

# The Project of Constitutional Sociology: Irritating Nation State Constitutionalism

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## Abstract

Trends of constitutionalisation can be identified beyond the nation state. They follow two different directions. Outside the limits of the nation state, constitutions emerge in the institutions of international politics, and they emerge simultaneously outside the limits of politics in the 'private' sectors of global society. Transnationalisation confronts constitutional sociology with three different challenges: (1) to analyse empirically ongoing constitutionalisation processes beyond the nation state, (2) to develop a theory of transnational societal constitutionalism, and (3) to formulate sociological preconditions for normative perspectives in politics and law.

## 1. THE NEW CONSTITUTIONAL QUESTION

Once again, Google has become the target of a passionate political debate.<sup>1</sup> The global search engine's 90 per cent market share, its questionable handling of users' private data and its massive expansionist tendencies into other sectors of the internet raise not only political but also constitutional questions in the strict sense. Experts are warning the public about a 'private-public gap' and a 'distortion effect' in Google's activities: A dominant search engine may have incentives to distort its 'results' in ways that increase its profits but harm society.<sup>2</sup> However, which constitutional site is actually affected by Google's market power is not easy to determine. It can be said with certainty that, due to their territorial boundaries, nation state constitutions fall short. However, Google's market power is not solely a problem of the global economic constitution. Google's information monopoly becomes a problem for the constitution of the new media which cannot be reduced to economic issues. Its worldwide digital networking activities, which

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1 Rufus Pollock, 'Is Google the Next Microsoft? Competition, Welfare and Regulation in Internet Search' (2010) 9(4) *Review of Network Economics* 4; Geoffrey A Manne and Joshua D Wright, 'Google and the Limits of Antitrust: The Case against the Antitrust Case against Google' (2011) 34(1) *Harvard Journal of Law and Public Policy* 171.

2 Pollock (n 1) 38.

have enabled massive intrusions into the rights to privacy, informational self-determination and freedom of communication, represent typical problems for the constitution of the global internet. And the lack of transparency in Google's governance structures points to constitutional questions of democracy and of public controls.

This is a matter of constitution, not merely regulation. While legal-political regulation tries to influence actors' behaviour externally, here the internal structures of the internet and of its collective actors have to be changed. In the case of Google, a constitutional change would imply a 'division of powers', dividing the 'software provision' from the 'service provision' and subjecting them to different legal regimes. A regulatory change would imply the introduction of a regulatory agency to monitor results, with confidential access to the search machine's algorithms.<sup>3</sup> What needs to be transformed is the '*constitution capillaire*,'<sup>4</sup> which extends to the finest ramifications of digital processes.

Moreover, it is not just juridification but constitutionalisation of a legal vacuum that is the challenge. And this indicates a complex interlacing of social and legal processes on the meta-level of the internet and their collective actors. It is not the information processes themselves that form the digital constitution but rather their architecture—the famous 'digital code.'<sup>5</sup> And this constitution covers not only digital code *per se* but also its interplay with legal norms, which for their part are not primary, behaviour-controlling rules but secondary rules, constitutional norms of a higher rank.

Google is exemplary of the new constitutional question, which is prompted by the tendencies of globalisation, privatisation and digitalisation of the world. In comparison to the old constitutional question of the eighteenth and nineteenth centuries, today different, although no less severe, problems become apparent. While back then the focus was on the release of the nation state's political energies and likewise its effective limitation by the rule of law, today's constitutionalisation concentrates on constraining the destructive repercussions that result from the unleashing of entirely different social energies, which are especially noticeable in the economy, but also in science and technology, in medicine and the new media.<sup>6</sup> Constitutionalisation beyond the nation state occurs as an evolutionary process going in two different directions: constitutions evolve in transnational political processes outside the nation state and, simultaneously, they evolve outside international politics in the global society's 'private' sectors.<sup>7</sup>

3 See Pollock (n 1) 39.

4 Jacques Derrida, *L'Autre cap* (Minuit, 1991) 44.

5 Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999).

6 Philip Allott, 'The Emerging Universal Legal System' (2007) 3 *International Law Forum du droit international* 12, 16 goes so far as to describe the new constitutional question as 'the central challenge faced by international philosophers in the 21st century'.

