limited in its effects. The constitutional laws of politics, of the economy, of social security, of the press, of public health and, to an extent, of science and religion each raised their validity claim in the territorial framework of the nation-state and, at the same time, limited it to that framework. Under conditions of globalisation, self-constitution and constitutionalisation are drifting apart. The triangular constellation politics/law/subsystem, which in the nation-state produced societal sub-constitutions, finds no counterpart in the global context. Its role in both enabling and limiting systemic autonomy remains unfulfilled.

This is decidedly the case for the neo-corporatist variety of societal constitutionalism that dominated European welfare states. Because it effectively limited options for action for the social sectors involved, it was simultaneously able to release a larger measure of their autonomy. But what was provided, in this context, by way of fine-tuning between societal organisations and political institutions, cannot be repeated on a global scale today. Moreover, the necessary degree of mutual trust and socio-cultural norm-consensus cannot be globalised.²⁰ Even at European level, where experiments are conducted with institutions of a ‘social dialogue’ between the European Commission, the European Trade Union Confederation and the European trade associations, the transfer of the neo-corporatist model beyond the nation-state has proven to be of only

¹⁸ In detail, on the coordination problems of different systems rationalities in world society Poul F. Kjaer (2009 forthcoming) *The Structural Transformation of Democracy: Elements of a Theory of Transnational Constitutionalism*, London: Ashgate; Andreas Fischer-Lescano und Gunther Teubner (2006) *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, Frankfurt: Suhrkamp, 25 ff.

¹⁹ Riccardo Prandini (2009) "The Morphogenesis of Constitution(alism): Between Fragmented Foundations and Holistic Perspectives", in: Petra Dobner und Martin Loughlin (Hrsg.) *The Twilight of Constitutional Law: Demise or Transmutation?*, Oxford: Oxford University Press, ??, ?

²⁰ Wolfgang Streeck (2009) *Re-Forming Capitalism: Institutional Change in the German Political Economy*, Oxford: Oxford University Press, 93 ff.

limited success.²¹ At the global level, neo-corporatist arrangements are bound to fail. The contradiction remains: the self-constitution of social subsystems takes a global course, and only nation-state institutions are available for their political-legal constitutionalisation. The consequence is a shift in balance, on a global scale, in the triangle politics-law-subsystem as the bearer of societal constitutionalism. Are new configurations emerging, which advance constitutionalisation in place of nation-state constitution-making? Which internal qualities are assumed by the constitutional legal norms developed in this process?

Claims to lead the constitutionalisation of world society *in toto* have been made primarily by the United Nations. The basis for such claims is found in the UN Charter. According to Jürgen Habermas, the Charter has established a new constitutional order in which member states no longer understand themselves exclusively as partners in international treaties, but rather, 'together with their citizens, as constitutive elements of a politically constitutionalised world society'.²² According to this view, the UN Charter has developed beyond its original character as a mere treaty. Together with other fundamental international law treaties - the International Convention of Human Rights, the Convention against Race Discrimination, and the Rome Statute of the International Criminal Court - it has been transformed into a genuine constitution of the international community.²³ For our purposes, the claim of the United Nations to constitutionalise not only international politics, but also the major world societal sectors, is of particular relevance. The International Labour Organisation ILO, the World Health Organisation WHO, UNICEF and other suborganisations of the UN have made significant advances in developing constitutional norms for world societal sub-spheres.²⁴

A polemical critique of these ambitions has revealed that they are nothing more than 'constitutional illusions' – phantasms of a global state constitution.²⁵ Nation-state conceptions of a constitution are transferred, here, uncritically to global relations, as the UN is assigned the impossible task of producing a cosmopolitan constitution more or less as an inflated nation-state collective. Here, 'methodological nationalism', which as an element of international relations only recognises states and their associations,

²¹ Verified in Wolfgang Streeck und Philippe C. Schmitter (1991) "From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market", 19 *Politics and Society*, 133-164

²² Habermas (note 3); Höffe (note 13).

