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Reflections on the Constitutionalization of the World Power System

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The Paris research project on transnational companies corporate citizenship raises one of the most difficult issues of our time, that of the new constitutional question. Can the power that private collective actors build up in the transnational space be effectively limited through constitutional constraints?

A series of public scandals has erupted in recent years. Multinational companies have violated human rights; the World Trade Organisation has taken controversial decisions that threaten the environment and people's health in the name of global free trade; there has been doping in sport and corruption in science and medicine; private intermediaries have threatened freedom of expression on the Internet; private organisations have gathered information that has greatly infringed upon the private sphere and, most recently, catastrophic risks have been unleashed on the global financial markets with clear disregard. As the writings of Jean-Philippe Robé clearly illustrate, all of these scandals not only pose problems for regulation, but also constitutional problems in the strict sense. It is the constitutionalisation of social dynamics that is at stake and not merely the adoption of state regulation policies. Compared with the constitutional question of the 18th and 19th centuries, these are problems of another sort, but no less concerning, which arise today. If it was once about releasing the political energies of the power of the nation state and, at the same time, effectively limiting them by the rule of law, it is now, in the case of the new constitutional question, about releasing completely different social energies – particularly significant in the economy, but also in the areas of science and technology, medicine and new media – and effectively limiting their destructive effects.¹ Nowadays, these energies – in a productive and destructive way – are unloaded in social spaces beyond the nation state. The above-mentioned scandals cross the borders of the nation state in a dual manner. Constitutionalism beyond the nation state means two things: constitutional problems arise simultaneously outside of the boundaries of the nation state in transnational political processes, and outside the institutionalised political sectors: in the “private” sectors of global society.

The remarkable outcome of the Paris project is, in my view, how it succeeded in linking three different approaches: a comprehensive theory of the power of multinational companies, an original vision of the constitutionalization of the so-called private collective actors and detailed reform proposals, which indicate how such constitutionalization can be reached.

I fully agree with these three approaches. It seems to me that with the article by Jean-Philippe Robé, the Paris project has made a big step forward, not only in terms of considering the new constitutional question as a problem, but also in terms of showing wide-ranging, yet at the same time, very detailed possible solutions. There is one point about which I would formulate some qualifications. It is about the question whether constitutional rules for enterprise will be part of the constitutions of the state

¹ Philip Allott goes as far as to describe the new constitutional question as the “central challenge facing international philosophers of the 21st century” in “The Emerging Universal Legal System”, in *International Law Forum du droit international* 3 (2001), p. 12-17, here: p. 16.

world or whether they form part of a societal constitutionalism.² There are, in my opinion, three difficult problems, which would suggest to prefer the second alternative. These three problems are posed by (1) the impossibility of a world constitution, (2) the difficulties of a perspective focusing on the State and (3) the reduction of constitutional problems to problems of social power. I would like to stress the importance of a constitutional pluralism in national and transnational, in public as well as in private contexts, and lastly, I'd like to discuss one of the many examples offered by transnational societal constitutionalism, namely the codes of conduct for multinational firms.

I. Three problems

1. The impossibility of a cosmo-political world constitution

With a sober sense of realism, Robé denies a world-state as a substrate of a single constitution but instead he claims that there

“exists a global ‘system of power’, the ‘public’ and ‘private’ components of which have a constitutional origin rooted in positive state constitutions, which has subsequently been extended by means of international treaties.’ This system has an effectiveness and, in this sense, a world constitution is already at least partially in place.”³

If one takes serious the idea of a world constitution, the constitutionalization of international law would be considered, as far as possible, by analogy with the constitutional law of nation states: a hierarchy of constitutional law against ordinary law. The entire world would be seen as a single domain of validity extending to all national, cultural and social fields.⁴

The project of a world constitution presents spectacular extensions with respect to the constitutional tradition. But it ultimately is not able to free oneself from the fascination with the architecture of the nation state and instead simply seeks to offset the obvious shortcomings by suggesting all kinds of compensations, supporting elements, reconstructions, foundations and decorative facades, which only serve to complicate the construction instead of building anew. The problem of such an approach lies in the fact that it centres on the State constitution. It must be recognised that this approach has the courage to rethink the constitution towards a political whole, in the light of intergovernmental process, via the inclusion of social actors, through the structural effect of fundamental rights in society, but it nevertheless remains committed to an understanding of the constitution whose role would be to liberate and to limit state action.