7 For a detailed elaboration see Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012). For an interdisciplinary debate on this issue see the contributions in the symposium 'Transnational Societal Constitutionalism' (2013) 20(2) *Indiana Journal of Global Legal Studies* (forthcoming). The method of comparative and interdisciplinary inquiries is discussed by Peer Zumbansen, 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order', Osgoode CLPE Research Paper No 24/2011, (2012) 1(1) *Global Constitutionalism* 16.

When sociology of law addresses these problems, it returns to the beginnings of sociology as such. According to Chris Thornhill, a leading constitutional sociologist, from the outset sociology distanced itself from the narrow perspectives of constitutional law, which confined the constitutional phenomenon to the state, and focused on modern society's constitution as a whole and its various sub-constitutions.<sup>8</sup> Today, transnationalisation confronts constitutional sociology with three different challenges:

- to analyse empirically ongoing constitutionalisation processes beyond the nation state,
- to develop a theory of transnational societal constitutionalism, and
- to formulate sociological preconditions for normative perspectives in politics and law.

Whether and how constitutional lawyers will respond to these sociological irritations remains an open question. The resistance, however, is considerable. Can transnational regimes become suitable constitutional subjects, ie are they social institutions capable of having their own constitution? Constitutional lawyers have raised this question and answered it with a resounding 'no!'<sup>9</sup> In their view, only nation states can be constitutional subjects—not international organisations or transnational regulatory regimes, and certainly not 'private' transnational regimes. So-called constitutions beyond the nation state, they argue, lack a social substrate that could provide a suitable object for a constitution. The norms of transnational regimes exert only regulatory functions, not genuine constitutional ones. It is asserted that they are unable to realise the interplay between the different arenas of public opinion and binding decision-making processes. Furthermore, it is claimed that transnational constitutionalism is limited to mere hierarchies of legal norms; however, it is unable to enshrine these in democratic processes. These arguments are not legal arguments in the strict sense, but rather sociological theses within the constitutional discourse. What are legal sociology's responses?

## 2. EMPIRICISM: CONSTITUTIONALISATION PROCESSES

First and foremost, this is a matter of empirical social research. In which sites, in what types of social conflict and with what institutional results do actual constitutionalisation processes take place in the transnational sphere? This is clearly not only a task for

<sup>8</sup> Chris Thornhill, 'Niklas Luhmann and the Sociology of Constitutions' (2010) 10(4) *Journal of Classical Sociology* 1, 2 ff.

<sup>9</sup> Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World'; Martin Loughlin, 'What is Constitutionalisation?', both in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010).

the future, as recent research has shown that constitutional norms have actually evolved in different transnational contexts. Thus, future empirical studies can build upon these findings:

*Transnational human rights:* Especially against non-state collective actors, the horizontal effects of human rights have become a prominent legal issue, particularly in public interest litigation. It has become apparent in the environmental scandals in Nigeria, in the aids debacle in South Africa, and in the incidents of child labour, land grabbing and bio piracy in developing countries, that transnational corporations have repeatedly committed serious human rights violations.<sup>10</sup> Inter-state human rights conventions are of a certain relevance here, but it is the global civil society that has proven to be the driving force when it comes to sanctioning these human rights violations. Transnational human rights are limited to their effect on states, when they are guaranteed by inter-state conventions. They do not apply automatically to international organisations or transnational regimes.<sup>11</sup> Things become different only when, like in the WTO, on the basis of international treaties an independent judiciary begins to develop, when out of mere panels of conflict negotiation genuine court institutions are established and constitutional rights are recognised. Then those courts themselves, in a common-law-like procedure, are able to determine which standards of fundamental rights should apply within transnational regimes.<sup>12</sup> Similarly, private arbitration tribunals of the International Chamber of Commerce (ICC), the International Corporation for the Settlement of Investment Disputes (ICSID) and the Internet Corporation for Assigned Names and Numbers (ICANN) decide human rights issues. They decide in fact about the scope of human rights when they are faced with the choice between different standards of fundamental rights, and determine which constitutional rights are legally binding under their regimes.<sup>13</sup> Furthermore, protest movements, NGOs and the media are involved in the creation of constitutional rights when they scandalise violations of human rights by transnational collective actors.<sup>14</sup>

<sup>10</sup> Dawn Oliver and Jorg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007); Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, 2006); Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004).

<sup>11</sup> Stephen Gardbaum, 'Human Rights and International Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge University Press, 2008), <http://ssrn.com/paper=1088039>.