²³ Emphasised particularly by Bardo Fassbender (2007) ""We the Peoples of the United Nations": Constituent Power and Constitutional form in International Law", in: Neil Walker und Martin Loughlin (Hrsg.) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 269-290; ders. (2005) "The Meaning of International Constitutional Law", in: Douglas M. Johnston und Ronald St.J. Macdonald (Hrsg.) *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden: Nijhoff, 837-851; Pierre-Marie Dupuy (2002) "L'unité de l'ordre juridique international ", 9 *Recueil des Cours*, 217-??; ders. (1997) "The Constitutional Dimension of the Charter of the United Nations Revisited", 1 *Max Planck Yearbook of United Nations Law*, 1-33.

²⁴ For some exemplary developments see Christian Walter (2001) "Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law", 44 *German Yearbook of International Law*, 170-201.

²⁵ Andreas Fischer-Lescano (2005) *Globalverfassung: Die Geltungsbegründung der Menschenrechte*, Weilerswist: Velbrück, 247 ff.

functions as an epistemological obstacle. Even for global relations, it cannot overcome the state-centricity of constitutions.²⁶ A realistic appraisal will check such exaggerations. While it cannot be ignored that the UN has gone through a constitutionalisation process, the result is *absolutely not* a world constitution, but, rather, a much more limited constitution of formal organisations. An organisational constitution, not a cosmopolitan constitution – that is the reality of the UN. When it tries to realise greater ambitions, then these are at best political impulses for constitutionalisation processes, which play out elsewhere. This is particularly so in the case of the norms which the ILO, WHO, UNICEF and the Human Rights Commission adopt for their spheres of authority. The international ‘soft law’ formulated in codes of conduct for various global institutions is not comparable with binding constitutional norms, such as those provided by nation-state parliaments and constitutional courts for societal subspheres. On the merits, we are dealing here with mere constitutional impulses, sent by an – admittedly influential – international organisation towards the global social subspheres involved. Whether they become consolidated there as constitutional norms is decided in accordance with their internal processes.

The same can be said of the much discussed ‘constitutionalisation of international law’.²⁷ Here, three bodies of norms are prominent – *jus cogens*, norms with *erga omnes* effect, and human rights – which have, as a matter of fact, constitutional properties. It is true that doubts are often raised, suggesting that they ought rather to be regarded as simply lower-order legal limitations of state agreements. In respect of global human rights, however, Peters has convincingly elaborated a constitutional legal quality with respect to five criteria. Global human rights:

- (i) limit the sovereignty of individual states,
- (ii) make a catalogue of fundamental values universally binding,
- (iii) establish a hierarchy of norms, according to which binding higher-order law is superior to lower-order law,
- (iv) are not only programmatic, but have the status, rather, of positive international law with constitutional priority, and

²⁶ Apposite criticism from Andreas Wimmer und Nina Glick-Schiller (2002) "Methodological Nationalism and Beyond: Nation State Building, Migration and the Social Sciences", 2 *Global Networks. A Journal of Transnational Affairs*, 301-334, 302; M. Zürn, "Politik in der postnationalen Konstellation. Über das Elend des methodologischen Nationalismus" in C. Landfried (ed.) *Politik in einer entgrenzten Welt. Beiträge zum 21. Kongreß der Deutschen Vereinigung für Politische Wissenschaft* (2001: Köln; Verlag Wissenschaft und Politik) at 181-204; A. Wimmer & N. Glick Schiller, "Methodological Nationalism and Beyond: Nation-Building, Migration & Social Sciences" in (2002) 2 *Global Networks* 4 301-334; and U. Beck & N. Sznaider, "Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda" in (2006) 57 *The British Journal of Sociology* 1-23.