My main hypothesis is the following: we are witnessing the emergence of a multiplicity of civil constitutions. The constitution of a world society does not exclusively occur in the representative institutions of international politics. It can equally no longer take place in a world constitution encompassing all sectors of society. Rather, it develops gradually around the constitutionalization of a multiplicity of autonomous sub-systems of world society. This is the central message of a transnational societal constitutionalism.

² Robé formulates his reservations against societal constitutionalism in such a way that his « analysis differs from certain current attempts to develop a constitutional theory free of any reference to the nation State », J. Robé, *Globalization and Constitutionalization of the World Power System*, in this volume, fn. 68.

³ Robé, Jean-Philippe (2012) "L'entreprise et la constitutionnalisation du système-monde de pouvoir", in: Roger Baudoin (ed.) *L'entreprise, formes de la propriété et responsabilités sociales*. Paris: Lethielleux, 281-354, 313. A rigorous analysis of the different variants of a cosmo-political world constitution is offered by Ignacio de la Rasilla del Moral (2011) "At King Agramant's Camp: Old Debates, New Constitutional Times", 8 *International Journal of Constitutional Law*, 580-610.

⁴ A well-conducted critique of such "constitutional illusions" of a world state constitution is in Andreas Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte*, Weilerswist, 2005, p. 247 et seq.

2. The fixation on the State

A sociological theory of societal constitutionalism, which has thus far remained unheard in the debate on the constitution, reduces the state-centricity of traditional constitutionalism. This constitutional theory relies on four distinct variants of sociological theory. It essentially uses general theories of functional differentiation according to which the internal constitution of the social sub-systems – and not only of the state – is the central problem.⁵ In addition, it relies on a particular field of sociology – a recently developed sociology of constitutions⁶– and on the theory of private government⁷ and the concept of societal constitutionalism.⁸ In addition, a sociological theory of the constitution promises to connect historical-empirical analyses that have been made from constitutional phenomena, standardised perspectives.⁹

What is it that makes the sociology of constitutions different? The fact that it not only raises the constitutional question within the context of the relationship to politics and the law, but that it poses the question for all areas of society.

In this sense, the problem has been completely changed. It is not only, that the question of constitutionalization arises with regard to the world state of international politics or international law, but that it does for other independent sectors of global society as well, for the global economy first of all, but also for science and technology, education, media and public health. Does a societal constitutionalism have the necessary potential to stem, in addition to expansionist trends in the political system, the expansionist trends, which are no less problematic today, of many other social sub-systems that threaten the integrity of individuals and institutions? Can constitutions effectively fight centrifugal dynamics in the sub-systems of global society and thereby contribute to social integration – in a totally different manner from that of the classical understanding of integration by the constitution? Sociological theories can give a boost to these questions that arise with new urgency in the face of globalisation and privatisation trends.¹⁰ They call into question the fundamental assumptions of the current debate on transnational constitutions, replacing them with other hypotheses and thus identifying problems of a new kind and suggesting different practical consequences.¹¹

⁵ General sociological theories of functional differentiation in the tradition of Emile Durkheim, Georg Simmel, Max Weber, Talcott Parsons, Pierre Bourdieu, and Niklas Luhmann give a different slant on the issue of whether the state constitution can serve as constitution for the whole society, or whether the social sectors develop autonomous constitutions.

⁶ From a programmatic viewpoint, Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge, 2011 ; see also Gert Verschraegen, “Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights », in Mikael Rask Madsen, Gert Verschraegen (ed.), *Making Human Rights Intelligible: Towards a Sociology of Human Rights*. Oxford: Hart, 61-80.

⁷ The theory of private government has been developed by Philip Selznick in *Law, Society and Industrial Justice*, New York, 1969.

⁸ The concept of a *Societal Constitutionalism* (as opposed to a narrow *Political Constitutionalism*) was brought up for discussion by David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory*, Cambridge, 1992.