<sup>12</sup> Joel P. Trachtman, 'The Constitutions of the WTO' (2006) 17 *European Journal of International Law* 623, 640 ff.

<sup>13</sup> Moritz Renner, *Zwingendes transnationales Recht: Zur Struktur der Wirtschaftsverfassung jenseits des Staates* (Nomos, 2011).

<sup>14</sup> Andreas Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (Velbrück, 2005).

*Global economic constitution:* Social science analyses of the ‘New Constitutionalism’,<sup>15</sup> economic studies of an emerging global economic constitution,<sup>16</sup> and international law studies on the growing significance of constitutional norms<sup>17</sup> have identified constitutional institutions of astonishing density in the transnational sphere. Today, only very few authors continue to deny that the European Union—despite the failure of the constitutional referendum—has developed a genuine constitution.<sup>18</sup> In the transnational sphere the Washington Consensus gave political momentum to the constitutionalisation of the global economy, which is based on the autonomy of world markets. It triggered not only political regulation but also the standardisation of constitutional principles. These principles aimed at providing an unlimited scope of action for global companies, abolishing government participation in businesses, combating trade protectionism, and freeing commercial enterprises from political regulation.<sup>19</sup> The guiding principle in the constitution of the International Monetary Fund as well as that of the World Bank was to open up national capital markets. The constitutions of the World Trade Organization (WTO) as well as the European internal market, the North American Free Trade Agreement (NAFTA), the Mercado Común del Cono Sur (MERCOSUR) and the Asia Pacific Economic Cooperation (APEC) aimed for their part at constitutional protection of the freedom of world trade and at the promotion of direct investment.<sup>20</sup> However, the production of limitative rules, as a replacement for national regulations, was not on the agenda and was even opposed as counter-productive for years. Only today, due to the experience of the debacle triggered by the recent financial crises, do collective learning processes that are looking for constitutional limits at the global level seem to be emerging.<sup>21</sup>

*Transnational regime constitutions:* International organisations, transnational regimes and global networks are today not only strongly juridified but also constitutionalised. Despite their fragmentation, they have become part of a worldwide constitutional order. To be sure, this constitutional order does not reach the density of a national constitution.

15 David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press, 2008) 328 ff.

16 Peter Behrens, ‘Weltwirtschaftsverfassung’ (2000) 19 *Jahrbuch für Neue Politische Ökonomie* 5.

17 Jan Klabbers, ‘Setting the Scene’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009).

18 See Neil Walker, ‘Post-Constituent Constitutionalism: The Case of the European Union’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2008); Joseph H Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press, 2003).

19 For a critical analysis, see Joseph Stiglitz, *Globalization and its Discontents* (Penguin, 2002) 53 ff.

20 Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford University Press, 2005); Stephen Gill, *Power and Resistance in the New World Order* (Macmillan, 2003).

21 Poul F Kjaer, *The Structural Transformation of Democracy: Elements of a Theory of Transnational Constitutionalism* (Routledge, forthcoming 2013).

The global institutions that were born out of the agreements of the 1940s—the Havana Charter, GATT, Bretton Woods; the new institutions of the Washington Consensus—the IMF, the World Bank, WTO; but also the recent public debate about a global ‘financial market constitution’ and pleas for a worldwide ‘democratic constitutionalism’, speak the language of actual existing global sub-constitutions.<sup>22</sup>

*Lex mercatoria*: Above its contractual norms this self-created law of the global economy has created a layer of constitutional norms. In the *lex mercatoria* a hierarchy of norms exists, on top of which is the so-called ‘*ordre public d’arbitrage international*’, which in fact consists of constitutional norms, principles, procedural rules and human rights. Detailed analyses of arbitration tribunals have identified a variety of such self-created constitutional norms of international arbitration. Private arbitration tribunals determine the property principle and freedom of contract, as well as competition rules and human rights, as components of transnational public policy.<sup>23</sup>

