

# NORMATIVE ORDERS

Cluster of Excellence at Goethe University Frankfurt/Main

*Normative Orders Working Paper*

*05/2010*

## **The Structural Transformation of Embeddedness**

*Dr. Poul F. Kjaer*

Cluster of Excellence  
The Formation of Normative Orders  
[www.normativeorders.net](http://www.normativeorders.net)

Goethe University Frankfurt am Main  
Senckenberganlage 31  
Postfach 16  
60325 Frankfurt am Main

# **The Structural Transformation of Embeddedness**

by Poul F. Kjaer

## **Abstract:**

The concept of embeddedness plays a central role in the segment of economic sociology and social theory which is inspired by the works of Karl Polanyi. But to the extent that embeddedness is understood in a substantialist manner, implying the existence of a unitary lifeworld, the desire for embeddedness is an impossible aspiration under modern conditions. Throughout the modern era it is however possible to observe the emergence of complex societal stabilization mechanisms, which serve as substitutes to traditional forms of embeddedness. The emergence of function specific cultures, in the form of, for example, legal, political and scientific cultures, establishing a 'second nature' in the Hegelian sense, is one example of this. Other examples are (neo-)corporatist institutions which fulfilled a central stabilising role in classical modernity and the kind of network based governance arrangements which fulfil a similar position in today's radicalised modernity.

**List of Content:**

I. Introduction.....4

II. The End of Pre-Modern Embeddedness.....5

III. Equivalentents to Embeddedness in Classical Modernity.....10

IV. Equivalentents in the Radicalised Modernity.....17

## I. Introduction

The differentiation (*Ausdifferenzierung*) of a whole range of more or less autonomous functionally-delineated social spheres, fields or systems, such as law, the mass media, science, politics, education and the economy is one of the central characteristics of modernity. One of the many consequences of the move towards a relative pre-dominance of functional differentiation as the central organising principle of society is that modern society is characterised by a multiplicity of social contexts, roles, expectations and practices. Thus, the aspiration, associated with Karl Polanyi-inspired sociology, concerning a possible reestablishment of embeddedness is an impossible desire under the structural condition of modernity. That is especially the case if the term “embeddedness” is understood in a substantialist manner, in the sense that social practices are only understood as being embedded when they are unfolded within a unitary lifeworld.

Throughout the modern era, it is, however, possible to observe the emergence of a number of functional equivalents to the substantialist pre-modern kind of embeddedness in the form of complex stabilisation mechanisms within the functional differentiated structures of the modern society. Examples of such mechanisms are function-specific cultures, in the form of, for example, legal, political and scientific cultures. Such phenomena serve as internal stabilisation mechanisms within functionally-differentiated structures. It is also possible to observe the emergence of complex organisational forms and regimes which stand transverse to the functional-differentiated structures of society, and which have the stabilisation of relations between functionally-differentiated structures as their central task. In the classical “state-centred” modernity, which, with a couple of symbolic dates, can be said to span the period between 1789 and 1989, (neo-) corporatist structures were the primary form for such stabilisation in Western Europe. In the radical modernity of today, governance structures relying on the network form fulfil a similar role on an (almost) global scale.

However, neither in the classical, nor in the radicalised, modernity did such structures produce embeddedness in a pre-modern substantialist sense. Instead, they merely produce(d) stabilisation between abstract, generalised and highly complex – and, as such, “dis-embedded” - structures. This insight also seems to be

guiding post-Polanyian economic sociology in so far as a “non-atomistic” approach is advocated at the same time as holistic approaches are avoided.<sup>1</sup> Under the structural conditions of modernity, the endeavour of “re-establishing embeddedness” is only viable if it is translated into the attempt to maintain the autonomy of functional-differentiated spheres through mechanisms capable of reducing asymmetries, negative externalities and crowding-out effects between such spheres, as well as through the definition of the adequate social roles and the entrance criteria which guide the access to these roles within each functionally-differentiated sphere of society.

## II. The End of Pre-Modern Embeddedness

In an ideal-type manner, pre-modern Europe can be understood as being mainly characterised by a stratificatory form of social differentiation, in the sense that one of its key characteristic was the institutionalisation of hierarchically-ordered differences. This primacy of stratificatory differentiation did not exclude the existence of functionally-delineated forms of problem-solving through the stabilisation of different roles, situations and interests, but such forms mainly emerged as internal forms of stabilisation within the hierarchically-organised stratificatory structures constituted by the nobility, the clergy, traders, craftsmen and peasants.<sup>2</sup> Thus, functionally-differentiated forms mainly played a complementary role. This was also the case for the distinction between the centre and the periphery, which served as a form for the internal stabilisation of the higher strata, which enabled them to interact with equals within the larger European space.<sup>3</sup>

In pre-modern Europe, it was thus possible to observe a multitude of autonomous and geographically-overlapping societal structures, for example, in terms of principalities, trade regimes, the church and the cities, which all had their

---

<sup>1</sup> See, in particular, M. Granovetter, “Economic Action and Social Structure: The Problem of Embeddedness”, (1985) 91 *The American Journal of Sociology*, pp. 481–510.

<sup>2</sup> For the example of trade, see M. Weber, *Zur Geschichte der Handelsgesellschaften im Mittelalter: Schriften 1889 – 1894*, (Tübingen: Mohr Siebeck, [1889] 2008). For the latest level of research, see, also, the special issue on the law merchant in (2004) 5 *Chicago Journal of International Law*.