⁹ Chris Thornhill, “Towards a Historical Sociology of Constitutional Legitimacy”, in *Theory and Society* n° 37/2008, p. 161-197, p. 163 et seq.

¹⁰ For first steps toward a transnational societal constitutionalism, which states that in transnational space, numerous social sub-systems develop specific constitutions beyond the state, 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; ders. (2004) "Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?", in: Christian Joerges, Inger-Johanne Sand und Gunther Teubner (Hrsg.) *Transnational Governance and Constitutionalism*, Oxford: Hart, 3-28. idem (2012) *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford: Oxford University Press.

¹¹ Meanwhile, research (significantly different in detail) on transnational societal constitutionalism has proliferated: Jean de Munck, “Law in the Global Age: Heading toward a Societal Constitutionalism”, in this volume; Poul F. Kjaer (2014)

3. Beyond social power

A state-centric approach presents a third problem. This approach considers, incorrectly, that the constitution of companies and, in particular, the horizontal effect of fundamental rights is exclusively a problem of social power. Their real objective is missing: to limit by law the expansion of social sub-systems that do not always take place through the medium of power.

If the task is to limit by constitutional means the strong expansionist tendencies that have their origin in the specific logic of social sub-systems, then a State conception of fundamental rights is no longer preserved. We cannot assign them only to the individual players, nor focus them exclusively on the social phenomena of power, nor provide them with the form of autonomous spaces guarded by subjective rights. Can we develop an approach here, which declares that fundamental rights can work against the media of social communication themselves – power, but also profit, technology, knowledge, information media – instead of against the actors? Is it not then a case of protecting not only the fundamental rights of individuals, but also those of social institutions? Should the social effect of fundamental rights not be implemented through organisation and procedure rather than through subjective rights?

II. Constitutional pluralism

The alternative route to statist societal constitutionalism is a constitutional pluralism on a national as well as transnational scale. In this, it's necessary to see the result of experiments that were carried out in the past with four different concepts of the constitution of society.¹²

Constitutionalism in the Global Realm: A Sociological Approach, London: Routledge; Verschraegen, "Differentiation and Inclusion"; Hugh Collins, "The Constitutionalisation of Private Law as a Path to Social Justice" in Hans Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law*, London, 2011, p. 133-166; Pablo Holmes, "The Rhetoric of Legal Fragmentation and its Discontents: Evolutionary Dilemmas in the Constitutional Semantics of Global Law", in *Utrecht Law Review* n° 7, 2011, p. 113-140, here: p. 121 et seq.; Lars Viellechner, "The Constitution of Transnational Governance Arrangements: Karl Polanyi's Double Movement in the Transformation of Law", in Christian Joerges, Josef Falke (ed.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Oxford, 2011, p. 436-464, here: p. 449 et seq.; Graf-Peter Callies and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, Oxford, 2010, *passim*; Chris Thornhill, "Niklas Luhmann and the Sociology of Constitution" in *Journal of Classical Sociology* n° 10, 2010, p. 1-23; Hans Lindahl, "A-Legality: Postnationalism and the Question of Legal Boundaries", in *Modern Law Review* n° 73, 2010, p. 30-56, here: p. 33 et seq.; Riccardo Prandini, "The Morphogenesis of Constitutionalism", in Petra Dobner, Martin Loughlin (ed.), *The Twilight of Constitutionalism ?*, Oxford, 2010, p. 23-46, here: p. 40 et seq.; Larry Catá Backer, 2009, *Transnational Corporate Constitutionalism?* (<http://lcbackerblog.blogspot.com/2009/06/gunther-teubner-on-complications-of.html>); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge, 2008; Marc Amstutz et al., "Civil Society Constitutionalism: The Power of Contract Law", in *Indiana Journal of Global Legal Studies* n° 14, 2007, p. 235-258; James Tully, "The Imperialism of Modern Constitutional Democracy", in Neil Walker, Martin Loughlin (ed.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford, 2007, p. 315-338, here: p. 328 et seq.; Reinhart Koselleck, "Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung" in Reinhart Koselleck, *Begriffsgeschichten. Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*, Frankfurt, 2006, p. 365-401, here: p. 369 et seq.;

¹² Véronique Champeil-Desplats, « Constitutionalization Outside of the State? A Constitutionalist's Point of View », in this volume, develops an informative typology for different versions of societal constitutionalism – (1) structural, (2) institutional, (3) contractualist, (4) axiological - which highlights relevant differences among them. My own version seems to be close to the institutional and the structural. But none of them really fits. I would suggest a fifth type: a socio-legal version. It would stress the co-originality of the social and the legal processes within a constitution, their clear-cut autonomy and separation, their mutual interrelation in a "hybrid", or "symbiotic", or "co-evolutionary" process.