*Corporate constitutionalism*: A dynamic sector of transnational constitutionalisation has emerged that deals with the internal structure of corporations. Triggered by a first wave of ‘neo-liberal’ constitutionalisation, corporate constitutions focused on providing transnational companies with strong autonomy.<sup>24</sup> The corporate governance principles of multinational companies promoted business autonomy, capital market orientation and the establishment of shareholder values. This emerging global corporate constitutionalism aimed at two things: first, to loosen the strong structural linkage between transnational companies and national state politics and law; and secondly, to establish the rule of law insofar as it is necessary for a worldwide network of their functional specific communications. However, following the high number of corporate scandals in recent years, the so-called Corporate Codes of Conduct are surfing on a second wave of constitutionalisation, which is aimed at limiting companies’ activities. By means of private ordering, they attempt—for the benefit of various stakeholders in society—to break the shareholder-orientation and to engender social responsibility in the sectors of work, product quality, environment and human rights.<sup>25</sup>

22 David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’ (2011) 2(2) *Journal of International Dispute Settlement* 1.

23 See Renner (n 13) 92 ff; Jan H Dalhuisen, ‘Legal Orders and their Manifestations: The Operation of the International Commercial and Financial Legal Order and its *Lex Mercatoria*’ (2012) 24(1) *Berkeley Journal of International Law* 129.

24 Larry Catá Backer, ‘The Autonomous Global Enterprise: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality’ (2006) 41 *Tulsa Law Review* 541.

25 Gavin W Anderson, ‘Corporate Constitutionalism: From Above and Below (but Mostly Below)’, *The Constitutionalization of the Global Corporate Sphere?*, paper presented at Copenhagen Business School, Copenhagen, 17–18 September, 1; Peer Zumbansen, ‘“New Governance” in European Corporate Law Regulation as Transnational Legal Pluralism’ (2009) 15(2) *European Law Journal* 246.

*Global administrative law:* This is the most recent candidate for constitutionalising transnational sectors.<sup>26</sup> Today, there exist more than 2,000 global regulatory agencies in the form of international and intergovernmental organisations.<sup>27</sup> In contrast to the administrative law of the UN and general international law, which apply only within the internal space of institutionalised politics, the norms of this administrative law regulate directly the various sectors of global society that they affect. Through regulation of the social environment, forms of ‘private ordering’ are emerging, which cannot be captured by the categories of traditional ‘public’ administrative law. This development emphasises the ‘societal’ character of global administrative law. Regulatory competences are shifting, vertically, from nation states to international regimes and, horizontally, from states to non-public actors—transnational companies and collective actors in civil society.<sup>28</sup> The constitutional norms that are developed here include, importantly, due process of regulation, notice-and-comment rules, compulsory consultation with experts, the principle of proportionality, and respect for human rights.

*Constitutionalisation of international law:* This much-debated phenomenon also plays a role in the constitutionalisation of global subsystems.<sup>29</sup> Here, three complexes of norms, namely *jus cogens*, norms with validity claim *erga omnes* and human rights, which indeed dispose of constitutional qualities, are pushed to the foreground.<sup>30</sup> As a characteristic of universal values they waive the element of state consensus and develop their legal bindingness against states that have not given their consent. Such genuine constitutional norms are developed by changing the basic structure of international law. In the past, the basic structure was an ensemble of contractual relations between sovereign states. Now it has been transformed into an independent legal order that in the ‘*ordre public transnational*’ establishes its foundation with its own constitutional norms. Only this constitutionalisation allows international law to do what seems unthinkable for a mere contractual order that is not supported by a comprehensive legal order: to impose legally binding norms against the explicit will of contracting parties, which are legitimised not through state contracts but through a common-good-oriented legal order.<sup>31</sup>

26 Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68(3) *Law and Contemporary Problems* 15.

27 Sabino Cassese, ‘Administrative Law Without the State: The Challenge of Global Regulation’ (2005) 37(4) *NYU Journal of International Law and Politics* 663, 671.

28 Larry Catá Backer, ‘Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law’ (2006) 37(2) *Columbia Human Rights Law Review* 101, 107.

29 See Dunoff and Trachtman (n 11); Jochen A Frowein, ‘Konstitutionalisierung des Völkerrechts’ in Klaus Dickey *et al* (eds), *Völkerrecht und internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (Müller, 2000).

30 See Stephen Gardbaum, ‘Human Rights and International Constitutionalism’ in Dunoff and Trachtman (n 11); Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19(3) *Leiden Journal of International Law* 579, 585 ff.