<sup>3</sup> N. Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1997), p. 663 *et seq.*

distinct features and which all produced overlapping but, nonetheless, distinct, normative orders. A common feature for all of these structures was, however, that they relied on the household institution as the central structural coupling, which ensured the link between the different strata, in so far as the household structure stood in an orthogonal relationship to the stratified structures of society.<sup>4</sup> In this sense, the household institution was the single most important structure for the integration of society in pre-modern Europe.

A key feature of the household institution was, moreover, that it did not allow for any clear-cut distinction between economic reproduction and other forms of societal operations. Thus, only when the household institution ceased to be a central societal category, due to the emergence of a distinct property-based and contract-based form of economic reproduction, was it possible to understand the economic system as a distinct societal category.<sup>5</sup>

Against this background, the kind of embeddedness of economic reproduction to which Polanyi refers, namely, one in which economic reproduction and the societal reproduction of, for example, religion, intimate relations and education are intrinsically intertwined, in the sense that no distinction between the praxis of the different forms of reproduction is made, must be understood as a distinct pre-modern form of embeddedness.

It can, however, be argued that Polanyi's analysis of the challenge to embeddedness, through an unleashing of a specific capitalist logic, which he dates to the liberalisation of the British labour market in the 1830s,<sup>6</sup> is somewhat narrow, in the sense that the end of embeddedness through the break-down of the household institution was, by no means, a phenomenon which merely unfolded in relation to the praxis of economic reproduction. Instead, the differentiation of a specific economic logic was part of a broader process, leading to the break-through of modernity, which cannot be reduced to the question of the form of economic reproduction. This is also

---

<sup>4</sup> *Ibid.*, p. 695 *et seq*; see, also "Haus", pp. 1007–1020, and "Haushalt", pp. 1020–1021, in: *Historisches Wörterbuch der Philosophie, Band 3*, (Basel-Stuttgart: Schwabe & Co Verlag, 1974).

<sup>5</sup> N. Luhmann, *Recht der Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1993), p. 446 *et seq*.

<sup>6</sup> Karl Polanyi, *The Great Transformation. The Political and Economic Origins of our Time*, (Boston MA: Beacon Press, [1944] 2001), p. 84.

exemplified by the fact that the state, and not the economy, was the first dis-embedded sphere of society. The modern state is, in contrast to pre-modern forms of rule, a distinct and abstract legal person, which is separate from its members. The modern sovereign state is a structure of generalised and impersonal rule, in the sense that all rules apply to all persons within a given territory. It is a form of rule which only requires a minimum of communication towards its subjects, and only in a form which refers to specific roles which are unfolded within specific settings.<sup>7</sup> The constitutional structures of modern states can, therefore, only be understood as dis-embedded structures.<sup>8</sup>

Thus, not only the emergence of a modern economy, but also modern statehood, implied a break with the household institution, through the introduction of a distinction between the possessions of the state, and the possessions of the monarch, with a dis-embedding of the exercise of political power as the consequence.

Moreover, the central mechanism triggering the European state-building processes of early modernity was the military revolutions which unfolded from the Sixteenth century onwards.<sup>9</sup> These revolutions increasingly made functionally-delineated and hierarchical-organised political, legal and bureaucratic structures a defining feature of society, in so far as the result was a mutually re-inforcing configurative relationship between the bureaucratic organisation of military capabilities, the structuring of territory, and increases in available economic resources, thereby leading to a co-evolutionary differentiation (*Ausdifferenzierung*) of functionally-delineated spheres of society within areas such as law, politics and the economy. In addition, the mercantilist economies of the early modern era were state-economies, in the sense that the social construction of what later became the “free

---

<sup>7</sup> U.K. Preuss, “Disconnecting Constitutions from Statehood. Is Global Constitutionalism a Promising Concept?”, in: P. Dobner & M. Loughlin (eds), *The Twilight of Constitutional Law: Demise of Transformation?*, (Oxford: Oxford University Press, 2010).

<sup>8</sup> J. Tully, “The Imperialism of Modern Constitutional Democracy”, pp. 315–338, in: N. Walker & M. Loughlin (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press, 2007), p. 318.

<sup>9</sup> For overviews and paradigmatic texts, see M. Roberts, *The Military Revolution, 1560-1660*, (Belfast: Boyd, 1956); C. Tilly, *Coercion, Capital, and European States, AD 990-1990*, (Oxford: Blackwell Publishing, 1990); J.A. Black: *A Military Revolution? Military Change and European Society, 1550-1800*, (London-Basingstoke: Macmillan, 1991).

market” was, to a large extent, a process initiated by the state, just as the central organisational feature of the emerging industrial economy was the adaptation of the modern model of bureaucratic organisation, which had been developed within the realm of the emerging states, as the key feature of modern firms.<sup>10</sup>

To sum up, not only is the economic sphere not the only societal sphere which has undergone a process of dis-embedding, but it is also not the most central sphere if one seeks to understand the central driving forces leading to modernity. Or, to express it differently, Marx was wrong when he sought to turn Hegel upside down through his emphasis of economic structures, rather than the state, as the central mechanism of societal evolution in modernity.<sup>11</sup>

This argument can, moreover, be extended, since not just politics, law and the economy became distinct functionally-delineated spheres of society in the process leading to modernity. Instead, a multiplicity of functional-delineated structures emerged, in so far as areas such as science, art, intimate relations, health, sports, the mass media and education also emerged as distinct spheres of meaning (*Sinnwelten*) characterised by distinctly different social codes and norms.<sup>12</sup> As a consequence hereof, a multiplicity of roles emerged, in so far as the inclusion of human subjects in a given societal context became conditioned by their alignment with context-specific social roles. Subjects became consumers, pupils, citizens, patients, employees, and so forth. Thus, dis-embeddedness can also be understood as a reflection of a more fundamental fragmentation of meaning (*Sinn*) structures through which holistic universes, such as the household structure, are broken down and replaced with a multi-contextual setting, in which the form of meaning differs from context to context.