²⁷ Jochen A. Frowein (2000) "Konstitutionalisierung des Völkerrechts", in: Klaus Dicke, Waldemar Hummer, Daniel Girsberger, Boele-Woelki, Christoph Engel und Jochen A. Frowein (Hrsg.) *Völkerrecht und internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, Heidelberg: Müller, 427-447, Erika de Wet (2006) "The International Constitutional Order", 55 *The International and Comparative Law Quarterly*, 51-76; Anne Peters (2006) "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", 19 *Leiden Journal of International Law*, 579-610.

- (v) as constitutional legal dogma, provide a basis for argumentation in favour of the judicial extension of international constitutional law.²⁸

Such genuine constitutional norms emerge in the transformation of international law from merely a treaty-order of sovereign states to an independent legal order which, in the *ordre public international*, creates its own foundations with legal constitutional norms. This constitutionalisation allows international law to do what would have been unthinkable for a mere treaty-order: to establish binding norms even against the will of the parties to the treaty, legitimised with reference not only to the state treaties, but also to the orientation of the legal order to the public-good. But for all the indisputable significance of this 'constitutional law in the making', one must bear in mind the sectoral nature of the development. The three bodies of norms mentioned are constitutional limitations of international agreements and, as such, function only within international politics in the narrow sense. No wonder, then, that international law has a peculiarly indifferent attitude to the *lex mercatoria* and other global normative orders based on private autonomy. International constitutional law is simply not capable of achieving the equivalent of welfare state concepts in nation-states, namely, the constitutionalisation of other global social spheres.

Global administrative law is the newest candidate for global societal constitutionalism.²⁹ In comparison to the organisational law of the UN and to international law generally, which function in the sphere of institutionalised politics, administrative law norms regulate the relevant global subsystem directly. The 'social' quality of global administrative law has been clearly demonstrated by Kingsley.³⁰ In the regulation of transnational social spheres, more and more forms of 'private ordering' are activated, which are not encompassed by traditional 'public' administrative law. Here, too, one must bear in mind, however, that the norms being developed of constitutional character – due process in regulation, notice and comment rules, obligations to consult experts, the proportionality principle, respect for human rights³¹ – are concerned ultimately with the internal constitutions of the regulatory agencies: they cannot function as constitutional norms in the regulated spheres.

In all three areas it becomes clear that the conceptual demands for global processes of constitutionalisation (made, in particular, by Dieter Grimm) will not be met.³² At the same time, however, it also becomes apparent that the demands themselves misinterpret the nature of these processes. In respect of the developed constitutions of nation-states, it is certainly the case that we can only speak of a constitution in the full

²⁸ Peters (note 27), 585 ff.

²⁹ Programmatically on this point: Benedict Kingsbury, Nico Krisch, Richard B. Stewart und Jonathan B. Weiner (2005) "Symposium: The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems*, 15-61.

³⁰ Benedict Kingsbury (2009) "International Law as Inter-Public Law", in: Henry R. Richardson und Melissa S. Williams (Hrsg.) *NOMOS XLIX: Moral Universalism and Pluralism*, New York: New York University Press, 167-204.

³¹ Mattias Kumm (2007) "Constitutional Democracy Encounters International Law: Terms of Engagement", in: Sujit Choudhry (Hrsg.) *The Migration of Constitutional Ideas*, Cambridge: Cambridge University Press, 256-293.

³² Grimm (note 2).

sense when constitutional norms raise a comprehensive claim for the creation of a political community. In the discrepancy between globally established social subsystems and a politics stuck in the inter-national level, however, the constitutional totality breaks apart and is dissolved by a type of *constitutional fragmentation*.³³ In the sea of globality there are only islands of constitutionality. The comprehensive structural coupling between politics and law, which Luhmann observed in the constitutions of nation-states, has no counterpart at the level of world society.³⁴ Here, the constitutional totality is dissolved by occasional couplings as and when social problems demand. Constitutional norms are developed ad hoc when current conflict assumes constitutional dimensions, demanding constitutional decisions. The comprehensive societal claim for the creation of a community is reduced in two ways. Even the political system of world society has no comprehensive constitution – constitutional fragments are developed for particular segments – the UN, parts of international law and administrative law. Now more than ever, however, the transferral of political constitutional claims to other social subspheres, as achieved by the nation-state, is not recognisable. As stated above, one can speak at most only of constitutional impulses emanating from the political system of world society in the direction of other global societal spheres.