31 Karsten Nowrot, ‘Die transnationale Verantwortungsgemeinschaft im internationalen Wirtschaftsrecht’ in Christian Tietje and Karsten Nowrot (eds), *Verfassungsrechtliche Dimensionen des internationalen Wirtschaftsrechts* (Boorberg, 2007) 59 ff.

In all these sectors, the task of socio-legal analysis is to identify the specific features of global constitutionalism as compared to its national counterparts.<sup>32</sup> The search for transnational equivalents to the traditional constitutional subject, the nation state, is given priority. What are the new constitutional subjects under the conditions of globality? The system of international politics itself? Global function systems? International Organisations? Transnational regimes? Global networks? New assemblages, configurations or ensembles? The answer depends on whether such non-state institutions enable sustainable analogies to the *pouvoir constituant* of the nation state, to self-constitution of political collectives, to democratic decision-making and to organisational rules of a political constitution in the strict sense.<sup>33</sup>

Which collective actors and which power relations are the driving forces behind the constitutionalisation of transnational configurations? This question forms the focus of much legal sociological research, particularly following the recent financial crisis. In particular, the question of what role the nation states play with regard to the constitutionalisation of world societal institutions arises. Are they the constitutional legislator for other sectors of world society? Or only participating observers of autonomous societal constitutionalisation processes? Coordinators of conflicting systemic dynamics? Possibly, societal forces are more relevant than nation states.<sup>34</sup> Civil societal countervailing forces—the media, public debate, spontaneous protest, intellectuals, social movements, NGOs, trade unions, professions—exert considerable pressure on the internal constitutionalisation of transnational regimes.

To identify peculiar constitutional principles, which in contrast to the political principles of state constitutions each reflect the diversity of the underlying social system: therein might exist the specific contribution of legal sociology to the constitutional debate. If legal practice re-specifies transnational human rights in different social fields, this does not merely mean that originally state-oriented human rights are to be adjusted to the peculiarities of private law, as legal scholars usually assert. A mere legal doctrinal approach that adapts only constitutional values to the system of private law misses the peculiarities of the different social contexts. Human rights need to be released from their state-orientation and are to be newly calibrated to the specific threats that are produced by other social systems. If the constitutions of the economy, science, the mass media and the health system now legally formalise their communicative media on a global basis, fundamental rights must be redirected to them.

<sup>32</sup> For first steps in this direction, see Teubner (n 7) chs 3–5.

<sup>33</sup> Lars Viellechner, 'Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law' (2012) 4(2) *Goettingen Journal of International Law* 599.

<sup>34</sup> Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press, 2011) ch 6.



### 3. THEORY: THE UBIQUITY OF THE CONSTITUTIONAL PHENOMENON

#### A. A Multidisciplinary Debate

Constitutions are too important to be left to constitutional lawyers and moral philosophers. In very different disciplines there are theoretical traditions that criticise the restriction of constitutionalism to the nation state and pose the constitutional question for various sectors of society.

The renowned historian Reinhart Koselleck has offered a fierce critique of constitutional lawyers—namely that they still today focus their attention exclusively on nation states.<sup>35</sup> He demands that the historical reality be recognised: that for centuries not only the nation state constitution but also the more comprehensive societal constitution has existed, which embraces economical, societal and cultural institutions. Likewise, Koselleck firmly emphasises the new transnational constitutionalisation. However, due to the state-centredness of conventional constitutionalism it is impossible ‘to address the post-statal, in a way supranational, phenomena of our times’.<sup>36</sup>

In a similar vein, classical sociology did pose the constitutional question not only for the state but also for all societal sectors. Emile Durkheim established a correlation between basic societal structures—segmental differentiation vs division of labour—on the one side, and societal constitutional norms—mechanic vs organic solidarity—on the other.<sup>37</sup> In the sociology of organisation, the theory of ‘private government’ has pioneered the debate and revealed the genuinely political character of commercial enterprises and other private organisations which required the transfer of political principles to private organisations.<sup>38</sup> Within organisations that are apparently exclusively centred around economic efficiency, genuine political power processes could be discovered and analogies to the larger political systems could be drawn. By means of analogy to constitutional state-political governments, private governments are required to establish legitimacy through explicit political configuration of organisational rules and ensure their members’ sphere of freedom through constitutional rights.