---

<sup>10</sup> P.F. Kjaer: “Post-Hegelian Networks: Comments on the Chapter by Simon Deakin”, pp. 75–85, in: M. Amstutz & G. Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation*, (Oxford: Hart Publishing, 2009), pp. 80 *et seq.*

<sup>11</sup> K. Marx & F. Engels: “Ludvig Feuerbach und der Ausgang der Klassischen Deutschen Philosophie”, pp. 262–307, in: *Marx & Engels. Werke, band 21*, (Berlin: Dietz Verlag, [1888] 1975), p. 293.

<sup>12</sup> For an historical overview of the evolution of the differentiation of functional systems, see R. Stichweh, “Strukturbiildung in der Weltgesellschaft – Die Eigenstrukturen der Weltgesellschaft und die Regionalkulturen der Welt”, in: T. Schwinn (ed), *Die Vielfalt und Einheit der Moderne. Kultur- und strukturvergleichende Analysen*, (Wiesbaden: Verlag für Sozialwissenschaften, 2006), pp. 239–257; R. Stichweh, “Das Konzept der Weltgesellschaft: ‘Genese und Strukturbiildung eines globalen Gesellschaftssystems’”, pp. 329–355, in: *Rechtstheorie*, Sonderheft, Heft 2-3, 2008.



Not surprisingly modernity therefore implied a problematization of what human subjects are. The positive reply, often aligned with a Kantian tradition, was the specifically modern concept of the individual and the process of individualisation. A concept, which served as a tool of de-paradoxialisation in so far as its central function is to “cover up” the death of the subject as a unitary figure as brought about by the transformation of human subjects into carriers of a multiplicity of social roles.<sup>13</sup> The emergence of highly-complex social codes, expectations and norms inherent to each role was, moreover, conditioned by a “civilising process” which, through the deployment of disciplinary mechanisms, re-created the human subjects in a manner which made it possible to align them with the specific roles of modern society.<sup>14</sup> In this sense, the move from the concept of the human subject to the concept of the single individual must be understood as being inherently connected to the shift from “nature” to “culture” which Kant diagnosed as a central element of the modern world.<sup>15</sup>

On the other hand, the shadow side of the fragmentation of meaning structures was already problematised by Rousseau, who sought to develop a concept capable of retaining the perceived qualities of the “embedded” pre-modern *polis* under the condition of modernity,<sup>16</sup> and Hegel, who was the first to combine the concept of modernity with a concept of critique systematically.<sup>17</sup> From these two scholars, a multitude of links can be established to, for example, Kierkegaard (existential fear), Marx (alienation), Weber (rationalisation), Durkheim (anomie), Adorno and Horkheimer (reification), Elias and Foucault (disciplination) and Habermas (colonialisation).

---

<sup>13</sup> N. Luhmann, note 3 *supra*, p. 1024 *et seq* & 1066 *et seq*. For a paradigmatic overview of the discussion, see, also, A. Heller, “Death of the Subject”, (1990) 25 *Thesis Eleven*, pp. 22–38.

<sup>14</sup> See N. Elias, *Über den Prozeß der Zivilisation, Band 1*, (Frankfurt aM: Suhrkamp Verlag, [1938] 1976), and *idem*, *Die höfische Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, [1969] 2002).

<sup>15</sup> G. Harste, “Kant und Luhmann über Teleologie in politischer Kommunikation und Natur”, pp. 169–83, in: *idem*, T. Mertens & T. Scheffer (eds), *Immanuel Kant über Natur und Gesellschaft*, (Odense: Odense University Press, 1996).

<sup>16</sup> J.-J. Rousseau, *Du Contract Social ou Principes du Droit Politique*, (Paris: Hachette Litteratures, [1762] 2005).

<sup>17</sup> J. Habermas, *Der philosophische Diskurs der Moderne. Zwölf Vorlesungen*, (Frankfurt aM: Suhrkamp Verlag, 1985), p. 13–58.

Hence, the concept of dis-embeddedness is one of many concepts which deal with the dark side of modernity. Distilling the core insights of the various approaches, one can, moreover, conclude that dis-embeddedness must be understood as an inescapable condition of modernity, just as modernity must be conceptualised in a paradoxical manner, in so far as it sets the individual free at the same time as it makes him or her an object of the “social engineering” through which the human subject is purposefully recreated.<sup>18</sup>

### III. Equivalents to Embeddedness in Classical Modernity

Hegel, a contemporary observer of the break-through of modernity, was not only the first to understand critique as an inherent element of the concept of modernity, but was also the first to conceptualise modern society as a pre-dominantly functional-differentiated society. Under the influence of the economic studies of David Ricardo and Adam Smith, he was also the first to problematise the socio-economic aspect of the end to embeddedness systematically.<sup>19</sup> Thus, the central question for Hegel was the question of how society could remain integrated under the condition of the (relative) primacy of functional differentiation and a capitalist economy.