IV. Sectoral Constitutions in World Society?

Are we stuck, then, with self-constituting global systems without political-legal constitutionalisation? Will the global villages that have been built in the economy, science, health, communicative media, exist in the long run without the stability provided by legal-political constitutionalisation? Will their autonomy remain for that reason at a rather underdeveloped level? Or will they have to rely for their constitutional stabilisation on nation-state legislation and judicial precedent – even though these can provide only a confusing variety of territorially-specific constitutional norms with competing claims? Or will they have to wait for a unification of laws; for a gradual harmonisation of the constitutional standards of nation-states? Here, we come up against an intriguing new phenomenon – that of ‘self-constitutionalisation without a state’.³⁵ Sectors of world society begin to develop step-by-step their own constitutional norms. Pressing social problems that accrue within autonomous world systems produce social conflicts resulting in legal norms of a constitutional quality. These norms then become aggregated, over time, into sectoral constitutions of world society.

³³ This thesis is particularly emphasised by Walter (note 24); Neil Walker (2002) "The Idea of Constitutional Pluralism", 65 *Modern Law Review*, 317-359 and Andreas Fischer-Lescano (2005) *Globalverfassung: Die Geltungsbegründung der Menschenrechte*, Weilerswist: Velbrück, 247 ff.

³⁴ Niklas Luhmann (2004) *Law as a Social System*, Oxford: Oxford University Press, (dt. 582).

³⁵ On autonomous constitutions of global subsystems: Gunther Teubner (2003) "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?", in: Karl-Heinz Ladeur (Hrsg.) *Globalization and Public Governance*, Oxford: Oxford University Press, 71-87; Hauke Brunkhorst (2002) *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, Frankfurt: Suhrkamp, 203 ff.; Graff-Peter Calliess (2002) "Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law", 24 *Zeitschrift für Rechtssoziologie*, 185-217; Graff Peter Calliess und Peer Zumbansen (2009) *Rough Consensus and Running Code: A Theory of Transnational Private Law*, Oxford: Hart; Kjaer (note 18) ch. 1.

This analysis is not merely the result of theoretical deliberations arising from occasional observations; it is based on empirical observations. A large-scale empirical study into the global creation of law was conducted over several years by means of individual studies of non-state institutions. It was summarised as follows by the project leader, with barely concealed surprise:

'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. Is world society thus about to develop functional equivalents to the classical constitutional state, and will the latter gradually become marginal?'³⁶

The primary candidates for such constitutions are international organisations. Regardless of whether the organisations were formed through international treaties, such as the WTO, or, alternatively, through private ordering, like multinational corporations, tendencies towards constitutionalisation can be observed everywhere, as the organisations continually free themselves from the consensus of the founding members. In the case of the WTO, this kind of constitutional emancipation has emerged in respect of panels set up to mediate conflicts between member states and the WTO, regarding the interpretation of the Treaty. Though the panels were intended, originally, to mediate only through negotiations, they have developed, over time, into genuine 'courts' with extensive decision-making powers.³⁷ Decisions are made concerning not only straightforward questions of law, but also constitutional questions regarding the external relations of the WTO to nation-states. The regulatory body of the internet, ICANN, established under Californian law as a private association, has developed, over time, functional and territorial representative structures, forms of separation of powers, and an effective jurisdiction over questions of domain-name allocation. In this context, governance questions of constitutional significance arise.³⁸

³⁶ Olaf Dilling, Martin Herberg und Gerd Winter (Hrsg.) (2008) *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, Oxford: Hart, ??

