Gunther Teubner

Societal Constitutionalism: Alternatives to State-centred Constitutional Theory

Storrs Lectures 2003/04 Yale Law School.

I. A Right of Access to Cyberspace?

A group of globalisation critics are suing a commercial host provider of the Internet. They are appealing to the principle of free speech in order to enforce their alleged right of access judicially. The host provider who offers content providers the possibility on its computers to set up websites, had long got caught up in the tangles of state attorneys and private collective actions because some of the websites contained child pornography and Nazi propaganda. The decisive factor came with the decision of the Paris Tribunal de Grande Instance, Order of 20 November 2000, ordering Yahoo Inc to bar access by French users to auctions of Nazi objects[1] The final blow came with the new trends toward public-private co-regulation which exempts providers from liability when they cooperate with state agencies.[2]The provider thereupon electronically barred access to all websites where it regarded the risk of criminal or civil actions as too high. The bar also affected political groups rated by Compuserve as politically radical or too close to violent protest campaigns. In a civil action, these groups are now seeking to compel access to the host provider.

The case ties together in a single focal point a range of fundamental problems that the digitisation of communication is throwing up anew. It is not just technical legal questions of compulsory contracting for private providers, a right of access to internet institutions, the validity and implementation of national norms in the transnational internet, or the third party effect of fundamental rights in cyberspace that are up for debate.[3] Rather, we are faced with the more fundamental

---

[1] TGI Paris, Ordonnance de référé du 20 nov. 2000 at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm. This decision confirmed the earlier ruling of May 22, 2000 ordering Yahoo! to block access to material that was judged illegal to display in France under Article R. 645-1 du Code Pénal. See TGI Paris, Ordonnance de référé du 22 mai 2000 at http://222.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm.

[2] USA: 1990 Protection of Children from Sexual Predators Act, Section 42 U.S.C. § 13032; 1998 Digital Millenium Copyright Act, 17 U.S.C. 512 (C). Europe: Directive 2000/31.

[3] These issues, particularly problems of free speech in the internet, are discussed in B Frydman and I Rorive, "Regulating Internet Content through Intermediaries in Europe and the USA", 23 *Zeitschrift für Rechtssoziologie* 2002, 41-59; B Holznagel, "Meinungsfreiheit oder Free Speech im Internet: Unterschiedliche Grenzen tolerierbarer Meinungsäußerungen in den USA und Deutschland", 9 *Archiv für Presserecht* 2002, 128-133; B Holznagel, "Responsibility for Harmful and Illegal Content as well as Free Speech on the Internet in the United States of America and Germany" in C Engel (ed.), *Governance of Global Networks in the Light of Differing Local Values* (Baden-Baden, Nomos, 2000); B Holznagel, "Responsibility for Harmful and Illegal Content as well as Free Speech on the Internet in the United States of America and Germany" in C Engel (ed.), *Governance of Global Networks in the Light of Differing Local Values* (Baden-Baden,

question of a universal political right of access to digital communication. Ultimately, problems of exclusion from global communication processes are raised. In the background lurks the theoretical question whether it follows from the evolutionary dynamics of functional differentiation that the various binary codes of the world systems are subordinate to the one difference of inclusion/exclusion.[4] Will inclusion/exclusion become the meta-code of the 21st century, mediating all other codes, but at the same time undermining functional differentiation itself and dominating other social-political problems through the exclusion of entire population groups?

From the many problems our harmless legal case raises, I wish to single out one question: how is constitutional theory to respond to the challenge arising from the three current major trends—digitisation, privatisation and globalisation—for the inclusion/exclusion problem? That is how today's "constitutional question" ought to be formulated, by contrast with the 18th and 19th century question of the constitution of nation-states. While that had to do with disciplining repressive political power by law, the point today is to discipline quite different social dynamics. This is in the first place another question for theory. Will constitutional theory manage to generalise its nation-state tradition in contemporary terms and re-specify it? Can we, then, make the tradition of the nation-state constitution fruitful, while at the same time changing it to let it do justice to the new phenomena of digitisation, privatisation and globalisation?[5]

II. Reactions in Constitutional Theory

Contemporary generalisation and re-specification—this is a problem where several ambitious attempts to postulate a universal world constitution beyond the nation-state have laboured away at in vain. This is true of legal efforts to see the United Nations Charter as the constitutional law of the "international community" put into force by a world sovereign and legitimising the exercise of global political power.[6] It is, however, also true of a number of philosophical endeavours in the Kantian tradition to conceive a universal world constitution where the introduction of new political institutions and procedures of global statehood is supposed to be

---

Nomos, 2000); DJ Goldstone, "A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech", 69 *Colorado Law Review* 1998, 1-70.

[4] For inclusion/exclusion in global society, N Luhmann, *Das Recht der Gesellschaft* (Frankfurt, Suhrkamp, 1993) 582ff.

[5] On the use of historical experience for the globalisation of law, P Zumbansen, "Spiegelungen von Staat und Gesellschaft: Governance-Erfahrungen in der Globalisierungsdebatte" in M. Anderheiden, S Huster and S Kirste (ed.), *Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts: Vorträge der 8. Tagung des jungen Forums Rechtsphilosophie, 20. und 21. September 2000 in Heidelberg* (Stuttgart, Steiner, 2001).

[6] Explicitly B Fassbender, "The United Nations Charter as Constitution of the International Community", 37 *Columbia Journal of Transnational Law* 1998, 529- 619; P Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited", 1 *Max Planck Yearbook of United Nations Law* 1997, 1 - 33.

used to set up a federative centre and forum of common world internal policy.[7] All attempts can be reproached with not generalising the traditional concept of the constitution sufficiently for today's circumstances, nor re-specifying it carefully enough, but instead uncritically transferring nation-state circumstances to world society. In particular, the changes the concept of constitution would have to go through in relation to sovereignty, organised collectivity, hierarchies of decision, organised aggregation of interests and democratic legitimacy, if no equivalent of the state is to be found at world level.[8]

There is more realism in attempts to dissociate state and constitution clearly, and explicitly conceive of a global constitution without a world state. This innovative construction has most recently been exhaustively deployed in the debate on the European constitution, but at world level too, the attempt is made to track down constitutional elements in the current process of an international politics that has no central collective actor as subject/object of a constitution.[9] Especially the attempt to see the co-existence of nation-states as a segmental second-order differentiation of world politics and their interaction as a spontaneous order of a secondary nature, a "world constitution of freedom", lend a world constitution re-specified in this way as a structural link between decentralised world politics and law quite a different shape.[10] Yet here too the generalisation does not go far enough to do justice to the decentralisation of politics in world society. In particular, this sort of spontaneous constitution of states has to contend with the problem of whether and how non-state actors and non-state regimes can be incorporated in the international process of constitutionalization.

This shortcoming is in turn the starting point for positions that explicitly transform actors not traditionally recognised as subjects of international law into constitutional subjects.[11] These actors are on the one hand international

---

[7] O Höffe, "Königliche Völker": Zu Kants kosmopolitischer Rechts- und Friedenstheorie (Frankfurt, Suhrkamp, 2001); J Habermas, Die postnationale Konstellation: Politische Essays (Frankfurt, Suhrkamp, 1998); J Rawls, "The Law of Peoples" in S Shute and S Hurley (ed.)*, On Human Rights: The Oxford Amnesty Lectures* (New York, Basic Books, 1993).

[8] A brilliant critique of the "great normative phantasmogories" of a political world society offers A Schütz, "The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society" in G Teubner (ed.), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997).