Hegel’s answer was the all-encompassing rational and sovereign (welfare-) state. This answer was derived from his conceptualisation of functional, stratificatory and territorial differentiation as three independent forms of differentiation which stand in an orthogonal relationship to each other, and which enabled him to develop a three-dimensional concept of the state. Firstly, he understood the state as being composed of the legal and the political system in the “narrow sense”, that is, of functionally-delineated structures such as the government, the state bureaucracy and the courts. Secondly, he understood the state as an entity composing society as a whole. This concept of the “larger state” relied on corporatist structures (*Kooperationen*), framed by socio-economic constitutions, which reflected the social

---

<sup>18</sup> For the relation of mutual increase between freedom and discipline, see, in particular, Michel Foucault: “The Subject and Power”, in: H. Dreyfus & P. Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics*, (Chicago IL: Chicago University Press, 1982), pp. 208–226.

<sup>19</sup> G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, *Werke Band 7*, (Frankfurt aM: Suhrkamp Verlag, [1821] 1970), § 235–246, especially § 244.

classes of the emerging industrial society. Thirdly, the state was conceptualised as a container constituting itself through the delineation of one state towards other states. Thus, Hegel did not open the path to a return to a pre-modern form of embedded social praxis on the basis of pre-modern morality (*Sittlichkeit*), but, instead, emphasised the integrative force of the rational state as the appropriate functional equivalent under the condition of modernity.<sup>20</sup>

At first glance, Hegel's concept of the absorption of society in the state, developed in the first decades of the Nineteenth century, is a useful starting-point for a description of how the emergence of new forms of stratification triggered the development of complex corporatist regimes, operating upon the basis of the distinctions between employers and employees and capital and labour, in most (Western) European countries in the late Nineteenth century and throughout much of the Twentieth century. The fundamental function of the corporatist regimes was the stabilisation of the relationship between the social classes of the industrial society. Not surprisingly, the economic system and the labour market were, therefore, at the centre of the corporatist regimes. Although the "variety of capitalism", as it emerged within the framework of national structures, led to substantial differences in the organisational forms, a common feature of the European corporatist regimes was, however, that they reached *beyond* the economic system, in the sense that the triangular relationship between the state, employers and employees served as the centre of co-ordination for the emerging, and far larger, welfare-state conglomerates. Thus, within national frames, corporatism bound together a multitude of organisations, which all relied on stratificatory differentiation as their central exclusion/inclusion mechanism, and which were attached to all functional systems; for example, from the form of political parties within the political system, newspapers within the mass-media system, schools within the education system, hospitals within the health system, to sports clubs within the area of sports. In this sense, the emergence of corporatist structures provided a counter-movement to the increased functional-differentiation of the overall structures of society, thereby providing an essential contribution to the stabilisation of economic operations within the larger

---

<sup>20</sup> *Ibid.*, § 241–242.

societal realm, and thus to the integration of society in a manner which, from an overall perspective, was in accordance with the Hegelian vision.

The Hegelian position is, however, conceptually problematical in so far as he did not, in practice, refer to territorial and stratificatory differentiation as constants emerging upon the basis of an independent logic, but sees them precisely as the “side effects” of the break-through of modernity, due to an increased reliance on functional differentiation. When he referred to stratificatory differentiation, he was not explicitly referring to structures which are similar to pre-modern stratificatory structures, but, instead, to the modern form of stratification between social classes (conceptualised as the agricultural, the business, and the bureaucracy class), which was the result of the kind of modern capitalist economy which represents one of the central expressions of the increased reliance on functional differentiation.<sup>21</sup> Territorial differentiation is also understood by Hegel as an explicitly modern phenomenon which is the result of the emergence of a modern society.<sup>22</sup> These shortcomings are, moreover, re-inforced by the conceptual contradictions inherent in the three-dimensional concept of the state. A concept which is based upon the fundamental distinction (*Leitdistinktion*) between state and society (*Staat und Gesellschaft*), at the same time as this distinction is supposed to be rescinded through the state. Hegel was never capable of dissolving this paradox, and it thus remains unclear how the unity of the three forms of the state is constituted. Nonetheless, large segments of contemporary comparative politics and welfare state research, more or less consciously, continue to rely on a worldview which is strikingly similar, if not identical, to the Hegelian position.

An alternative is offered by modern systems theory. One of the central insights of systems theory is that stratificatory and territorial differentiation cannot be understood as independent forms of differentiation. Functional differentiation can be defined as expressing an equality of difference in so far as different spheres of society reproduces different functions without any of these spheres taking up a

---

<sup>21</sup> S. Avineri, *Hegel's Theory of the Modern State*, (Cambridge, Cambridge University Press, [1972] 1995), p. 155 *et seq.*

<sup>22</sup> G.W.F. Hegel, *Die Verfassung Deutschlands [1800 – 1802]*, *Werke I*, (Frankfurt aM: Suhrkamp Verlag, 1970), pp. 451–610.

superior position *vis-à-vis* other spheres.<sup>23</sup> In this process, the specific modern form of territorial differentiation emerged as an internal form of stabilisation within each sphere through the development of territorially-based political sub-systems and territorially-based legal sub-systems, just as other systems, such as the systems of economy, health, sports, art and science, to a high extent, came to rely on organisational forms and regimes which operated within territorially-defined frames. For example, firms and university systems maintained a strong national outlook, thereby enabling the emergence of a semantic of “national economies” and specific nationally-embedded institutional forms and practices of science.<sup>24</sup>

Thus, although the legal and political complex might be understood as enjoying a “privileged position”,<sup>25</sup> the structures which are normally dubbed as nation-states cannot be understood as merely representing the sum of the legal and the political systems, or as structures in which other societal structures are succumbed to the primacy of the political system. Instead, they are structures consisting of a dense web of mutually re-inforcing and partly overlapping structural couplings between the functional sub-systems of, apart from law and politics, the systems of economy, education, science, health, sports and so forth. Sub-systems, which are not necessarily delineated along completely identical territorial lines, but which, in most cases, are characterised by strong overlaps between the territorial delineations to which they refer. Such overlaps do not, however, change the fact that such territorial delineations remain as internal system boundaries, and are not overall frames capable of constituting closed units.