The claim to constitutionalisation spread through the entire economy: this was the theme of theories of economic democracy. The basis was the political ‘idea of a Labour Constitution’, which means ‘a social order which grants workers participatory rights via statute law or collective agreements and thus limits exclusive shareholder rights’.<sup>39</sup> With

<sup>35</sup> Reinhart Koselleck, *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Suhrkamp, 2006) 369 ff.

<sup>36</sup> *Ibid.*, 369.

<sup>37</sup> Emile Durkheim, *The Division of Labor in Society* (Free Press, 1933 [1883]) ch 3.

<sup>38</sup> The *locus classicus* is Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage, 1969) 75 ff, 259 ff.

<sup>39</sup> Hugo Sinzheimer, ‘Das Wesen des Arbeitsrechts’ in Hugo Sinzheimer (ed), *Arbeitsrecht und Rechtssoziologie* (Europäische Verlagsanstalt, 1976 [1927]) 108 ff.

time, this idea has become more generalised. The political constitution is understood as a 'societal' overarching institution, with the consequence that democratic participation and guarantees of constitutional rights should be extended from the political process to all socially relevant organisations.<sup>40</sup> Such programmes postulate constitutions for all social sectors following the model of democratic politics. The programmes are based on theories of societal transformation, such as Polanyi's, which register the unstoppable economisation of society but at the same time also identify social counter-movements that reconstruct the 'protective cloak of culture specific institutions' against the total economisation of society.<sup>41</sup>

Economic constitutionalism has been discussed in depth in an exemplary controversy, whose representatives in Germany are Hans-Joachim Mestmäcker and Rudolf Wiethölter. Ordo-liberal theory claims that property, contract, competition and monetary institutions form an autonomous economic constitution that emerges not merely from the constitutional law of the state but from the interplay of economic self-regulation, economic theories and legal-political norms. The legitimacy of economic constitutionalism is based not on the political decisions of the legislature but primarily on the autonomy of economic action.<sup>42</sup> In contrast, the 'political theory of law' focuses on a '*Rechtsverfassungsrecht*' for all social sectors with the aim of institutionalising the political in 'society as society'. This is formed 'not just from the "democratic" unified sum of such citizens, but it also "organises" institutionalisations for decision-making, communication and education processes'.<sup>43</sup>

Theories of neo-corporatism that identify a variety of societal sub-constitutions have become very influential, both in practice and in theory.<sup>44</sup> Politico-economic theories of the 'varieties of capitalism' have clarified the peculiarities of neo-corporatist regimes.<sup>45</sup> This variant of a societal constitutionalism, in which organised interests from different social sectors exert quasi-public functions, was particularly influential in the 1970s, before it was repressed by the wave of liberalisation. However, following the great financial crisis it regained currency.

40 Ulrich K Preuss, 'The Guarantee of Rights: Horizontal Rights' in Michel Troper and Dominique Chagnollaud (eds), *Traité international de droit constitutionnel, Tome III* (Dalloz, 2012); Helmut Ridder, *Zur verfassungsrechtlichen Stellung der Gewerkschaften im Sozialstaat* (Fischer, 1960) 18; Helmut Ridder, *Die soziale Ordnung des Grundgesetzes* (Westdeutscher Verlag, 1975) 47 ff.

41 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (Farrar & Rinehart, 1944).

42 Ernst Joachim Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (Nomos, 2003).

43 Rudolf Wiethölter, 'Justifications of a Law of Society' in Oren Perez and Gunther Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart Publishing, 2005); Rudolf Wiethölter, 'Zur Regelbildung in der Dogmatik des Zivilrechts' (1992) 45 *Archiv für Rechts- und Sozialphilosophie, Beiheft* 222, 238.

44 Wolfgang Streeck and Philippe C Schmitter, *Private Interest Government: Beyond Market and State* (Sage, 1985).

45 Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

A mature theory of societal constitutionalisation was eventually presented by David Sciulli.<sup>46</sup> Starting from Max Weber's dilemmata of modern rationalisation, he poses the question whether there exist any forces opposing the existing massive evolutionary drift towards increasing authoritarianism in modern societies. The only social dynamic that in the past has effectively counteracted the drift and in future can offer resistance is, according to Sciulli, to be found in the institutions of 'societal constitutionalism'. What really counts is the social institutionalisation of 'collegial formations' that can be identified in specific organisational forms of professions and other norm-producing deliberative institutions.