[9] On Europe C Joerges, Y Meny and JHH Weiler (ed.) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer (Florence: Robert Schuman Centre, 2000)* Robert Schuman Centre, Firenze 2000); U Di Fabio, "Eine europäische Charta", 55 *Juristenzeitung* 2000, 737-743; A v Bogdandy, "Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform: Zur Gestalt der Europäischen Union nach Amsterdam" (Baden-Baden, Nomos, 1999); on the constitution of the international community, R Uerpmann, "Internationales Verfassungsrecht", 56 *Juristenzeitung* 2001, 565-573; CTomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des Cours* 1993, 195-374.

[10] S Oeter, "Internationale Organisation oder Weltföderation? Die organisierte Staatengemeinschaft und das Verlangen nach einer 'Verfassung der Freiheit'" in H Brunkhorst (ed.), *Globalisierung und Demokratie: Wirtschaft, Recht, Medien* (Frankfurt, Suhrkamp, 2000).

[11] Important steps toward a constitutional pluralism on the global level, N Walker, "The Idea of Constitutional Pluralism", 65 *Modern Law Review* 2002, 317-359; C Walter, "Constitutionalizing

organisations, multinational enterprises, international trade unions, interest groups and non-governmental organisations as participants in global decision-making, and on the other individuals, only hesitantly and marginally accepted by international law as legal subjects, as the bearers of fundamental and human rights.[12] Implicitly, such pluralist conceptions recognise that the processes of digitisation and global networking are decisively carried by non-state actors, the existence of which a world constitution too would have to take cognisance of. The question is, however, whether a merely personal extension of a constitutionalisation process is still adequate, and whether quite different structures and processes ought not to be included.

Finally, yet a further step is taken by ideas of the horizontal effect of fundamental rights, no longer asserting fundamental rights-positions exclusively against political bodies, but also against social institutions, in particular vis-à-vis centres of economic power. Nation states are supposed to have corresponding protective obligations imposed upon them, in order to combat threats to fundamental rights in areas remote from the state[13]. Even if this debate is only at the very beginnings in the international sphere, in view of the massive human rights infringements by non-state actors it points out the necessity for an extension of constitutionalism beyond purely intergovernmental relations.[14]

III. The Thesis: Constitutionalisation without the State.

These four concepts of a global constitution constitute quite dramatic extensions from the constitutional tradition, yet ultimately they cannot free themselves of the fascination of the nation-state architecture, but merely seek to compensate for its obvious inadequacies with all sorts of patches, add-ons, re-buildings, excavations and decorative facades—altogether merely complexifying the construction instead of building ex novo. But the design error already lies in the

---

(Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law", 44 *German Yearbook of International Law* 2001, 170-201.

[12] A Fischer-Lescano, "Globalverfassung: Verfassung der Weltgesellschaft", 88 *Archiv für Rechts- und Sozialphilosophie* 2002, 349-378.

[13] M Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes* (Tübingen, Mohr Siebeck, 2001); HD Jarass, " Die Grundrechte: Abwehrrechte und objektive Grundsatznormen. Objektive Grundrechtsgehalte, insbes. Schutzpflichten und privatrechtsgestaltende Wirkung" in P Badura and H Dreier (ed.), *Festschrift 50 Jahre Bundesverfassungsgericht*, (Tübingen, Mohr Siebeck, 2001); K Preedy, "Fundamental Rights and Private Acts: Horizontal Direct or Indirect Effect? - A Comment", *European Review of Private Law* 2000,125-133.

[14] For the European context, D Schindler, *Die Kollision von Grundfreiheiten und Gemeinschaftsgrundrechten: Entwurf eines Kollisionsmodells unter Zusammenführung der Schutzpflichten- und Drittwirkungslehre* (Berlin, Duncker-Humblot, 2001); A Clapham, *Human Rights in the Private Sphere* (Oxford, Oxford University Press, 1996); J Paust, "Human Rights Responsibilities of Private Corporations", 35 *Vanderbilt Journal of Transnational Law* 2002, 801-825; P Muchlinski, "Human Rights and Multinationals: Is There a Problem?", 77 *International Affairs* 2001, 31-48.

state-centring of the constitution.[15] For all the courage to rethink the constitution in a direction of political globality, in the light of an intergovernmental process, through the inclusion of actors in society, and in terms of horizontal effects of fundamental rights, they nonetheless remain stuck at seeing the constitution as tied to state-political action.

At the same time they are tied to a strange distinction, between the poles of which they continually oscillate.[16] While the constitution ought institutionally to confine itself to political processes, at the same time it ought to constitute the whole of society. The political organisation of the state apparatus is supposed to represent the constitution for the nation. This oscillation between the political and the societal is transferred to world society today. If one can only manage to constitutionalise the interaction of state-political institutions in international relations, then that ought to be enough to produce a constitution appropriate to world society. If this distinction was already problematic in the nation-state, then in world society it has once and for all been overtaken. But what is there in the blind-spot of the distinction? An all-embracing constitution for global society? A network of national and transnational constitutions? An autonomous legal constitution? Or what?

If in seeking to illuminate the blind-spot one abandons the state centring of the constitution, then the real possibilities of constitutionalisation without the state become visible. For constitutional theorists this amounts to breaking a taboo. A constitution without a state is for them at best a utopia, but a poor one into the bargain.[17] But this formula is definitely not an abstract normative demand for remote, uncertain futures, but an assertion of a real trend that can today be observed on a world-wide scale. The thesis is: emergence of a multiplicity of civil constitutions. The constitution of world society comes about not exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution overlying all areas of society, but emerges incrementally in the constitutionalisation of a multiplicity of autonomous subsystems of world society.[18]

The raging battles in the internet about cyberanarchy, governmental regulation and commercialisation front-rank constitutional policy conflicts, the chaotic course of which is gradually showing us the shape of nothing other than the organisational law of a digital constitution.[19] It is no coincidence that the

---

[15] N Walker (above n. 11).
[16] For this argument N Luhmann, *Die Politik der Gesellschaft* (Frankfurt, Suhrkamp, 2000) 201, 207f., 217.
[17] D Grimm, "Braucht Europa eine Verfassung?", 50 *Juristenzeitung* 1995, 581-591.
[18] International law scholars who come close to this position are Walker (above n. 11) and Walter (above n. 11) 188ff. It remains to be seen, however, whether they accept a radical legal pluralism which embraces the notion of constitutionalization without the state, when it comes to “private” governance regimes.
[19] The debate between L Lessig, *Code and Other Laws of Cyberspace* (New York, Basic Books, 1999) and D Johnson and D Post, "The New 'Civic Virtue' of the Internet: A Complex System

famous/notorious *Declaration of the Independence of Cyberspace* uses the constitutional rhetoric of the founding fathers, telling the

> „Governments of the Industrial World, you weary giants of flesh and steel ... ,the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear".[20]

One of the fundamental rights problems of the digital constitution presents itself in our legal case. Whether a right to access vis-à-vis a host provider for the internet exists or not is to be decided on the basis of the inclusion principles of digital communication.[21] It is not the principles of an external political constitution (which one? The US-constitution? Other national constitution? A transnational constitution?), aimed at power accumulation and policy formulation for the internet, but the principles of an internet constitution proper, aiming at freedom of communication and electronic threats to it, that is the adequate *sedes materiae* of the digital constitutional norms. But these principles have still to be worked out and validated in the course of constitutionalising the internet.[22] The open question in our case is whether business operators, even stimulated by economic stimulation in private-public co-regulation, should be entrusted with deciding on the limits of human rights.[23]

Extending the combat area, from Seattle to Genoa, what is taking place in the conference halls and on the street is fights over a constitution of the global economy, the outcome of which will give constitutional impetus to the World Bank, IMF and WTO. A constitution of the global health sector is taking shape in the fiery debates inside and outside science on embryo research and reproductive medicine, and on the hunt for medically adequate equivalents for traditional state-related fundamental rights. And since 11 September 2001, attempts to institutionalise debates among world religions more strongly in legally constituted institutions of inter-religious dialogue have been multiplying.