The same insight is valid in relation to stratificatory differentiation, in so far as stratification can only be understood as context-specific forms of stabilisation emerging within specific functional areas. Thus, the question of inclusion and exclusion, as well as the question of social justice, is thereby transformed into a

---

<sup>23</sup> N. Luhmann, note 3 *supra*, p. 743 *et seq.*

<sup>24</sup> For example, for science, see R. Stichweh, *The Institutional Structure of the German University*, Working Paper, University of Lucerne, 08, 2007. Available at: <http://www.unilu.ch/files/the-institutional-structure-of-the-german-university.pdf>.

<sup>25</sup> *De facto*, Luhmann represents the position that law and politics, in terms of societal function, enjoy a privileged position in so far as they produce compatibilisation of the time structures of society in its entirety (“gesamtgesellschaftlichen Zeitausgleichs”). See N. Luhmann, note 5 *supra*, p. 429.

question of access to specific roles, which cannot be explained upon the basis of a reductionist economic approach in which social justice is reduced to a question of money:<sup>26</sup> the bohemian artist might not have any money but might still have privileged access to the sphere of art, just as the not so well-off factory worker might be superior to the *bourgeois* on the football field. The concept of social inequality must, therefore, be replaced with a multi-contextual concept of inclusion and exclusion.<sup>27</sup>

Another central systems theoretical insight is the impossibility of assuming the existence of a singular state-embedded national culture.<sup>28</sup> Instead, it is possible to observe a multitude of mutually re-inforcing and overlapping cultures in the form of, for example, national legal cultures, national political cultures, national science cultures and – within the economy – the specific praxis of “doing business”. Apart from serving as “reservoirs” of knowledge, and thus as a basis for learning, such cultures also act as “internal environments” of the respective functional systems, in the sense that they frame the horizons which are taken into account in the continued selection of operations, thereby serving as stabilisation mechanisms which reduce the volatility of societal reproduction. They rely on “fictional semantics”, in the form of, for example, foundational myths and the social constructions of languages, traditions and “vested interests”, which are specific to each sphere of society. They are abstract constructions, or, in Hegelian terms, “second natures”,<sup>29</sup> which, nonetheless, remain “real”, in the sense that they have real effects in terms of which forms of communications are being included and which are being excluded.<sup>30</sup> They serve as frames for the production of societal trust within their respective societal spheres, and, as such, provide a contribution to the internal stability of such

---

<sup>26</sup> For the move from stratification to roles, see, in particular, R. Dahrendorf, *Soziale Klassen und Klassenkonflikt in der industriellen Gesellschaft*, (Stuttgart: Ferdinand Enke Verlag, 1957), and *idem.*, *Homo Sociologicus. Ein Versuch zur Geschichte, Bedeutung und Kritik der Kategorie der sozialen Rolle. 16. Auflage mit einem neuen Vorwort*, (Wiesbaden, Verlag für Sozialwissenschaften, [1965] 2006).

<sup>27</sup> N. Luhmann, “Inklusion und Exklusion”, in: *idem. Soziologische Aufklärung, Band 6, Die Soziologie und der Mensch*, (Opladen: Westdeutscher Verlag, 1995), pp. 237–264.

<sup>28</sup> For the opposite perspective, see U. Haltern, *Was bedeutet Souveränität?*, (Tübingen: Mohr Siebeck, 2007).

<sup>29</sup> G.W.F. Hegel, note 19 *supra*, § 4.

<sup>30</sup> A. Mascareño, “La Cultura chilena como ficción real”, in: M. Figueroa & M. Vicuña (eds), *El Chile del Bicentenario*, (Santiago: Ediciones Universidad Diego Portales, 2008), pp. 183-240.

structures, in the sense that they tend to reduce volatility. As such, they have an “integrative effect”. An effect which is conditioned by the instrumental harmonisation of social structures through the purposeful construction of system-specific universes and the highly intrusive social engineering of the roles assigned to these universes, just as increased integration is conditioned by the constitution of boundaries, thereby leading to the paradox that increased integration among some elements only comes about through the increased exclusion of other elements.

The above de-construction of the “old-European” (*Alteuropäische*) concepts of the totalising state, stratification and culture means that a functional equivalent to the concept of the nation-state is needed. Instead of nation-states, a concept of (national) configurations is more suitable. National configurations consist of a web of couplings between functionally-differentiated spheres, which partly, or completely, refer to the same territory. The foundational element of configurations is the mutual fixation of different systems, which produces an added value (*mehrwert*) in terms of societal integration. In addition, as the existence of disciplines such as comparative law and comparative politics illustrates, a variety of configurations exists in the sense that substantial differences can be observed between different configurations. Hence, although national configurations cannot be understood as being constituted through class struggle or upon the basis of a specific culture or national character (*Volksgeist*), the “additional value” which they produce implies, in contrast to the purely metaphorical status which they are granted within mainstream systems theory, that they must be understood as independent social phenomena.

It is, however, important to understand that configurations are mainly constituted at the level of organisational systems, in so far as a whole range of organisations, from constitutional courts and central banks to universities, serve as structural couplings between functional systems. Such couplings are, moreover, complemented by a whole range of regimes, which range from nationally-delineated corporatist labour market structures to national football leagues. Such regimes consist of a multiplicity of organisations (for example, trade unions and business organisations, or league of football clubs) as well as a broader set of stakeholders. In this sense, regimes can also be understood as structures which produce integration through the establishment of unity between leading roles and supportive roles, in

other words, between producers and consumers, performers and audience, employers and employees, clerics and believers, and so forth.