³⁷ See e.g. Robert Howse und Kalypso Nicolaïdis (2003) "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity", 16 *Governance*, 73-94; Deborah Z. Cass, *The Constitutionalization of the World Trade Organization* (Oxford: Oxford University Press, 2005); Jeffrey L. Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647-675. Sol Picciotto, 'The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance' (2005) 18 *Governance* 477-503; Chios Carmody, 'A Theory of WTO Law' (2008) 11 *Journal of International Economic Law* 527-557.

³⁸ See e.g. Ernst-Ulrich Petersman, 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19-25; Petersman, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society' (2006) 19 *Leiden Journal of International Law* 633-667.

³⁹ See e.g. Robert Post (2001) "The Challenge of Globalization to American Public Law Scholarship", 2 *Theoretical Inquiries in Law*, 323-.

When questions of fundamental rights in the internet have been raised, there has not been a reversion to diverse national constitutions, which would work only for national segments of the internet; instead, internet-specific fundamental rights standards have been developed with a claim to global validity.³⁹ Multinational corporations formed under rules of national company law go on to develop codes of conduct through disputes with local organisations, social movements, and NGOs, which act as the transnational equivalent of national corporate constitutions.⁴⁰ Global standards organisations, such as the ISO, free themselves from their national counterparts and develop principles of constitutional law. They produce rules for the representation of national bodies, experts and interest groups, norms of due process and institutionalised discourse, and principles of material decision-making.⁴¹ And in the lex mercatoria, the self-created law of the global economy, a hierarchy of norms has gradually developed, at the top of which stand constitutional legal norms, procedural principles and fundamental rights standards.⁴²

Although these processes are set in motion by functional differentiation, the constitutionalisation process is not directed toward the major function systems themselves. Finance and product markets are globalised, scientific communication takes place at a global level, the system of communicative media, news agencies, tv, internet transmits news across the whole globe. Despite the operational closure of these world systems, however, there is no sign of a unified global economic constitution, scientific constitution, media constitution *sui generis*. As neo-corporatist constitutions within nation-states have already experienced, the function systems themselves lack the capacity to take action, to become organised and, therefore to be constitutionalised. The various attempts at global constitutionalisation are directed rather at social processes 'beneath' the function systems, at formal organisations and at formalised transactions that are not tied to the territorial borders of nation-states.

It would nevertheless be overhasty to understand these as merely internal constitutions of international organisations – a mistake made in most of the literature dealing with international institutions.⁴³ It is not only the internal decision-making processes of international organisations, private or public, that is constitutionalised, but also their external relations with various constituencies. To understand the private ordering of ICANN, it is not enough to take into account only its formal organisation as a private association under Californian law. Its external relations must also be considered. A whole network of contracts has been built up, which has enabled ICANN to create a

³⁹ Vaios Karavas und Gunther Teubner (2005) "The Horizontal Effect of Fundamental Rights on "Private Parties" within Autonomous Internet Law", 12 *Constellations*, 262-282.

⁴⁰ Dilling et al (note 36).

⁴¹ Harm Schepel (2005) *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Oxford: Hart Publishing, 403 ff.

⁴² Jan H. Dalhuisen (2006) "Legal Orders and their Manifestations: The Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria", 24 *Berkeley Journal of International Law*, 129-?; Nathalie Voser (1996) "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", 7 *The American Review of International Arbitration*, 319-358.