Model for the Governance of Cyberspace", *http://www.temple.edu/lawschool/dpost/Newcivicvirtue.html* 1998, is couched explicitly in constitutional terms.

[20] JP Barlow, *Cyberspace Declaration of Independence* (http://www.eff.org.//Publications/John_Perry_Barlow, 2002).

[21] The court decisions LG Bonn MMR 2000, 109 and OLG Köln MMR 2001, 52 dealing with the parallel problem of access to a chat room of a provider attempt to develop legal principles of internet-access on the basis of a strange mixture of property and contract. KH Ladeur, "Rechtsfragen des Ausschlusses von Teilnehmern an Diskussionforen im Internet: Zur Absicherung von Kommunikationsfreiheit durch netzwerkgerechtes Privatrecht", 5 *Multimedia und Recht* 2002, 787-792 asks explicitly for the development of a network-adequate private law.

[22] For an internet-adequate transformation of the constitutional right of free speech in ICANN-panels, see V Karavas and G Teubner, "http://www.CompanyNameSucks: Grundrechte gegenüber ‚Privaten' im autonomen Recht des Internet?" in W Hoffmann-Riem and K-H Ladeur (ed.), *Innovationsoffene Regulierung des Internet* (Baden-Baden, Nomos, 2003 forthcoming).

[23] Frydman and Rorive (above n. 3) 59.

IV. Three Trends of Development

To shift the focus from the one political constitution of the nation-state to the many civil constitutions of world society, immediately raises the question what circumstances justify overthrowing the model of an exclusively political constitution that seems to have proven itself through the centuries. Very schematically and in much abbreviated fashion, I wish to sketch out three secular trends subverting state-centred constitutional thought and making societal constitutionalism on a global level empirically and normatively plausible.

Diagnosis I: Dilemma of Rationalisation

Here the theory of societal constitutionalism developed by the American sociologist David Sciulli supplies initial starting points.[24] Starting from the dilemma of the rationalisation process of modernity analysed by Max Weber, he raises the question what counter-forces may exist to a massive evolutionary drift manifested in four thrusts: (1) fragmentation of logics of action, with consequences of highly advanced differentiation, pluralisation, and regional compartmentalisation of separate social spheres; (2) dominance of instrumental calculation as the sole rationality meeting with recognition across the domains; (3) comprehensive replacement of informal co-ordination by bureaucratic organisation; (4) increasing confinement in the "iron cage of servitude to the future", especially in social spheres. This drift would inevitably end society-wide in a situation of intensive competition for positions of power and social influence, highly formalised social control and political and social authoritarianism. Additionally, it has the nature of a dilemma, because every conscious attempt to achieve collective control over the drift itself gets caught up in this logic and only strengthens the drift.[25]

The only social dynamic that has effectively worked against this evolutionary drift in the past and can offer resistance in the future is, according to Sciulli, to be found in the institutions of a "societal constitutionalism":

> „Only the presence of institutions of external procedural restraint (on inadvertent or systemic exercises of collective power) within a civil society can account for the possibility of a nonauthoritarian social order under modern conditions."[26]

---

[24] D Sciulli, *Theory of Societal Constitutionalism* (Cambridge, Cambridge University Press, 1992); see also D Sciulli, "Corporate Power in Civil Society: An Application of Societal Constitutionalism", 2001; D Sciulli, "The Critical Potential of the Common Law Tradition", 94 *Columbia Law Review* 1994, 1076-1124; D Sciulli, "Foundations of Societal Constitutionalism: Principles from the Concepts of Communicative Action and Procedural Legality", 39 *British Journal of Sociology* 1988, 377-407.

[25] Sciulli 1992 (above n. 24) 56.

[26] Sciulli 1992 (above n. 24) 81.

The decisive point is to institutionalise procedures of (in the sense of rational choice) non-rational norms that can be empirically identified in what he calls "collegial formations", that is, in the specific organisational forms of the professions and other norm-producing and deliberative institutions:

> „it is typically found not only within public and private research institutes, artistic and intellectual networks, and universities, but also within legislatures, courts and commissions, professional associations, and for that matter, the research divisions of private and public corporations, the rule-making bodies of nonprofit organizations, and even the directorates of public and private corporations."[27]

The public policy consequence is to legitimate the autonomy of such collegial formations, guaranteeing it politically and underpinning it legally. Beyond the historically achieved guarantees of autonomy for religious spheres, institutions of collective bargaining and free associations, these guarantees should also apply to

> „deliberative bodies within modern civil societies as well as professional associations and sites of professionals' practice within corporations, universities, hospitals, artistic networks, and elsewhere."[28]

This theory of societal constitutionalism had its forerunners in ideas about private government in the US and about co-determination and other forms of democratisation of social sub-systems in Europe, exposing non-governmental formal organisations to constitutionalisation pressure.[29] Today, it can link up directly with post-Rawlsian approaches to deliberative theory of democracy that seek to identify democratic potential in social institutions, and to draw normative and institutional consequences.[30] The important thing here is that deliberative democratisation is not seen as confined to political institutions but explicitly considered in its extension to social actors in the national and the international context.[31] Even more important are the parallels to the constitutional theory of systems sociology, which portrays a quite similar developmental dynamics of

---

[27] Sciulli 1992 (above n. 24) 80.
[28] Sciulli 1992 (above n. 24) 208.
[29] P Selznick, The Moral Commonwealth: Social Theory and the Promise of Community (Berkeley, University of California Press, 1992), 229ff.; P Selznick, *Law, Society and Industrial Justice* (New York, Russell Sage, 1969); J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Polity, 1992).
[30] MC Dorf and C Sabel, *A Constitution of Democratic Experimentalism* (Cambridge (Mass.), Harvard University Press, 2003, forthcoming); J Cohen and C Sabel, "Directly-Deliberative Polyarchy", 3 *European Law Journal* 1997, 313-342.
[31] O Gerstenberg and C Sabel, "Directly Deliberative Polyarchy: An Institutional Ideal for Europe?", 2002, 289-341; J Cohen, "Can Egalitarianism Survive Internationalization?" in W Streeck (ed.), *Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie* (Frankfurt, Campus, 1998).

system expansion and its concomitant restraint. From a systemic viewpoint, the historical role of the constitution is not, especially when it comes to fundamental rights, exhausted in norming state organisation and individual legal rights, but consists primarily in guaranteeing the multiplicity of social differentiation against swamping tendencies.[32] Considered historically, constitutions emerge as a counterpart to the emergence of autonomous spheres of action typical for modern societies. As soon as expansionist tendencies arise in the political system, threatening to ruin the process of social differentiation itself, social conflicts come about, as a consequence of which fundamental rights, as social counter-institutions, are institutionalised precisely where social differentiation were threatened by the tendencies to self-destruction inherent in it. Individual conflicts between private citizens and the administrative bureaucracy at the same time serve to set up legally institutionalised guarantees of a self-restraint of politics.