1. The autonomy of societal constitutions

The tendency of liberal constitutionalism to ignore social sectors is discredited today. The totalitarian model that extended a massive regulation of the State to all sectors of society is rightly discredited. In contrast, we find the current concepts of the welfare state on the right, which emphasize that the State must prescribe the constitutions of the social sectors but at the same time respect their autonomy. However, the incessant injection of uniform political procedures of power and the consensus in the various social sectors has a counter-productive effect. Economic theories of law rely on the autonomy of the sectorial constitution of the economy. But they lose their credibility by relying exclusively on economic rationality, deeming all other rationales to be irrational and relying on integration of the whole society via market and competition.

It therefore comes down to sailing between the Scylla of the societal constitutions of the welfare state and the Charybdis of a purely economic constitutionalization. A compass is provided by the “law of conflict of rights” in the sense of Rudolf Wiethölter, according to whom sectorial societal constitutions are self-contained and have no need of political intervention in the event of a crisis.

Taking autonomy seriously means relying on self-determination and at the same time on the inevitable externalisation which should not be understood as outside determination but rather as potential support from outside in situations where self-help is not possible. It could be compared to therapeutic assistance or support structures outside the law.¹³

Indeed, different variants of constitutional pluralism try, in effect, to maintain this difficult pathway.¹⁴ The sociological theory of private government has conducted pioneering work here insofar as it has analysed the companies and other private organisations such as political power associations and has encouraged, therefore, a transfer of political principles towards private organisations.¹⁵ It is, therefore, in terms of legal policy, a criticism and a dismantling of the power and, in any case, of the legitimacy and limitation – and even the constitutionalization – of economic power. Just as with the constitution of politico-state power, private governments should establish their legitimacy in combining their organisational rules in an explicitly political way and by protecting their members’ areas of freedom by elements equivalent to fundamental rights.

However, the theory of private government is too closely related to formal organisations or even only to financial companies. That the claim to constitutionalization be extended to the entire financial process and other societal processes at the same time is what theories on a larger scale supporting a societal and financial constitution of the welfare state are calling for. The starting point was the political idea of the “constitution of labour” (Sinzheimer), i.e. “of each order that calls for employees – in the areas determined by law or by contract – to exercise all rights of decision, reserved previously and exclusively to employers”.¹⁶ This idea became more widespread as a consequence. Democratic

¹³ Rudolf Wiethölter, “Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung: Fragen eines lesenden Recht-Fertigungslehrers”, in *Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft* 3, 1988, p. 1-28, here: p. 27 et seq. Idem (2005) “Just-ifications of a Law of Society”, in: Oren Perez und Gunther Teubner (ed.) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart, 65-77.

¹⁴ The main representative of constitutional pluralism is Neil Walker, “The Idea of Constitutional Pluralism”, in *Modern Law Review* 65, 2002, p. 317-359.

¹⁵ The key texts are: Philip Selznick (1969) *Law, Society and Industrial Justice*, New York, Russell Sage; Robert A. Dahl (1990) *After the Revolution? Authority in a Good Society*, New Haven, Yale University Press, p. 80 et seq., 100 et seq.