⁴³ Henry G. Schermers und Niels M. Blokker (2004) *International Institutional Law: Unity within Diversity*, Leiden: Martinus Nijhoff.

comprehensive regulatory system. ICANN contracts with the organisation VeriSign for the latter to act as domain administrator and it, in turn, negotiates contracts with national domain administrators. The national domain administrators stipulate the details of domain name allocation by means of standard contracts with internet users, which refer to the internet regulation of the UDRSP. Moreover, ICANN is associated with public law bodies via contractual relations, which allow the US Government to secure a means of influencing this otherwise private governance. The arrangement involves, then, a complex combination of contracts which cannot be equated with either one formal organisation, or with the sum of bilateral contracts. Individual contracts and formal organisations are aimed at the achievement of one overriding purpose and create a regulatory framework at the emerging level.⁴⁴

It is not sufficient, therefore, to talk only of the constitutionalisation of international organisations. The concept of a 'regime constitution' is rather more adequate. Global regimes, commonly defined as a 'set of principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given cause-area',⁴⁵ encompass substantially more than formal organisations. Admittedly, the nature of this added value, in comparison to formal organisations, is not made entirely clear in the course of the unsystematic debate about regimes. The regimes are referred to, appropriately, as complex and variable 'ensembles of – formal and informal – institutions, organisations, actors, relations, norms and rules'.⁴⁶ Further aspects are captured by the following description:

'A regime within the political or the physical comprises a set of conditions or measures, which fit in and work within a certain environment without necessarily being completely understood or even spelled out. A regime combines formal and informal rule, or outspoken and silent expectations and commitments. It is both an institution and a style, or even a 'combination of styles around institutions', and it makes use of this combination in order to be able to float with respect to both its range and its core.'⁴⁷

It is helpful to distinguish between the centre and the periphery of a regime. At the centre, there is often a formal organisation (or several formal organisations) with

⁴⁴ Lars Viellechner (2007) "Können Netzwerke die Demokratie ersetzen? Zur Legitimation der Regelbildung im Globalisierungsprozess ", in: Sigrid Boysen, Ferry Bühring, Claudio Franzius, Tobias Herbst, Matthias Kötter, Anita Kreutz, Kai von Lewinski, Florian Meinel, Jakob Nolte und Sabrina Schönrock (Hrsg.) *Netzwerke: 47. Assistententagung Öffentliches Recht*, Baden-Baden: Nomos, 36-57, 42f.; Hutter ICANN Michael Hutter (2001) "Efficiency, Viability and the New Rules of the Internet", 11 *European Journal of Law and Economics*, 5-22.

⁴⁵ S.D. Krasner, International Regimes, 1983, 1; Robert Keohane und Joseph Nye (2001) *Power and Interdependence: World Politics in Transition*, Boston: Little Brown, 5.

⁴⁶ Edgar Grande, Markus König, Patrick Pfister und Paul Sterzel (2006) "Politische Transnationalisierung: Die Zukunft des Nationalstaats - Transnationale Politikregime im Vergleich", in: Stefan Schirm (Hrsg.) *Globalisierung. Forschungsstand und Perspektiven*, Baden-Baden: Nomos, 123

⁴⁷ Dirk Baecker (2009) "The Power to Rule the World", in: Gralf-Peter Callies, Andreas Fischer-Lescano, Dan Wiersch und Peer Zumbansen (Hrsg.) *Soziologische Jurisprudenz: Festschrift für Gunther Teubner*, Berlin: De Gruyter, 673-686, with reference to Harrison C. White (1992) *Identity and Control: A Structural Theory of Action*, Princeton: Princeton University Press, 226.

professional core competencies. But the regime also has a periphery, consisting of the interactions of the centre with its constituencies. A regime constitution normalises both the internal relations of the formal organisation (or network of formal organisations) and the external relations in their relevant environmental sectors (the interactions with their publics).

V. Constitutionalisation in a Dynamic Disequilibrium

The fragmented constitutions of the current global regimes are markedly one-sided in their normative quality. Only the constitutive function is prominent, directed at guaranteeing the institutional conditions for subsystem autonomy. The constitutions focus on the fact that the segmentary internal differentiation of nation-state entities creates obstacles for cross-boundary communication in the spheres of the economy, ecology, science, education, health and media. The politics and law of nation-states have created a tight structural coupling with other function systems in the form of national production regimes.⁴⁸ The global regimes regard the dismantling of such nation-state production regimes in the most varied spheres as an uppermost constitutional priority. At present, world societal constitutionalism has two prominent goals: to break open the national boundaries of function systems, and to dismantle regulatory structures to the extent necessary for global function-specific communications. Constitutive norms of this type serve to release the particular dynamics of function systems at the global level.