There follows a general definition of constitutions in the process of modernisation. Polanyis' famous double movement - the implementation of the market and the setting up of a protective cladding of cultural institutions - finds its generalisation here to the extent that the dynamics corresponding to it also includes other expansive social systems.[33] In constitutionalisation the point is to liberate the potential of highly specialised dynamics by institutionalising it and, at the same time, to institutionalise mechanisms of self-restraint against its society-wide expansion. These expansive trends have manifested in historically very diverse situations, earlier chiefly in politics, today more in the economy, in science, technology and other social sectors. Strengthening the autonomy of spheres of action as a counter-movement to trends of de-differentiation seems to be the general response at work in both the political constitutions of the tradition and the emerging civil constitutions. If it was the central task of political constitutions to uphold the autonomy of other spheres of action against the expansion of the polity, specifically in relation to political instrumentalisation, then in today's civil constitutions it is presumably to guarantee the chances of articulating so-called non-rational logics of action against the dominant social

---

[32] The systemic reformulation of the institutional role of constitutional rights starts with N Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Berlin, Duncker & Humblot, 1965). For an elaboration in different contexts KH Ladeur, "Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie", 32 *Kritische Justiz* 1999, 281-300; C Graber and G Teubner, "Art and Money: Constitutional Rights in the Private Sphere", 18 *Oxford Journal of Legal Studies* 1998, 61-74; D Grimm, "Grundrechte und Privatrecht in der bürgerlichen Sozialordnung" in D Grimm (ed.), *Recht und Staat in der bürgerlichen Gesellschaft* (Frankfurt, Suhrkamp, 1987); H Willke, *Stand und Kritik der neueren Grundrechtstheorie: Schritte zu einer normativen Systemtheorie* (Berlin, Duncker & Humblot, 1975).

[33] K Polanyi, *The Great Transformation: Politische und ökonomische Ursprünge von Gesellschaften und Wirtschaftssystemen*, (Frankfurt, Suhrkamp, 1995)*;* for an interpretation of economic law in such a perspective, M Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft* (Baden-Baden, Nomos, 2001).

rationalisation trend, by conquering areas of autonomy for social reflection in long-lasting conflicts, and institutionalising them.[34]

But ought this not to become the primary task specifically of a genuinely political constitution of world society? This deep-rooted prejudice would seem very hard to remove. Yet effective shifts in the balance between politics and other social processes in the globalisation process are compelling the contemplation of a further decisive change to constitutionalisation.

Diagnosis II: Polycentric Globalisation

World society is coming about not under the leadership of international politics but at most reactively accompanied by the latter—as the globalisation of terrorism has shown recently. Nor can it be equated with economic globalisation, to the convulsions of which all other spheres of life can only respond. Instead, globalisation is a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitute autonomous global sectors for themselves.[35] Globalization is a

> "multidimensional phenomenon involving diverse domains of activity and interaction including the economic, political, technological, military, legal, cultural, and environmental. Each of these spheres involves different patterns of relations and activity."[36]

The outcome is a multiplicity of independent global villages, each developing an intrinsic dynamic of their own as autonomous functional areas, which cannot be

---

[34] For this view on the constitutionalisation of private law, see G Teubner, "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?" in KH Ladeur (ed.), *Globalization and Public Governance* (Oxford, Oxford University Press, 2003, (forthcoming); G Teubner, "Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes", 9 *Social and Legal Studies* 2000, 399-417; G Teubner, "After Privatisation? The Many Autonomies of Private Law", 51 *Current Legal Problems* 1998, 393-424. Further analyses in this direction, G Calliess, "Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law", 24 *Zeitschrift für Rechtssoziologie* 2002(forthcoming);P Zumbansen, "The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation", 3 *Juridicum* 2002, 32-40.

[35] This view of a polycentrical globalisation is shared by diverse camps of the debate, the neo-institutionalist theory of "global culture", JW Meyer, J Boli, GM Thomas and FO Ramirez, "World Society and the Nation-State", 103 *American Journal of Sociology* 1997, 144-181;
post-modern concepts of global legal pluralism, BdS Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995).
systems theory studies of differentiated global society, R Stichweh, *Die Weltgesellschaft: Soziologische Analysen* (Frankfurt, Suhrkamp, 2000).
and various versions of "global civil society", K Günther, "Recht, Kultur und Gesellschaft im Prozeß der Globalisierung", 2001; M Shaw, "Civil Society and Media in Global Crisis", 1996.

[36] D Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (Cambridge, Polity Press, 1995), 62.

controlled though the outside. Globalisation, then, does not mean simply global capitalism, but the worldwide realisation of functional differentiation.[37]

The decisive thing for our question is now that the globalisation of politics by comparison with other subsystems has relatively lagged behind, and will no doubt continue to for the foreseeable future. In view of the notorious weaknesses of the United Nations institutions, world politics is at bottom still inter-national politics, that is, a system of interactions between autonomous nation-states into which international organisation too are gradually drawn, without replacing the world of nation-states or even being able to push it into second place. This asymmetry of fully globalised subsystems of society and merely internationalised politics takes the ground from under the above-mentioned situation where the political institutions with their own constitutions could at the same time also be the constitution for the whole of society. The nation-state was still able, continuing old concepts of a hierarchical political society in which the monarch was the head of society, to make it credible that the subsystem of politics at the same time through its state constitution constituted the whole nation, even if the fragility of this construction was already plain. This is shown by the repeated emergence of ideas of an independent economic constitution, but also of other constitutions in social subsectors, along with concepts of the horizontal effect of fundamental rights in civil society, rather than them being merely ordered by the state.[38] For world society, however, such a claim can simply no longer be asserted. Seeing the United Nations as a world sovereign at work giving not just the UN organisations but also international politics, indeed even the non-governmental systems of world society, a constitution with a claim to bindingess, legitimacy and enforceability, as some international lawyers seek to do, is a mere illusion.

That by contrast a real constitutionalisation process is actually taking place in international politics and in international organisations in the narrower sense, as noted by many international lawyers, is not thereby to be disputed, but indeed to be emphasised.[39] The development of human rights applying worldwide vis-à-vis the powers of nation-states is the clearest evidence of this start. The decisive point from our view is that this represents the constitutionalisation of international politics only, a sub-constitution of world society among others, which

---

[37] Explicitly, Luhmann (above n. 16) 220ff. See also, M Albert, *Zur Politik der Weltgesellschaft: Identität und Recht im Kontext internationaler Vergesellschaftung* (Weilerswist, Velbrück, 2002); M Albert, "Observing World Politics: Luhmann's System Theory of Society and International Relations", 28 *Millenium: Journal of International Studies* 1999, 239-265; H Brunkhorst, "Ist die Solidarität der Bürgergesellschaft globalisierbar?", 2000, 274-286, 282ff.