¹⁶ Hugo Sinzheimer, “Das Wesen des Arbeitsrechts” [1927], in idem, *Arbeitsrecht und Rechtssoziologie*, Frankfurt, Europäische Verlagsanstalt, 1976, p. 108-114.

participation and the guarantee of fundamental rights should be extended to all socially relevant organisations.¹⁷

Western Europe is experimenting with a multiplicity of social constitutions granting the political constitution only the status of *primus inter pares*. Constitutions are everywhere in society: not just *ubi societas, ibi ius*, as Grotius once said, but *ubi societas, ibi constitutio*. Self-founding orders are developing at numerous places in society and are being stabilised by constitutional law. Law must accordingly develop a “multilateral constitutionalism” that does not bind social orders unilaterally either to the constitution of the state or to the economy, but rather models specific constitutions that do justice to the peculiarities of the various orders.

The far-reaching influence of interest groups on politics, extending from sheer lobbyism to genuinely public functions of private actors, the institutionalisation of labour co-determination in corporations, the control of markets through the self-regulation of business associations, the strong role of professional organisation in almost all social sectors – in the health service, sport, culture, science, education, the mass media – all these neo-corporatist arrangements institutionalise the representation of various social interests. In each case they are based on a special constitution which contains constitutive rules for self-regulation and at the same time permits the private associations to function as participants in the broader political process.

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

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

The “triangular constitutionalisation” of social subsystems – a division of labour between their self-foundation in society, the constitutional interventions of the state and the stabilising role of the formal law – may be considered as the important practical and theoretical contribution of neo-corporatism. Co-determination is the paradigm for the intricate interaction of societal constitutions and their external constitution through politics and law. State coordination through statutory laws are closely co-ordinated with social self-organisation in corporations and trade unions, and with the courts constantly readjusting the balance.

2. Societal constitutionalism

¹⁷ Gavin W. Anderson, “Social Democracy and the Limits of Rights Constitutionalism”, *Canadian Journal of Law & Jurisprudence* 17, 2004, p. 31-59.

David Sciulli developed the concept of “societal constitutionalism”, which concentrates on another weak point of neo-corporatism.¹⁸ Neo-corporatism is far too beholden to the dualism of politics and economics and to a large extent ignores other social sectors. As the repeatedly used term of “interest mediation” suggests, it focuses too narrowly on the relations between institutionalised politics and the economy. According to its self-understanding, neo-corporatist arrangements transform trade associations and labour unions into participants of the political system and turn their institutionalised interest mediation into political decisions. It underestimates the autonomy of other social subsystems which makes them relative distant from institutionalised politics. At the same time the concept is too close to the economy and takes only trade associations, corporations and trade unions into account. What is missing is to respecify neo-corporatist institutions in other independent logics in society. Societal constitutionalism in fact corrects this deficit, because it is aimed from the outset at society in all of its sub-areas

Starting with the dilemmata of rationalisation in modernity, keenly analysed by Max Weber, Sciulli attempts to identify counter-forces which would work against the massive evolutionary drift towards an increasing authoritarianism. This drift is pushed by four impulses:

- (1) fragmentation of action logics results in escalated differentiation, pluralisation and reciprocal compartmentalisation of separate spheres: each area of action in society develops its own formal rationality that is in insoluble conflict with the rationalities of other areas;
- (2) dominance of instrumental calculation as the only rationality acknowledged in all areas: given the collision of rationalities in modernity, the logic of instrumental calculation alone is becoming generally accepted in economics and politics, but increasingly in other action sectors as well;
- (3) comprehensive replacement of informal co-ordination by bureaucratic organisation: increasingly, in all areas of life, formal hierarchically structured organisations staffed by experts are proliferating as promoters of formal rationalities;
- (4) increasing confinement in the “iron cage of modernity”: particularly outside politics, formal organisations are proliferating within different social areas, leading to a comprehensive rule-based orientation of the individual.¹⁹

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

“typically found not only in public and private research institutes, artistic and intellectual networks and universities, but also within legislatures, courts and commissions, professional associations and, for that matter, the research divisions of

¹⁸ David Sciulli, *Theory of Societal Constitutionalism*, *op.cit.*; *idem* (1994) “The Critical Potenzial of the Common Law Tradition: Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory”, in *Columbia Law Review* 94, p. 1076-1123; *idem* (2001) *Corporate Power in Civil Society: An Application of Societal Constitutionalism*, New York, New York University Press.