### B. A Constitutional Concept for the Transnational Context

The current challenge for constitutionalism is to capture those different strands of theories and to reformulate them according to the new global situation. Primarily it is a matter of developing a constitutional concept that is adequate for transnational regimes. How far do the principles of nation state constitutions have to be generalised in order to avoid the fallacies of methodological nationalism? And how do they have to be re-specified for the peculiarities of diverse societal institutions in a globalised world? Such a method of generalisation and re-specification will have to answer the following question: Is it possible to identify a transnational equivalent to nation state constitutions in terms of functions, arenas, processes and structures?

It should be self-evident today that a 'formal' constitutional concept is too narrow. Instead, constitutions outside the state need to satisfy the requirements of a 'material' concept of constitution, according to which a constitution establishes a distinct legal authority which for its part structures a *societal* process (and not merely a political process, as in nation state constitutions) and in turn is legitimised through this process.<sup>47</sup> In order to qualify as constitutional norms, the norms of transnational regimes have to pass the following quality tests:

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

Regime constitutions fulfil the constitutive function when they formalise the autonomy of their own communication medium and are doing so on a globalised scale. By means of constitutive rules<sup>48</sup> the respective constitution regulates the abstraction of a uniform communicative medium—power, money, law, knowledge—as an autonomous

<sup>46</sup> David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxistic Critical Theory* (Cambridge University Press, 1992).

<sup>47</sup> Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called' (2006) 54 (Supplemental Issue) *American Journal of Comparative Law* 505, 508.

<sup>48</sup> John R Searle, 'Social Ontology: Some Basic Principles' (2006) 6(1) *Anthropological Theory* 12.

social construct within a worldwide functional system. For that reason, organisational rules, procedures, competences and subjective rights are developed, the separation between different social spheres is codified, and thus the functional differentiation of society is supported.

Regime constitutions fulfil the limitative function, which is of particular significance today, when they develop norms of constitutional self-restraint. This is not just a special problem for the political system but one for all sectors of society.<sup>49</sup> Differences only follow from the respective reproductive conditions. Only politics constructs its constitution to aggregate power and consensus for collective decisions and must use the medium of power for its self-limitation. Other social systems have to align their constitutional limitations on their own communicative media.

(2) *Constitutional arenas*: Is it possible to identify different arenas of constitutionalisation, comparable to the arenas of organised political processes and of spontaneous processes of public opinion, as they are regulated in the organisational part of state constitutions?

Societal constitutionalism turns the existence of a variety of ‘reflection-centres’ within society, and in particular within economic institutions, into the main criterion of a democratic society.<sup>50</sup> The internal differentiation of function systems into an organised-professional sphere and a spontaneous sphere plays a key role in the interplay between these reflection-centres. Within the organised-professional sphere, a further differentiation can be observed between decentralised organisations and centralised self-regulating institutions. The political constitutions have already given shape to the corresponding internal differentiation of politics. In their organisational part, they enact detailed sets of norms, procedural rules for elections and rules for parliamentary and governmental decisions. Yet even the other function systems constitutionalise different internal areas: not only their organised-professional area (ie corporations, banks, internet intermediaries, health organisations, professional associations and universities) but also their spontaneous area (ie the various function-specific constituencies).

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

This connection to nomic community is produced by what is here called ‘double reflexivity’. The primary aspect of constitutionalisation is always to self-constitute a social system: the self-constitution of politics, the economy, communications media, or public health.<sup>51</sup> One must take into account the fact that constitutions are primarily social pro-

49 Riccardo Prandini, ‘The Morphogenesis of Constitutionalism’ in Dobner and Loughlin (n 9) 312 ff.

50 See Sciulli (n 46).

51 Chris Thornhill, ‘Towards a Historical Sociology of Constitutional Legitimacy’ (2008) 37(2) *Theory and Society* 161, 169 ff.

cesses and only secondarily legal processes. However, such a medial reflexivity does not yet generate constitutions in the technical sense; it enables only the self-foundation—not yet the constitutionalisation—of social systems. Whether in politics, economics or in other sectors, one can only speak of constitutions in the strict sense when the reflexivity of a social system is structurally linked to the reflexivity of law, ie to secondary rules. Constitutions emerge when such phenomena of double reflexivity arise—the reflexivity of the self-constituting social system and the reflexivity of the law that supports its self-foundation.

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

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

Only under the condition that a transnational configuration disposes of all these features can one speak of a transnational constitution in the strict sense.