[38] On constitutional pluralism in general Walker (above n. 11); for the discussion of a global economic constitution, P Behrens, "Weltwirtschaftsverfassung", 19 *Jahrbuch für Neue Politische Ökonomie* 2000, 5-27;

[39] For a recent comprehensive analysis, Walker (above n. 11); A Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte im postmodernen ius gentium* (Frankfurt, Juristische Dissertation, 2002), Ch. 5 and 6.

can no longer use any *pars pro toto* claim.[40] This takes the ground away from under the politics-centred constitutional thinking. If one then seeks for other constitutional elements in world society, one has to look for them in the separate global subsystems outside politics. The ongoing constitutionalisation of international politics has no monopoly over constitutionalising world society. A kind of constitutional competition is set into motion by the autonomisation of global sub-constitutions.[41]

Diagnosis III: Creeping Constitutionalisation

If it is accordingly true that international politics can at best pursue its own constitutionalisation, but not that of the whole world society, and if it is further true that the evolutionary drift of global rationalisation processes necessitates to guarantee spheres of autonomy for reflexion, then the question arises whether the sectors of global society at all possess the potential for constitutions of their own.[42]

The point here is to establish an important connection between juridification and constitutionalisation. Necessarily, every process of juridification at the same time contains latent constitutional normings. In the words of a constitutional lawyer:

> "Not every polity has a written constitution, but every polity has constitutional norms. These norms must at least constitute the main actors, and contain certain procedural rules. Theoretically, a constitution could content itself with setting up one law-making organ, and regulating how that organ is to decide the laws."[43]

Ultimately, this establishes the constitutional quality of any emergence of a legal system, which leads directly into the thorny issues of the non-foundational foundations of law, around which the major legal theories of our time circle. The technical problems that present themselves here are known as: self-justification of law, resulting paradoxes that block the process of law; the practical "solutions" of these paradoxes, which always also remain problematic, through autological qualities of constitutionalisation. These qualities have been played out in ever new variations, by Kelsen in the relationship of the basic norm to the highest constitutional norms, by Hart in the theory of secondary rules and the ultimate rule of recognition, by Luhmann in the relationship between legal paradox and constitution, and by Derrida in the paradoxical violence that is the non-

---

[40] Succinctly, A Fischer-Lescano, "Globalverfassung: Verfassung der Weltgesellschaft", 88 *Archiv für Rechts- und Sozialphilosophie* 2002, 349-378.
[41] Walker (above n. 11).
[42] For an excellent analysis of legal globalism in a systemic perspective, S Oeter, "International Law and General Systems Theory", 44 *German Yearbook of International Law* 2001, 72-95.
[43] R Uerpmann, "Internationales Verfassungsrecht", 56 *Juristenzeitung* 2001, 565-573, 566. Similarly Tomuschat (above n. 9), 217.

foundational foundation for law.[44] The point is continually to understand the paradoxical process in which any creating of law always already presupposes rudimentary elements of its own constitution, and at the same time constitutes these only through their implementation.

In our context, the need is now no longer to confine the problematic relationship between juridification and constitutionalisation to the political community. Grotius' famous proposition *ubi societas ibi ius* has to be reformulated in the conditions of functional differentiation of the planet in such a way that wherever autonomous social sectors develop, at the same time autonomous law is produced, in relative distance from politics. Law-making also takes place outside the classical sources of international law, in agreements between global players, in private market regulation by multinational concerns, internal regulations of international organisations, interorganisational negotiating systems, world-wide standardisation processes that come about partly in markets, partly in processes of negotiation among organisations.[45]

> "Regulations and norms are produced not only by negotiations between states, but also by new semi-public, quasi-private or private actors which respond to the needs of a global market. In between states and private entities, self-regulating authorities have multiplied, blurring the distinction between the public sphere of sovereignty and the private domain of particular interests"[46]

And legal norms are not only produced within conflict regulation by national and international official courts, but also within non-political social dispute settling bodies, international organisations, arbitration courts, mediating bodies, ethical committees and treaty systems. If it is true that the dominant sources of global law are now to be found at the peripheries of law, at the boundaries with other sectors of world society, not any longer in the existing centres of law-making—national parliaments, global legislative institutions and intergovernmental

---

[44] H Kelsen, "General Theory of Law and State" (Cambridge, Mass., Harvard University Press, 1946), 116ff.; HL Hart, *The Concept of Law* (Oxford, Clarendon, 1961), 77ff.; N Luhmann, "Two Sides of the State Founded on Law" in N Luhmann (ed.), *Political Theory in the Welfare State* (Berlin, de Gruyter, 1990); J Derrida, *Otobiographies: L'enseignements de Nietzsche et la politique du nom propre* (Paris, Galilée, 1984).; J Derrida, "Force of Law: The Mystical Foundation of Authority", 11 *Cardozo Law Review* 1990, 919-1046.

[45] M Albert, Zur Politik der Weltgesellschaft: Identität und Recht im Kontext internationaler Vergesellschaftung (Weilerswist, Velbrück, 2002); J Robe, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in G Teubner (ed.), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997); J Robe, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in G Teubner (ed.), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997); BdS Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995).

[46] J Guéhenno, "From Territorial Communities to Communities of Choice: Implications for Democracy" in W Streeck (ed.), *Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie* (Frankfurt/M, Campus, 1998), 141.

agreements—then this at the same time means that norms of constitutional quality are always also being produced there.

The new phenomena of global juridification thus imply the possibility that constitutionalisation processes too may be played out outside national and political institutions.[47] One should hasten to add that this does not mean that every sector of society now produces its constitutional norms under its own auspices solely. Just as the global juridification of social subsectors always shows a proportionate mix of autonomous and heteronomous law-making, the emergence of global civil constitutions is also a process in which external and internal factors combine.[48] The legal system is always involved, since these processes come about simultaneously within the social subsystem and on the periphery of law. And to a greater or lesser extent, international politics does play a part in the formation of global subconstitutions, by irritating these through political constitutional intervention. How in detail the mixing proportion between external political and autonomous social constitutionalisation takes shape is ultimately a difficult empirical and normative question that depends on unique historical situations. But to the extent that autonomous global law rests upon its own resources, and international organisations, non-governmental organisations, the media, multinational groups, global law firms, professional associations and global arbitration courts push the global law-making process forward, autonomous rule-production is also decisively involved in forming their sectorial constitutions.

Ultimately, a remarkable latency phenomenon can be seen here. Civil constitutions will not be produced by some sort of big bang, a spectacular revolutionary act of the constituent assembly on the American or French model. Nor do the global regimes of the economy, research, health, education, the professions have a single great original text embodied as a codification in a special constitutional document. Instead, civil constitutions are formed in underground evolutionary processes of long duration in which the juridification of social sectors also incrementally develops constitutional norms, although they remain as it were embedded in the whole set of legal norms. In the nation-state, the glare of the political constitution has been so blinding that the individual constitutions of the civil sectors have not been visible, or at best have appeared as part of political constitutions. And on the global scale, too, they are equally present only latently, remarkably invisibilised.

As so often, hereto much can be learned from the special case of Britain. Though the prejudice is readily cultivated on the continent that Britain has no constitution at all or is at least constitutionally underdeveloped, nonetheless, in the light of

---

[47] Walker (above n. 11).

[48] This needs to be stressed to avoid misunderstanding legal pluralism. Economic international law is a mixture of economic and political law making which is empirically variable. G Teubner, "Global Bukowina: Legal Pluralism in the World Society" in G Teubner (ed.), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997).

Dicey's analyses, the constitutional qualities of the British polity and the common law have repeatedly been clearly worked out.[49] Its substantive qualities in relation to state organisation and fundamental rights, in particular their protective intensity, can stand any comparison with continental constitutions. The point is social institutionalisation, not the formal existence of a constituent assembly, a constitutional document, norms of explicitly constitutional quality, or a court specialised in constitutional questions. *Mutatis mutandis*, this is also true of the civil constitutions of global society. Actualising the latency of constitutional elements would then also imply normatively reflecting the *de facto* course of constitutionalisation, and being in a position to influence its direction.