Thus, configurations can – to use a Leninist expression - also be described as “organisational societies” (*Organisationsgesellschaften*).<sup>31</sup> The importance of the organisational dimension is underlined by the fact that it was the Seventeenth and Eighteenth century organisational revolutions, emerging from the preceding military revolutions, which provided the basis for the political and economic revolutions which unfolded in the late Eighteenth century and throughout the Nineteenth century, thereby making the organisational revolutions, which unfolded within the political, as well as within the economic, sphere, the most important driving force leading to the establishment of the national configurations.<sup>32</sup> The fact that functional sub-systems sail on a sea of organisations as well as the profound societal effects that this produces is, however, downplayed within mainstream systems theory,<sup>33</sup> just as deliberative theory does not seem capture the pivotal importance of the organisational aspect of democracy, in the sense that the question of the organisational infrastructure of political communication remains radically under-exposed within this strand of research.<sup>34</sup>

It follows from the above re-construction of different aspects of Nineteenth and Twentieth century society that, under the condition of modernity, the kind of embeddedness which Polanyi departs from *cannot* be re-established. In modernity, the functional equivalent is, instead, a balancing of different functionally-delineated

---

<sup>31</sup> N. Hayos, “Regionale ‘organisierte Gesellschaften’ und ihre Schwierigkeiten mit der Realität der funktionale Differenzierung”, *Soziale Systeme. Zeitschrift für Soziologische Theorie*, Jg. 13, Heft 1+ 2, 2007, pp. 160–172, at 164 *et seq.*

<sup>32</sup> G. Harste, *Modernitet og Organisation*, (Copenhagen: Forlaget Politisk Revy, 1997). On the basis of similar insights, Norbert Elias describes the French Revolution as nothing more than a *coup d'état* in which one branch of the state bureaucracy, the *noblesse de robe*, ousted another branch, the *noblesse d'épée*. See N. Elias, *Über den Prozeß der Zivilisation. Soziogenetische und psychogenetische Untersuchungen, Band 2*, (Frankfurt aM: Suhrkamp Verlag, [1938] 1976), p. 230 *et seq.*

<sup>33</sup> Luhmann did develop an elaborated theory of organisations. See, in particular, N. Luhmann, *Organisation und Entscheidung*, (Opladen-Wiesbaden: Westdeutscher Verlag, 2000). The problem is the limited status which he grants to organisational systems *vis-à-vis* functional systems within society as such. For example, one notice that organisational systems occupy only 21 pages of his 1,164 page general theory of society. See N. Luhmann, note 3 *supra*, pp. 826-847.

<sup>34</sup> See, in particular, J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt aM: Suhrkamp Verlag, 1992).



spheres of society, such as, but not exclusively, the market and the (welfare-) state. In a multi-contextual society, the question of “social justice” is thereby transformed from a question of class conflict to the task of defining the social roles emerging within different spheres of society as well as the entrance criteria regulating the access to these roles.

This development can also be illustrated by the move from corporatism to neo-corporatism. By the middle and late Twentieth century, the early forms of corporatism had evolved into neo-corporatist negotiation systems (*Verhandlungssysteme*) within Western European configurations. Neo-corporatist structures are hierarchically-organised “peak-associations” which mediate between their specific sectors of the economy and the state. In this sense, they bridge the gap between “state and society” or – to be more precise – between politics and economy, thereby producing the mutual stabilisation of the two spheres.<sup>35</sup> These structures served as the central axis of co-ordination of national configurations, but were, at the same time, characterised by a move towards an ever-increasing reliance on functionally-delineated professions, which gradually made the earlier reference to the distinction between capital and labour and the social classes less profound. Thus, neo-corporatism can also be understood as a transitional phenomenon which bridges the gap between the Hegelian state-embedded society and the radical poly-contextual society.<sup>36</sup>

#### IV. Equivalentents in the Radicalised Modernity

The emergence of national configurations must be understood as the result of highly-complex and improbable evolutionary processes.<sup>37</sup> Improbably because such configurations are constituted through a mutual fixation of a whole range of

---

<sup>35</sup> For a critique of the concept of neo-corporatism from an US-American critical theory perspective, see D. Sciulli, *Theory of Societal Constitutionalism. Foundations of a non-Marxist critical Theory*, (Cambridge: Cambridge University Press, 1992), p. 73 *et seq.*

<sup>36</sup> H. Willke, *Ironie des Staates: Grundlinien einer Staatstheorie polyzentrischer Gesellschaft*, (Frankfurt aM: Suhrkamp Verlag, 1992); *idem*, *Systemtheorie III: Steuerungstheorie*, 2. Auflage, (Stuttgart: Lucius & Lucius, 1998), especially p. 109 *et seq.*

<sup>37</sup> N. Luhmann, “Der Wohlfahrtsstaat zwischen Evolution und Rationalität”, pp. 26–40, in: P. Koslowski, P. Kreuzer & R. Löw (eds), *Chancen und Grenzen des Sozialstaats*, (Tübingen: Mohr Siebeck, 1983).

dimensions, in terms of functional systems, professions, regimes and organisations, in a manner which ensures the necessary autonomy of the dimensions at the same time that a “higher order” is established. The constitution through mutual fixation means that configurations are autonomous “universes” in so far as they derive their constitutive basis from the structure itself. They are assemblages<sup>38</sup> of *eigenstructures*,<sup>39</sup> which represent different forms and dimensions for the reproduction of social patterns. Because they are mutually supportive, radical structural changes within one or more dimensions are, as a minimum, likely to create pressure for a re-organisation and an adjustment within other dimensions of the configuration, or, in extreme cases, to be fatal for the future viability of the configuration in question.