¹⁹ D. Sciulli, *Theory of Societal Constitutionalism*, *op. cit.*, p. 80.

private and public corporations... and even the directorates of public and private corporations.²⁰

All these variants of constitutional pluralism fundamentally differ from their economic rivals and the welfare state by the role they attribute to State policy in the process of the constitutionalization of society. Unlike proposing a constitutional economy, the State is not limited to standardise minimum preconditions for an autonomous economic constitution or to only issue corrections in the case of self-destructive trends. And constitutional pluralism cannot be identified with achieving political organisational goals throughout society, contrary to the intention of the concepts of the welfare state. It adds to the role of politics, the role of establishing constitutional guidelines for social sectors in a manner that close cooperation between the State and social players could put a brake on the centrifugal tendencies of the functional differentiation. What counts is that there is an interaction between the societal auto-constitutionalization and state-political impulses. It assigns to the political institutions of the nation state the task of integrating the sub-systems in conflict, not by taking concrete decisions that are collectively binding, but by coordinating the cooperation of social and political organisations.

3. A transnational constitutionalism?

Obviously, such an arrangement is made to measure for the special conditions of the nation state. Constitutional pluralism has been having a lot of success but it depends on social and institutional conditions that occur only within the context of the nation state.²¹ This raises the question of whether, under the conditions of globalisation, equivalents to such constitutional pluralism can be institutionalized. But the discussion of the different approaches should have clearly shown to which problem the constitutionalism of society reacts: to the idea of establishing an external pressure to contain both negative externalities as well as the centrifugal tendencies of the autonomous sub-systems by their self-restraint.

With regard to the transnational space, there is a misconception that is widespread and that explains that the current debate underestimates the radicalism of societal constitutionalization. In principle, a need for a constitution is only due to particular forms of political “*governance*” that have been formed in global society and that differ from the “*government*”, i.e. the traditional government practices of the nation state. The “*governance*” is considered to be the result of socio-political administrative interventions, in which public and private players solve social problems.²² The interconnection of different specialised bureaucracies of nation states with players from around the world, transnational corporations, financial groupings, NGOs and hybrid schemes is seen as the new issue of global governance, which should now be overcome by constitutional institutions.²³

Without a doubt this socialisation of political domination encounters one of the central elements of global governance, but nevertheless, this analysis is short-sighted. It minimises the problem when one only thinks of limited new private players, which include the power structures of global governance, by constitutional standards. Again, it should be pointed out that the narrow view of the politico-legal theories of the constitution, which also only focus on transnational reports and phenomena of the

²⁰ *Idem.* p. 208.

²¹ Wolfgang Streeck (2009), *Re-Forming Capitalism : Institutional Change in the German Political Economy*, Oxford, Oxford University Press.,

²² Jan Kooiman (2000), “Societal Governance: Levels, Modes, and Orders of Social-Political Interaction”, in Jon Pierre (ed.), *Debating Governance*, Oxford, p. 138-163, here: p. 139 et seq.

²³ A well thought out concept of *governance* is found in Edgar Grande et al. (2006) "Politische Transnationalisierung: Die Zukunft des Nationalstaats – Transnationale Politikregime im Vergleich", in Stefan Schirm (ed.), *Globalisierung : Forschungsstand und Perspektiven*, Baden-Baden, p. 119-145.

policy (in the narrow sense of institutionalised politics). From a sociological point of view, it becomes clear, however, that the real problem is the constitution of autonomous spheres of action in global society – precisely outside of international politics – and that the role of the standards of constitutional law in this process must be discussed. It is only when one goes beyond the transnational political processes in the narrow sense and it is understood that social players are involved not only in the process of global governance but that they establish themselves in autonomous global regimes outside of institutionalised policy – they can, however, become political players themselves and react to the policy – that the problems of constitutionalism in the strongest sense of the term become visible in global society.