Both theorists of the “new constitutionalism” and ordoliberal advocates of a global economic constitution identify in those global regimes a genuine global constitutional order, though they evaluate this, politically, in diametrically opposed ways.⁴⁹ The regimes of the International Monetary Fund and the World Bank are orientated to the opening of national capital markets. The regime of the WTO, like that of the Single European Market, NAFTA, the Mercado Comun del Cono Sur (MERCOSUR) and the Asia Pacific Economic Cooperation (APEC), is aimed at a legally guaranteed constitution of free world trade, and the facilitation of direct investment. The lex mercatoria has developed a layer of constitutional norms which enforce property and freedom of contract legally and globally. International standards organisations aim to harmonise national standards globally by combining public and private law-making.⁵⁰

⁴⁸ On differing production regimes as stable configurations of economics, politics, law, responsible for the varieties of capitalism: Peter A. Hall und David Soskice (Hrsg.) (2005) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford University Press. On the generalisation of the terms as structural coupling between different subsystems: Gunther Teubner (2001) "Alienating Justice: On the Social Surplus Value of the Twelfth Camel", in: David Nelken und Jirí Pribán (Hrsg.) *Law's New Boundaries: Consequences of Legal Autopoiesis*, Aldershot: Ashgate, 21-44.

⁴⁹ On the critique of the “new constitutionalism” in international relations Schneiderman and Tully (note 7). On the neo-liberal view of a global economic constitution Behrens (note 7) and Ernst-Ulrich Petersmann (2009) "Can International Public Goods Be Supplied Without Multilevel Constitutional Democracy and 'Constitutional Justice'?", in: Rainer Nickel (Hrsg.) *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, Oxford: Hart, ??

⁵⁰ Schepel (note 41), 11 ff., 177 ff.

In the long run, however, the one-sided limitation of societal constitutionalism to its constitutive function cannot be sustained. It is only a matter of time until, in addition to their positive effects, the freed-up systemic energies have destructive consequences of such proportions, that the resulting societal conflicts push for drastic change of constitutional politics. In the ‘dynamic disequilibrium’ between simultaneous autonomisation and limitation of the logic of subsystems, a tipping point is reached. It is no longer constitutive constitutional norms, but now limitative constitutional norms that are sought.

This is the situation after drastically 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 overridden many of the limitations that nation-states placed on the dynamics of the function systems. Unburdened by nation-state restrictions, the systems are now free to follow without constraints, globally, a programme of maximising their partial rationality. Despite their many differences, sociological analyses in the tradition of Karl Marx, Max Weber, and Niklas Luhmann all agree on the consequences of this diagnosis. Whether the laws of motion of capital, or the rationalisation of spheres of social action, or the dynamics of functional differentiation – all identify destructive energies created by the one-sided function-maximization of a social sector.

The dismantling of national production regimes releases destructive dynamics in the global systems; destructive dynamics in which the one-sided rationality-maximisation of one social sector collides with other social dynamics. Without being significantly hindered by nation-state countervailing programmes, the globalised function systems now burden themselves, society and the environment with serious ‘consequential problems of their own complete differentiation, specialisation and high achievement orientation’.⁵¹ The subsequent series of crises are not a result of irrational action. To the contrary, as the paradigmatic case of the financial crisis in 2008 showed, the financial system was a victim of its own rationality. Three fields of collision can be identified: (i) the collision of a particular sub-rationality with other sub-rationalities, (2) collision with a comprehensive rationality of world society, and (3) the collision of the function-maximisation 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 emerge which prevent the positive feedback catastrophe.