Indeed, such pressure can currently be observed because, sometime in the latter half of the Twentieth century, the economic system reached the limits of its expansion within the framework of (European) national configurations. This development transformed the national configurations from infrastructural elements facilitating economic reproduction into obstacles for further economic expansion.<sup>40</sup>

This development is not, however, restricted to the economic sphere, in so far as similar developments can be observed within almost all spheres of society, ranging from the mass-media to science, which have also undergone a structural development, which implies increased emancipation from their boundedness within national configurations. The result is a structural drift towards a substitution of internal stabilisation mechanisms through territorial and stratificatory forms of differentiation with new forms of radically functionally-differentiated forms. Multinational companies, trade associations, fair trade groups, NGOs within areas such as human rights, environment and developing aid, universities and research

---

<sup>38</sup> S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, (Princeton NJ: Princeton University Press, 2006).

<sup>39</sup> R. Stichweh, “Strukturbildung in der Weltgesellschaft – Die Eigenstrukturen der Weltgesellschaft und die Regionalkulturen der Welt”, in: T. Schwinn (ed), *Die Vielfalt und Einheit der Moderne. Kultur- und strukturvergleichende Analysen*, (Wiesbaden: Verlag für Sozialwissenschaften, 2006), pp. 239-257.

<sup>40</sup> For the European context, see, also, P.F. Kjaer, “The Societal Function of European Integration in the Context of World Society”, (2007) 13 *Soziale Systeme. Zeitschrift für Soziologische Theorie*, Heft 1 + 2, pp. 367–378, *idem.*, “Integration/Desintegration als Code des europäischen Verfassungswandels”, in: A. Fischer-Lescano, F. Rödl & C.U. Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, (Baden-Baden: Nomos Verlag, 2009).

institutions, sport associations, and so on and so forth, increasingly establish new functionally-delineated normative orders which operate on a more or less global scale, and which are internally stabilised through new forms of (quasi-) legal structures.<sup>41</sup> The fact that we are dealing with a co-evolutionary process which cannot be reduced to a question of pure economy<sup>42</sup> is, moreover, being underlined by the fact that the political system, as well as the “traditional” legal structures, is also undergoing a globalisation process through the emergence of structures, such as the EU and the WTO, and many other international organisations, courts and tribunals.

In the same manner as the modern states emerged from within the kind of pre-modern religiously-embedded structures which characterised the pre-modern world,<sup>43</sup> these new structures emerge from the structures constituting national configurations. Firms which used to operate on a national scale have become global, and classical international law organisations have increasingly developed a life of their own and thereby have gained a transnational dimension. Thus, multinational companies as well as international organisations must be understood as two-dimensional structures. In the case of multinationals, they often retain a national core, in the sense that they still count, for example, as German, Swiss, American or Japanese firms, which, to a great extent, remain structured by the national legal structures and the business culture of their country of origin. On the other hand, they are globally-operating structures with a need to develop products, organisational structures and policies, which are suitable for the entire globe. In this second sense, they must be understood as independent normative orders. As such, they are faced with a functional pressure to internally develop (quasi-) legal structures capable of stabilising such orders, as well as to develop policies capable of framing their

---

<sup>41</sup> Ulrich K. Preuss, note 7 *supra*.

<sup>42</sup> For a somewhat reductionist view in which ongoing transformation processes are essentially understood as reflections of a change in the mode of economic reproduction, see Karl-Heinz Ladeur, “Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?”, pp. 89–118, in: Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization*, (Aldershot: Ashgate Publishing, 2005). For a constructive critique, see, also, Poul F. Kjaer, “Embeddedness through Networks – a Critical appraisal of the Network Concept in the *Oeuvre* of Karl-Heinz Ladeur”, (2009) 10 *German Law Journal*, pp. 483–499.

<sup>43</sup> See, in particular, Ernst Kantorowicz, *The King’s Two Bodies. A Study in Mediaeval Political Theology*, (Princeton NJ: Princeton University Press, [1957] 1997).

relations with stakeholders, in the form of consumers, distributors, sub-contractors and the wider public on a global scale.<sup>44</sup> Thus, multinationals are neither just national-based companies nor free-flowing global entities. Instead, they are both at the same time.<sup>45</sup>

The same is the case for international organisations. They remain treaty-based and, as such, the political system in the nation-state form remains of central importance. Trans-national structures cannot, however, be understood as the result of pure delegation upon the basis of international treaties.<sup>46</sup> Each delegation of competences implies recognition of the autonomy of the structure to which delegation is made, just as delegation implies a transfer of discretionary capacities, which enable them to select between varieties of possible operations. Selections of operations also tend to frame the variety of the possible operations that can be selected in the future. In this sense, delegation always implies a loss of control. Hence, delegation always represents a step into the unknown, which, at times, can release forces of surprising viability.<sup>47</sup> For example, despite the massive efforts of the US government, in particular, to ensure inter-governmental control in the negotiation of the WTO agreement, the WTO regime has, nonetheless, developed into a dynamic autonomous structure, operating upon the basis of a specific logic, within a very short time-span.<sup>48</sup> Thus, a structure such as the WTO must be understood as a classical international organisation and as an autonomous transnational regime at the same time. The same phenomenon can be observed in the EU context: for example, comitology committees act as “mini-Councils”, upon the basis of delegation. At the same time, the comitology complex has evolved into an

---

<sup>44</sup> Larry Catá Backer, “Economic Globalization and the Rise of Efficient Systems of Global Private lawmaking: Wal-Mart as Global Legislator”, (2007) 37 *University of Connecticut Law Review*, pp. 1739–1784.