Thus the differences between the sectorial constitutions and the political constitution come to the foreground. The constitutionalization of global governance has therefore always been understood as the constitution of transnational political processes in the narrowest sense. On the other hand, the sociological analysis of the global sub-systems – the economy, science, culture and the mass media – is facing much more difficult questions: global sub-systems now deploy a dynamic of uncontrolled growth, but must these be subject to constitutional restrictions? Are there, in these areas, similar things to expansive dynamic safeguards, in particular regarding the political separation of powers? More fundamentally, the question further asks to what point is it necessary to generalise the principles of political constitutions in order to escape the traps of methodological nationalism? And how should they be specified again to take into account the characteristics of a social institution of globality?²⁴

Sectorial constitutions do not aspire to a stable equilibrium but follow the chaotic model of a 'dynamic imbalance' as a result of contrary developments – empowerment and limitation of the functional logic of the sub-systems.²⁵ The new world constitutional orders have, until now in the west, only established *constitutive rules*, which normatively support the release of different systemic rationalities on a global scale. Today, however, it is clear that reorientation is needed. After long experiments in the history of the strong tendencies towards expansion of the global functional sub-systems and after the shocks of the endogenous crises, counter-movements take place which draw up – after violent social conflict – *limiting rules* that counteract self-destructive trends and limit the damage to social, human and natural environments. Of course, since the beginning of globalisation, the 'vertical' problem of the constitution has been politically besieged: thus compared to nation states, the borders must be imposed on the new global regimes. But the most serious constitutional problem, the 'horizontal' problem, is absolutely not taken into consideration “if the autonomy of functional systems cannot lead to mutual charges that will limit the structural adaptability of functional systems to their own differentiation.”²⁶

This blindness towards the negative externalities produced by systems that are clearly expanding with respect to their self-destructive potential was revealed by the financial markets crisis. The world constitution of financial markets, valid until that point, was simply the result of a blind evolutionary process where markets automatically turned global. Rather, this took place through the active participation of politics and law. In terms of dismantling national barriers and an explicit policy of de-regularisation, a global constitution of financial markets, politically desired and legally stabilised,

²⁴ For generalisation and re-specification, see Talcott Parsons and Charles Ackerman (1966) “The Concept of ‘Social System’ as a Theoretical Device” in Gordon J. DiRenzo (ed.), *Concepts, Theory and Explanation in the Behavioral Sciences*, New York, p. 19-40. For more on the re-specification of basic political rights in financial organisations: Jens Schierbeck (2000), “Operational Measures for Identifying and Implementing Human Rights Issues in Corporate Operations”, in Asbjorn Eide *et al.* (ed.), *Human Rights and the Oil Industry*, Antwerpen, p. 161-177, here: p. 168.

²⁵ Karl Polanyi analyses the historic 'double movement' of the expansion of markets and their limitation Karl Polanyi (1944) *The Great Transformation: The Political and Economic Origins of Our Time*, New York: Farrar & Rinehart, p. 106 et seq., p. 182 et seq. In a generalised form - not only for the economy but for the different social sectors as well Wiethölter, “Justi-fication” op.cit. here: p. 20).

²⁶ Niklas Luhmann (1997) *Die Gesellschaft der Gesellschaft*, Frankfurt: Suhrkamp, p. 1087.

which freed uncontrolled dynamics, was established. But that which would replace national regulations and standardise restrictive rules at the same time was not planned by the political agenda, and was even opposed for years as being counter-productive. It is only today, following the experience of several quasi-catastrophes that led to a collective learning process where we are seeking to limit finance by constitutional law on a global level in the future. In this regard, my thoughts are directly in line with those of Jean-Philippe Robé. It is very urgent to limit the social dynamics that are raging in their negative externalities by means of constitutional rules. And it is here especially that the finance constitution and the constitutions of transnational companies are at the centre of constitutional attention.

4. A final example

It is possible to observe the first steps toward transnational societal constitutionalism in the social conflicts the result of which are corporate codes of conduct. Massive international and much-publicised public criticism plus the actions of protest movements and non-governmental organisations (NGOs) of civil society, compelled many transnational companies to “voluntarily” establish business codes of conduct. In these codes, they claim to commit to resolve certain types of problems with regard to the public interest and promise to implement them internally.²⁷ The question of how the effects of these business codes in the areas of labour, products, the environment and human rights must be assessed remains ambivalent. The commitments in the "private" codes are often simple public relations strategies that do not lead to effective changes in behaviour.²⁸

But our attention may be held by empirical studies which, in some cases, indicate that codes have brought about real changes. They have improved working conditions, increased protection levels for the environment and for human rights.²⁹ Ongoing monitoring by NGOs or the contracts that bind companies to certifying bodies in civil society seem to be the most important conditions for success.³⁰

What matters are the pressures of learning, i.e. external constraints that are exerted on transnational companies with a view to gradual change. This means that communication is not simply by the medium of the law and legal sanctions are not the only ones to transfer expectations from the outside to the inside. Instead, through non-legal media – through the knowledge of experts, political and social power and economic incentives and monetary sanctions – learning processes are triggered.