V. Basic Features of Civil Constitutions. Example: A Digital Constitution

What basic features must be present for demonstrating constitutional elements in the various global sectors?[50] In fact, the political constitution of the nation-state may serve as the great historical model for civil constitutions. Here a stock of historical experience, of procedures, terms, principles, and norms, is available as an analogy for the present situation. Yet analogies must be handled with extreme caution, since they can be over-hastily transposed, ignoring the specific features of globalised social sectors.

This is already true of the quantitative extent of constitutionalisation. It is very variable. Nowhere is written that the comprehensive juridification that covers the whole political process with a dense fabric of constitutional norms has to be repeated in the constitutions of social sub-sectors—one need only think of research or art. Many of their fundamental principles – epistemology or artistic styles – resist any constitutionalisation, while only a limited range – freedom of research and freedom of art – can be brought into legal form. There is always a need, as said at the outset, for careful generalisation and re-specification of the constitutional phenomena simultaneously. Generalisation means separating the constitutional concept from certain peculiarities of the political system and in particular of the state apparatus, something that is, however, extremely delicate in view of the close interpenetration of constitutional and political aspects. Re-specification is then a no less delicate matter, since the peculiarities of the sub-system, its specific operations, structures, media, codes and programmes require a far-reaching rethinking of constitutional institutions.

To make this clear by one constitutional problem of the global research: how can freedom of research against economic influences be constitutionally protected? Too close an analogy from political to economic power would adequately generalise and re-specify neither the medium that threatens the fundamental right, nor appropriate sanctions. The criterion cannot simply be, as politically inspired considerations continually suggest, the social power of economic actors. Instead the criterion must be the threat that comes from the specific

[49] A Dicey, *An Introduction to the Study of the Law of the Constitution* (London, MacMillan, 1964).
[50] See the analysis by Walker (above n. 11); Walter (above n. 11) 188ff.

communicative medium of the expansive social system. Research freedom is, thus, endangered not by the repressive power structures of multinationals, against which powerless individuals protest. Instead, the new and more subtle dangers for research freedom derive particularly from structural corruption through the medium of money. Research dependency on the market denotes the new situation of seduction by economic incentives which obviously cannot be counter-acted by constitutional guarantees of fundamental rights as a protected sphere of autonomy. Posing the question of how to generalise and how to re-specify the constitutional problem and possible responses, suggests a more effective constitutional guarantee, namely to multiply the monetary sources of dependency of research. A constitutional guarantee would make sure that out of the many dependencies a single new independence arises. Drive out the devil with Beelzebub! If the constitution of global science were able not just to norm the multiplicity of differing mutually competing funding sources for research, but also de facto to guarantee them, then this would have effects on the autonomy of science that need not be shy of the comparison with the effect of traditional subjective rights against political interference.[51]

First Feature: Structural Coupling between Sub-system and Law

Civil constitutions are neither mere legal texts nor are they the *de facto* structures of social systems.[52] Elements of a civil constitution in the strict sense can be spoken of only once an interplay of autonomous social processes on the one side and autonomous legal processes on the other comes about. In systems theory language: if long-term structural linkages of sub-system specific structures and legal norms are set up.[53] Only here can one find the remarkable duplication of the constitutional phenomenon. Structural linkage excludes the widespread perception of a single constitution embracing both legal system and social system. A constitution is always bridging two real ongoing processes: from the viewpoint of law it is the production of legal norms, which is interwoven with fundamental structures of the social systems; from the viewpoint of the constituted social system it is the production of fundamental structures of the social system which at the same time inform the law and are in turn normed by the law.[54] The important effect of structural linkage is that it restrains both—the legal process and the social process—in their possibilities of influence. The possibility of one system being swamped by the other is blocked, its respective autonomy enabled, and mutual irritation concentrated upon narrowly delimited and openly institutionalised paths of influence.

---

[51] For freedom of science in this perspective, T Kealy, "It's Us Against Them", May *Guardian* 1997, 7; for the freedom of art, Graber and Teubner (above n. 32).
[52] Behrens (above n. 38).
[53] On the concept of structural coupling of law to other social systems, G Teubner, "Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism" in J Ziman (ed.), *The Evolution of Cultural Entities: Proceedings of the British Academy* (Oxford, Oxford University Press, 2002); Luhmann (above n. 4), 440ff.
[54] Luhmann (above n. 44).

The constitution is thereby, to the extent that it is institutionalised as a coupling between two spheres of meaning, responding to a problem that arises in all autonomous norm-building in society: the problem of structural corruption. Thus the much disputed question today of whether, how and by what actors the internet is to be regulated has to do precisely with this.[55] National regulation tends to fail due to implementation problems raised by the transnational nature of digital communication. In contrast, an internet regulation, desired by all good men today, through legitimate international law-making in turn threatens, alas, to fail due to the difficulties in reaching intergovernmental consensus. This does not of course exclude the possibility of continuing to try both, in part even with success. Yet the *de facto* difficulties with both forms of regulation entail that self-regulation of the internet as an autonomous system takes on dramatically more value. Therefore, observers of internet regulation speak of a "trend toward self-regulation".[56] The internet's self-made law profits not just from the problems with the other two forms of regulation, but additionally from the technical advantages the code's architecture offers for highly efficient regulation. Thanks to electronic means of constraint, it can largely do without regulation controlled by socio-legal expectations, but the electronic means are in turn controlled by meta-legal norms.[57] The trend thus clearly goes in the direction of hybrid regulatory regimes.[58] There autonomous *lex electronica*, in parallel to the autonomous *lex mercatoria* of autonomous economic law, plays an important role. The arbitration panels of ICANN, which decide on the basis of the autonomous non-national legal norm of §12 a of the ICANN policy on domain-issuing, legally bindingly and with electronic enforcement, are a conspicuous part of autonomous digital law-making.[59] And in an exact parallel with global economic law, *lex electronica* brings with it the problem of structural corruption, that is, the massive and unfiltered influence of "private" interests on law-making. It is here that the constitutional question of the internet arises.[60]

Here the chances and limits of a digital constitution must be realistically assessed, if political constitutions that have responded to the problem of

---

[55] B Holznagel, "Sectors and Strategies of Global Communications Regulation", 23 *Zeitschrift für Rechtssoziologie* 2002, 3-23; Committee to Study Global Networks and Local Values, *Global Networks and Local Values: A Comparative Look at Germany and the United States* (Washington, DC, National Academy Press, 2001); Lessig (above n. 19); Post (above n. 19).

[56] Holznagel and Werle (above n. 55), 18; J Goldsmith, "The Internet, Conflicts of Regulation and International Harmonization" in C Engel (ed.), *Governance of Global Networks in the Light of Differing Local Values* (Baden-Baden, Nomos, 2000).

[57] Lessig (above n. 19), 43ff.

[58] H Farrell, "Hybrid Institutions and the Law: Outlaw Arrangements or Interface Solutions", 23 *Zeitschrift für Rechtssoziologie* 2002, 25-40.

[59] J v Bernstorff, in this volume; D Lehmkuhl, "The Resolution of Domain Names vs. Trademark Conflicts: A Case Study on Regulation Beyond the Nation State, and Related Problems", 23 *Zeitschrift für Rechtssoziologie* 2002, 61-78; E Thornburg, "Going Private: Technology, Due Process and Internet Dispute Resolution", 34 *University of California Davis Law Review* 2000, 151-220.