Where it becomes concrete, this contingency experience of the catastrophe may be regarded as the ‘constitutional moment’.⁵² This is not yet the moment when the structurally applied self-destructive dynamic makes the abstract danger of a collapse

⁵¹ Luhmann (note 17) 802.

⁵² Obviously, this is a variation on a theme, Bruce A. Ackerman (2000) *We the People: Transformations*, Cambridge (Mass.): Harvard University Press

appear – that is the normal state of things under functional differentiation. 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-energising processes of maximising sub-rationalities, self-correction seems to be possible only at the very last moment. The similarity with individual drug addiction therapies is obvious: ‘Hit the bottom!’ It must be one minute before midnight. Only then has today’s addiction society a chance of self-correction. Only then is the understanding lucid enough, the suffering sufficiently 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 criticise 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.

When processes in a social subsystem spin out of control in this manner, a choice must be made between state intervention and constitutionalisation. After the experience of political totalitarianism during the last century, permanent subordination to the state is not an option that is seriously discussed. The political regulation of social processes by means of global regulatory regimes is a possibility, but its meaning is ambivalent. What are the options, then? Either administrative steering of global communication processes, or external pressure for a self-limitation of the system’s choices. If it is correct that the defence of the three collisions mentioned above is central, then the second option is preferable. This is the core message of societal constitutionalism. A global constitutional order must face the challenge: how can sufficient external pressure be brought to bear on the subsystems so that the self-limitation of their possible courses of action becomes effective?

But why self-limitation and not external limitation? Does not past experience show that self-limitation strategies put the fox in charge of the henhouse? That excesses can only be prevented by the external exercise of control, backed by massive sanctions? Yet does it not also show that attempts to steer internal processes by means of external interventions are bound to misfire? Societal constitutionalism attempts to steer a difficult path between singular external interventions and pressures toward self-limitation.⁵³ What is required is a form of ‘hybrid constitutionalisation’: the exercise of state power, the enforcement of legal rules, the strong influence of social countervailing

⁵³ The usual formulation, regulation of self-regulation, is the result of a debate about the chances of social steering by politics and law. See: Robert Baldwin und Julia Black (2007) "Really Responsive Regulation", 71 *Modern Law Review*, 59-94; Wolfgang Hoffmann-Riem (Hrsg.) (2001) *Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungstaates* Berlin: Duncker & Humblot. The formula must be clarified, however, insofar as it only promises success where external irritations and internal reactions converge in the direction of a common difference-minimisation. See: Niklas Luhmann (1997) "Limits of Steering", 14 *Theory, Culture & Society*, 41-57; ders. (1989) "Politische Steuerung: Ein Diskussionsbeitrag", 30 *Politische Vierteljahresschrift*, 4-9; ders. (1990) "Steuerung durch Recht? Einige klarstellende Bemerkungen", 11 *Zeitschrift für Rechtssoziologie*, 137-160.

power from other spheres - media, public discussion, spontaneous protest, intellectuals, social movements, NGOs, trade unions - must apply such massive external pressure to the expansionist function systems that their self-limitations become truly effective. But this can only work within, and not outwith, the logic specific to a subsystem. External social influences, among them political-legal regulation can only succeed if they are transformed into the self-regulation of systemic dynamics. This requires massive interventions from politics, law and civil society: interventions, however, which, as a matter of fact, are translated into self-limiting impulses and transformed into a regime constitution.

The challenge is to combine external - political, legal and social - impulses with internal self-limitation. How that might be achieved, concretely, cannot be known in advance. Ex-ante prognoses are impossible. For that reason, there is no alternative but to experiment with constitutionalisation. The application of external pressure will be successful only if the impulses of politics, or law, or other subsystems, create such strong 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. The desired course of constitutional politics is: limitations of the inherent tendencies towards self-destruction and environmental damage.

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