Of what does the pressures consist? The sanctions of the law do not play a decisive role in this process. Mechanisms outside of the law act in their place. First of all, the process of inter-organisational power – unilateral pressure and political exchange – is forcing companies to develop their own codes. It cannot be emphasised enough that this external pressure is a prerequisite condition

²⁷ For details, Kenneth Abbott und Duncan Snidal (2009) "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit", 42 *Vanderbilt Journal of Transnational Law*, 501-571.

²⁸ For a critique of corporate codes, Tim Bartley (2007) "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions", 113 *American Journal of Sociology*, 300, 327 et seq.; Harry Arthurs (2002) "Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation", in: Joanne Conaghan, Richard Michael Fischl und Karl Klare (ed.) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*, Oxford: Oxford University Press, 471-488.

²⁹ Martin Herberg (2006) *Private Regulative in den Lücken der Staatenwelt: Umweltschutz im multinationalen Konzern zwischen staatlicher Steuerung und gesellschaftlicher Selbstregulierung*, Frankfurt am Main, New York: Campus; Olaf Dilling, Martin Herberg und Gerd Winter (ed.) (2008) *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, Oxford: Hart.

³⁰ Annegret Flohr et al. (2009) *The Role of Business in Global Governance. Corporations as Norm-entrepreneurs*, Basingstoke: Palgrave.

in order for corporate codes to really have an effect.³¹ Here are found the pressures of the nation state, as argued by Robé, as well as the pressures of social movements, such as I see them, to prove themselves as necessary mutual additions. In line with experiences so far, the states, as well as international organisations of the world states have, with their multinational company codes of conduct, generated resources of power that required external pressure. So far the pressures of offensive power from protest movements, NGOs, trade unions, non-profit organisations and public opinion have proved to be just as strong. These are economic sanctions that often ultimately decide in the end: companies depend upon sensitive consumers and their buying habits and groups of investors who, with their investments, exert financial pressure on the companies.³²

Behind the metaphor of "voluntary codes" hides something totally unlike volunteering. If transnational companies adopt the codes, it was not after having considered the request for the common good or due to corporate ethics. They resign "voluntarily" themselves to adopting, when massive learning pressures come from the outside. The learning process does not take place within the legal system, from code to code, through a transfer of validity, but it follows detours through other functional systems. In a complicated "translation process", the boundaries between systems are crossed; a perturbation cycle forms between the legal acts of international organisations, the pressures of political and social power, knowledge operations in epistemic communities, economic sanctions and legal acts of multinational companies. Initial content is radically changed when the code of conduct for international organisations is "translated" into the scholarly language of the experts, who design models and organise the monitoring, into the inter-organisational power of political attitudes among international organisations, NGOs and multinational enterprises, into the power of the regulatory mechanisms of public space and of incentives and financial sanctions and when lastly, everything is "retranslated" into the legal language of the internal codes of the company. This kind of complicated link between the two codes clearly shows that an auto-constitutionalization of the company does not stem from intrinsic reasons of volunteering, but is only due to external and diverted learning pressures.

³¹ Abbott und Snidal, "Strengthening International Regulation Through Transnational New Governance" op.cit, 506 resume: "These norms are "voluntary" in the sense that they are not legally required; however, firms often adhere because of pressure from NGOs, customer requirements, industry association rules, and other forces that render them mandatory in practice."

³² For a detailed analysis of the relation between external pressures and internal enterprise structures see Jennifer Howard-Grenville, Jennifer Nash und Coglianesi (2008) "Constructing the License to Operate: Internal Players and Their Influence on Corporate Environmental Decisions, 30 *Law and Policy*, 73.