[60] See the critique by Lehmkuhl (above n. 59), 67ff.; M Geist, "Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP", 2001.

structural corruption of law by politics are to be used as a model.[61] The diffuse dependency of pre-modern law on political pressures, on political terror, and on positions of social and economic power, was given the dual answer by institutions of structural coupling that could of course not remove corruption but nonetheless reduce it effectively: illegalisation of corrupting influences on the one hand, and increase of legitimate irritability on the other. For parallel problems of the corruption of law by the economy, it was not the political constitution that gave corresponding answers, but the economic constitution proper that took on a similar function, through the private law institutions of property and contract. The venality of the legal conflict resolution itself was strictly ruled out, and the economic irritations of law were channelled through the mechanism of contract and property. At the same time, this made it possible to reserve ultimate regulation of contract and property to law and politics.[62] A realistic answer to problems of structural corruption of cyberlaw ought similarly to come only from the internet's own constitution, as long as it manages to bring about a functioning structural coupling between fundamental digital structures and legal norms. Whether and to what extent this sort of constitution of its own is issued politically from outside, whether unilaterally by the US government or by international agreement, or whether it takes shape as an internal self-organising process of the internet, through institutions like ICANN, internal arbitration courts, standardisation organisations like the World Wide Web Consortium or the Internet Engineering Task Force, and digital civil movements, is quite a different question.[63] It does not, however, change anything about the need for a separate digital constitution for an effective structural link between law and digital communications.

Second Feature: Hierarchy of Norms – Constitutional versus Ordinary Law

Structural coupling of social system and law is a necessary condition for a civil constitution, but not a sufficient one. For there are myriads of mutual irritations that do not however take on constitutional qualities. This defeats a concept of civil constitution which would be formulated in parallel with the concept of economic constitution defined as the "*totality* of the legal rules binding for the economies in society".[64] In addition to the quality of legal norm and to its structural coupling with a social system, a specific autological relationship, a hierarchialisation between norms of "higher" constitutional quality and those of "lower" quality of ordinary law must exist.

In the first place, there are rules of self-production, that is, constitutional norms that meet the paradoxical requirement of regulating the lawful production of legal norms, but at the same time also regulate their own production, or instead refer to a revolutionary act of violence, a social contract, divine foundation or some

[61] Luhmann (above n. 4), 468ff.
[62] Luhmann (above n. 4), 452ff.
[63] For these options, Farrell (above n. 58)
[64] ME Streit, *Theorie der Wirtschaftspolitik* (Düsseldorf, Werner, 1991), 24.

other foundation myth. A particularly influential conception here has been Herbert Hart's: he defines law by the existence of a constitutional difference between primary norms (control of conduct) and secondary norms (production of law). He is running thereby, however, into the problem of an infinite regress of metameta…-norms, which is broken off through the arbitrariness of an ultimate rule of recognition.[65] The challenge for a civil constitution lies in identifying separate self-production rules that overcome the narrow focus of the politics-centred law-producing exercise. If even the political constitutional tradition had difficulties with the quality as a legal norm of genuine judge-made law, of international law, of private contracts, private organisational norms and customary law, because in these cases the "official" secondary norms which in positivised constitutions refer to parliamentary legislation failed, the problems multiply in the case of autonomous legal systems in the expanses of world society. There has been 30 years of vigorous debates in the case of *lex mercatoria*;[66] in the case of *lex electronica*, it is only gradually starting to heat up.[67] The discussion gets hotter once people realise that secondary norms give an answer not just to the cognitive question "What is valid law?", but also to the more intricate normative question "Who are the legitimate actors and what are the legitimate procedures for producing law?".

What are the secondary norms that define the transformation of *netiquette*, i.e. internet good manners (no spamming etc.) into digital customary law with universal validity claims? What constitutional empowerment can the standardisation organisations of the internet be based on when they proclaim rules of digital communication and simultaneously implement them in internet architecture? What rules of recognition guide the private internet courts of arbitration that decide domain disputes with a claim to legal bindingness and enforce them directly by electronic means once a brief period for appeal to national courts is over? What secondary norms govern the legal quality of *click wrap rules*, general terms of business of internet providers and host providers, which, as in our harmless legal case, decide bindingly as to access to legal institutions? Constitutionalists are taking too much of an easy way out when they dismiss all this as legal fantasies of overexcited Harvard professors. A realistic view will recognise that in the course of such self-organised legal practises, which because of the necessary textualisation of digital communication are highly formalised, constitutional secondary norms emerge, able to overcome the validity

---

[65] Hart (above n. 44), 77ff.

[66] For this debate, K Berger, "Understanding International Commercial Arbitration" in Center of Transnational Law (ed.), *Understanding International Commercial Arbitration* (Münster, Quadis, 2000); D Lehmkuhl, "Commercial Arbitration - A Case of Private Transnational Self-Governance?", *Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter* 2000; G Teubner, "Global Bukowina: Legal Pluralism in the World Society" in G Teubner (ed.), *Global Law Without A State* (Aldershot, Dartmouth Gower, 1997); U Stein, *Lex mercatoria: Realität und Theorie* (Frankfurt, Klostermann, 1995).

[67] Lehmkuhl (above n. 59); Geist (above n. 59); AM Froomkin, "Semi-private International Rulemaking: Lessons Learned from the WIPO Domain Name Process", 2000.

paradox of self-created digital law and decide selectively as to the quality as legal norms of social norms.

Third feature: Judicial Review of Norms

A hierarchy of norms means not just rules for self-production, but also for self-review of law. The law itself declares legally enacted norms unlawful if they are substantively in contradiction with higher level constitutional norms. In highly developed political constitutions this has, as we know, led to the differentiation between constitutional jurisdiction and ordinary jurisdiction, and between constitutional law and ordinary law. If now such explicit differentiation cannot be found in the various social sub-sectors, does this mean there are no hierarchies of norms, or that no review of norms takes place? Judicial review of standard business contracts, of private standards of due diligence, of standardisation by private associations, of arbitration court decisions in both national and international sphere, are examples of a *de facto* constitutional review of non-legislative law. One ought not to be deceived by the antiquated private law review formulas of “good morals”, “good faith”, that the ordinary courts use as to the fact that here, substantively, it is “ordre public”, i.e. the fit between “private” norms and constitutional norms, especially human rights, that is being decided. Yet a closer look shows that they are being measured not by the political constitution of the state but a constitution of their own. The resolve is simultaneously a judicial liberation and a judicial constraint on the dynamics of a system-specific rationality. The institutional dimension of constitutional rights is invoked in private domains of society.[68] Social norms on the periphery of the legal system are in general accepted at the centre of the law, but a process of judicial review of law fends off corrupting elements stemming from the shortcomings of the external source of law measured against the standards of due process and the rule of law. At the same time, however, the law acknowledges the intrinsic rationality of the external law-making processes, translates these into the quality of legal norms, and thereby brings about a considerable social upgrading of them.

In its relationship to politics, judicial constitutional review of legislation has presented the model that so far exists only rudimentarily in relation to other subsystems. In what respect does the law have to adjust to the intrinsic rationality of the other sub-systems, and to what extent must influences that corrupt the law be warded off? The constitutional review of political legislation has developed extensive review techniques that neutralise party-political decisions, translate result-oriented “policies” into universal legal principles, fit political decisions into legal doctrine in accordance with legal criteria of consistency, and in the worst case pronounce legislative acts unconstitutional.

---

[68] For the institutional dimension of constitutional rights in the private sector, O Gerstenberg, "Privatrecht, Verfassung und die Grenzen judizieller Selbstregulierung", 74 *Archiv für Rechts- und Sozialphilosophie. Beiheft* 1999, 141-156; Ladeur (above n. 32); Graber and Teubner (above n. 32).