#### 4. POLITICS AND LAW: SELF-LIMITATION OF SOCIETAL GROWTH COMPULSIONS

Should constitutional law be receptive to sociological analyses of transnational constitutionalisation, then it would be required at the same time to maintain a sufficient distance from its neighbouring discipline. Constitutional sociology can by no means predetermine legal principles, not to mention individual constitutional rules. Instead, constitutional law should focus on an interdisciplinary division of labour, in which each discipline renders an autonomous contribution from its own perspective. This means:

constitutional sociology examines the intrinsic logic of transnational configurations, discovers the characteristics of transnational constitutionalisation processes, and develops alternatives to structural solutions. In its turn, constitutional law responds to these irritations and develops out of its own intellectual traditions independent concepts, principles and rules for transnational constitutions that can be applied as appropriate legal solutions to their constitutive and limitative problems.

Today, constitutional law needs to concentrate on developing *limitative rules* for transnational regimes. The reason is that sociology has identified massive growth compulsions with destructive consequences in various function systems. In the economy, inherent pressure for ever-increasing production is a precondition of its self-reproduction, but this pressure is driven to such an extent that a descent into destructive tendencies is the consequence.<sup>52</sup> However, this pressure is found not only in the economy but also in other functional systems. Such growth compulsion goes beyond the acceleration circle of modern society diagnosed by Hartmut Rosa and William Scheuerman.<sup>53</sup> It is not only about the social alteration of time structures, which boil down to an acceleration of social processes. This is only the temporal dimension of a general dynamic. One needs to pay attention to material and social dimensions as well. In its material dimension, this dynamic manifests itself as the growth imperative of symbolic production, ie as a tendency to multiply operations of the same kind.<sup>54</sup> In its social dimension, it occurs as a social epidemiology, ie manifesting itself through imitation, spreading and contagion, as has been studied in particular in analyses of the 'herd instinct' in financial markets.<sup>55</sup> Overall, this is a question of advance contributions that generate expectations of performance enhancements, which in turn themselves exact the next advance contributions. In other words, something that begins as a dynamic necessary for system maintenance has a tendency to slide into socially harmful excess.

Constitutional law is confronted with the task of developing constitutional rules that are in a position to respond to the motivation-competence dilemma that transnational regimes are facing. Civil society movements, the spontaneous areas of functional systems, the courts and state politics, develop great motivation in order to limit the expansive tendencies of the regimes. However, what they are lacking is the knowledge, the capacity for action and the power of implementation that is required to achieve such changes successfully. In contrast, in transnational regimes these capacities are highly developed; however, due to their interest in self-maintenance, their motivation for self-limitation is mostly missing. In this situation of 'new obscurity', as indicated

<sup>52</sup> Hans Christoph Binswanger, *Vorwärts zur Mässigung: Perspektiven einer nachhaltigen Wirtschaft* (Murrmann, 2009).

<sup>53</sup> Hartmut Rosa and William E Scheuerman (eds), *High-Speed Society: Social Acceleration, Power and Modernity* (Penn State Press, 2009).

<sup>54</sup> Rudolf Stichweh, 'Towards a General Theory of Function System Crisis' in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing, 2011).

<sup>55</sup> Urs Stäheli, 'Political Epidemiology and the Financial Crisis' in Kjaer, Teubner and Febbrajo, *ibid.*

appropriately by Habermas, the only way out remains a 'siege' of organised-professional regimes through a political general public.<sup>56</sup> It is only changes in the internal constitution of transnational regimes that are able to raise their irritability towards the demands of civil society, courts and state politics.

How such a capillary constitutionalisation can succeed in a concrete manner, no one can predict. *Ex ante* prognoses are in principle impossible. Thus, there are no alternatives to an experimental constitutionalisation. Political interventions are indispensable in countering the self-threatening elements of subsystemic rationality, their aim being to introduce new possibilities by breaking down self-blockages, but not to confront it with a different state rationality. Political and legal regulation and external societal influence are only likely to succeed if the practical form they take is the self-domestication of systemic growth dynamics. This calls for massive external interventions from politics, law and civil society—but only those designed to translate into self-transformation and whose translation into internal processes of change actually succeeds.

<sup>56</sup> Jürgen Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies' (1986) 11(2) *Philosophy and Social Criticism* 1.