On the other hand, constitutional law has liberated the intrinsic logic of politics by "politicising" the law itself: teleological interpretation, policy orientation, balancing of interests, impact assessment and result-orientation are indicators for an adaptation of law to the rationality of politics.[69]

Where, however, are the analogous combinations of liberation and constraint formed in relation to non-political sectors of society when non-legislative law-making mechanisms are at work here? Evidently, the review criteria and adjustment mechanisms of the political constitution must be replaced by those of its own constitution. Global technological standards require different legal review, different criteria, different procedures, from, say, international general terms of trade or global codes of conduct of international professional associations.

The internet is concerned with the (in)famous "code", the digital incorporation of behavioural norms in the architecture of cyberspace.[70] Its liberation and constraining is the general theme of the digital constitution, in parallel with the liberation and constraining of the phenomenon of power in the political constitution. In order to develop legal standards for the "code" one needs to analyse the specific risks of the cyberspace architecture. What specific dangers does the "code" entail for individual autonomy? How does the code impact on the autonomy of social institutions? And the legal control standards need to be reconstructed specifically for the architecture of the internet. What kind of legal meta-rules have to be developed in order to secure individual and institutional autonomy against the "code".

It is not primarily a matter of abuse of digital power, but the constitutional consequences of the structural differences between "code" and law. Within its reach of application the "code" transforms fundamentally the normative order of the cyberspace. It is no longer the appellative character of legal rules, but electronic constraints that regulates directly the communication in the internet.

The first relevant issue is the self-enforcing character of the code. In the predominantly instrumentalist perspective of internet-lawyers this seems to be the great advantage of the "code",[71] but becomes in a constitutional perspective the nightmare for principles of legality. Traditional law is based on an institutional, procedural and personal separation of law-making, law application and law enforcement. This is also true to a certain degree for law making in the private sector. The strange effect of digitalisation is a kind of nuclear fusion of these three elements which means the loss of an important constitutional separation of power.

---

[69] Cf. Teubner (above n. 34).
[70] Lessig (above n. 19);JL Reidenberg, "Lex Informatica: The Formulation of Information Policy Rules Trough Technology", 76 *Texas Law Review* 1998, 553-584.
[71] In this instrumentalist perspective of law, there is no great difference between the two protagonists of law and internet, Lessig (above n. 19) on the one side and Johnson and Post (above n. 19) on the other.

A second issue is the trias of regulation of conduct, construction of expectations, and resolution of conflict.[72] Traditional law cannot be reduced to one of these aspects but realises them all, however within separate institutions, normative cultures and principles of legality. There is a (hidden) constitutional dimension in this separation. Again, the digital embodiment of normativity in the "code" reduces these different aspects just to one, to the aspect of electronic regulation of conduct. This entails a loss of spaces of autonomy.

The third issue is calculability of normativity. In traditional law, formalisation was rather limited. The (in)famous effects of legal formalism have been relatively harmless as compared with the effects of the "code" which allows for a hitherto unknown formalisation of rules. The strict binary relation 0 – 1 which in the real world was limited to the legal code in the strict sense of lega/illegal, is now extended in the virtual world to the legal programs, to the whole ensemble of substantive and procedural structures that condition the application of the binary code. This excludes any space for interpretation. Normative expectations which traditionally could be manipulated, adapted, changed, are now transformed into rigid cognitive expectations of inclusion/exclusion of communication. In its day-to-day application the code lacks the subtle learning abilities of law. The micro-variation of rules through new facts and new values is excluded. Arguments do not play any rule in the range of code-application. They are concentrated in the programming of the code, but lose their power in the permanent activities of rule interpretation, application and implementation. Thus, informality, as an important countervailing force to the formality of law, is reduced to zero. The code knows of no exception to the rules, no principles of equity, no way to ignore the rules, no informal change from rule-bound communication to political bargaining or everyday life abolition of rules. No wonder that such a loss of "reasonable illegality" in the cyberworld nurtures the myth of the hacker, who with his power to break the code becomes the Robin Hood of cyberspace.

If these are code-specific risks for individual and institutional autonomy then it becomes clear that certain policy proposals for the internet have indeed constitutional quality. The open-source movement demanding transparency of the code for any software program is constitutionally as relevant as the principle of narrow tailoring which should be developed into a code-specific variation of the constitutional proportionality principle which needs to be respected in the private regime of the internet.[73] Judicial review and other public controls of the meta-rules of the code gain an importance which is – due to the code-specific risk – even higher than judicial controls of standard contracts and the rules of private organisations. And competition law needs to develop non-economic criteria for

[72] Luhmann (above n. 4), 124ff.

[73] L Lessig, *The Future of Ideas*, (New York, Random House, 2001), 49ff.; J Boyle, "Fencing Off Ideas", *Daedalus* 2002, 13-25; Y Benkler, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain", (Conference Paper, 2001) at http://james-boyle.com.

the legal structure of information "markets" in order to allow for a high variety of code-regulations.[74]

Fourth Feature: Dual Constitution of Organised and Spontaneous Sector

If political constitutional law has *de facto* to regulate two great areas of politics—organisational law of the state and citizens' fundamental rights—how is this to be appropriately generalised and specified? My suggestion is that the point is always the norming of a formally organised sector and a spontaneous sector within a sub-system, and in particular the precarious relationship between them.[75] The democratic character of a constitution seems to depend on whether a dualism of formally organised rationality and informal spontaneity can be successfully institutionalised as a dynamic interplay without the primacy of one or the other. In politics, the point is mutual control by the formally organised sector of political parties and state administration on the one side , and the spontaneous sector of the electorate, interest groups and public opinion on the other. This is continued in globalisation, in the relationship between the spontaneous sector of international relations and of international organisations under other auspices. In the economy, the relationship of tension between market-constituted spontaneous sector and organisational sector constituted in enterprises is certainly established—especially after the most recent globalisation thrust. In world wide research too, there seem to be tendencies towards a development of a global spontaneous sector as against formalised research organisations. In the education, the world wide competition of universities seems to be taking on the role of a spontaneous sector. In all these sectors the constitutional challenge would be to underpin the duality of social autonomy in the sub-systems, that is, the control-dynamics of spontaneous sector and organised sector, in normative fashion too.

In cyberspace we again see similar developments. Lessig fears a development of the internet towards an intolerable density of control by a coalition of economic and political interests.[76] Whereas in its anarchical beginnings the internet was built up on the principles of the inclusion of all, of anonymity, freedom from control and heterarchy, today the politically and economically motivated tendencies towards the emergence of so-called intranets, i.e. closed networks, based on exclusion, control, hierarchy, and strict goal-orientation, are growing stronger. The same development can, however, also be interpreted differently, namely as an internal differentiation of cyberspace into an anarchical spontaneous sector (internet) and various highly organised special sectors (intranet). The parallel with other social systems where a mutual control relationship between formally organised sector and spontaneous sector has grown up is clear. Politically, the point would not be, as Lessig et al think, to combat a development to cybercorporatism, but to stabilise and institutionally

[74] For these arguments, see Lessig (above n. 19), 43ff.
[75] For this argument, see Teubner (above n. 34).
[76] Lessig (above n. 19).

guarantee the spontaneous/organised difference as such. The constitution of the internet would distinguish between spontaneous public sectors (similar to the fundamental rights section of the constitution, or to constitutional law of the market) and highly formalised organised sectors (resembling the law of organisation of the state, or company law), stabilised both in their intrinsic logic, and see its main task as being to build up mutual control by them.

(translated by Iain L. Fraser)