<sup>45</sup> M. Amstutz & V. Karavas, “Weltrecht: Ein Derridasches Monster”, pp. 645-672 in: G.-P. Callies, A. Fischer-Lescano, D. Wielsch & P. Zumbansen (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin: De Gruyter, 2009), pp. 645-672, at 665 *et seq.*

<sup>46</sup> For the EU, see Poul F. Kjaer, “Constitutionalizing Governing and Governance in Europe”, (2010) *Comparative Sociology*, 9, 1, pp. 86 – 119 for a de-construction of the concept of principal-agent referring to the US debate, see Joshua Cohen & Charles Sabel, “Global Democracy?”, (2005) 37 *NYU Journal of International Law and Politics*, pp. 763–797.

<sup>47</sup> P.F. Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe’s Post-national Constellation*, (Oxford: Hart Publishing, 2010).

<sup>48</sup> The WTO was established 1 of January 1995.

extremely multi-faceted structure with a life of its own. Thus, transnational structures can also be understood as parasites, in the sense that they rely on national-configurations as their hosts, while, at the same time, tending to marginalise the hosts. But, potentially, they can also turn into parasitoids, namely into organisms which ultimately end up killing their hosts: for example, the EU, the most progressed transnational structure, is based upon an operational logic which systematically breaks down the very national constellations upon which it relies.<sup>49</sup>

Thus, a continuum of trans-national structures ranging from public international organisations, hybrid private-public structures, to “pure” private forms has emerged.<sup>50</sup> What we are witnessing is the emergence of a new form of configurations emerging “on top” of national configurations: configurations characterised by an independent logic and radically different institutional forms when compared with the national forms.

A common feature of these structures is that they represent a move towards partial de-territorialisation, constituted through a mixture of “fluid” legal regimes with global reach and “forum shopping” between territorially-defined jurisdictions. Thus, even the EU, which, in principle, is a territorially-differentiated structure, does not, in many instances, refer to a concept of territoriality. Instead, it consists of a multitude of dimensions, such as *The European Space of Freedom, Security and Justice* and the *European Economic Area*, which indicate that the structures in question are not referring to territoriality in the nation-state sense, but that they are, instead, regimes which operate without well-defined boundaries.<sup>51</sup> The consequence is a weakening

---

<sup>49</sup> Poul F. Kjaer, “Integration/Desintegration als Code des europäischen Verfassungswandels”, in: A. Fischer-Lescano *et al.*, note 40 *supra*.

<sup>50</sup> This is not, however, a new phenomenon. The process leading to the establishment of the first public international organization, the *Commission Centrale pour la Navigation du Rhin* (CCNR), was initiated at the Congress of Vienna in 1815. In the same year, the first volume of von Savigny’s *Geschichte des römischen Rechts im Mittelalter* was published, thereby starting the process which led to the development of the essential principles of modern international private law in his *Systems des heutigen Römischen Rechts* (1840-49). What has changed is rather the relative weight between the national and the transnational dimensions. See, also, C. Walter, “Constitutionalizing (Inter) national Governance: Possibilities for and Limits to the Development of an International Constitutional Law”, in: (2001) 44 *German Yearbook of International Law*, pp. 170–201.

<sup>51</sup> For the distinction between territory and space, see Alain Supiot, “The Territorial Inscription of Laws”, in: G.-P. Callies *et al.*, note 45 *supra*, pp. 375-393, in which the concept of territory is contrasted to the concept of air- and sea space. This *problématique* is, moreover having a history which is as long as modernity itself.

of the link between law and national-based forms of authority in the form of democratic processes, corporatist negotiation systems and so forth. The confinement to territorial boundaries, as inherent to the concept of a polity, is increasingly becoming an inadequate basis for problem-solving.<sup>52</sup> This is also being exemplified by the 2008 financial crisis, in the sense that reducing the imbalances of the economic system *vis-à-vis* other spheres of society is likely to necessitate a further strengthening of transnational legal and political structures, rather than a return to nation-state forms of regulation.

Thus, new forms of authority are emerging, in the sense that, within the transnational processes themselves, new authoritative structures, which evaluate the ongoing developments within their specific fields upon the basis of normative yardsticks, are emerging. The function of “scientific knowledge” within (public and private) risk regulation is a well-known example of this. But even NGOs within areas such as human rights (for example, *Amnesty International* and *Human Rights Watch*), fair trade (for example, the 24 organisations assembled within the framework of the *Fairtrade Labelling Organizations International* structure) and the environment (for example, *Greenpeace* and the *WWF*) increasingly gain a position which enables them to act as the central source of authority for the normative evaluation of what appropriate standards should be established within their specific fields.

The consequence is a “disorder of normative orders”,<sup>53</sup> characterised by a multitude of overlapping partly-national and partly-trans-national structures, partly-public and partly-private structures. Classical bureaucratic organisations to a large extent remain the organisational nucleus of these orders. This is the case in relation to purely national structures, international organisations, as well as multinational companies. But, at the same time, it is possible to observe the emergence of “buffer

---

For example, according to Hegel and Carl Schmitt, the distinction between “land and ocean” (*Land und Meer*) can be understood as the constitutive distinction between pre-modern and modern forms of social organisation. See G.W.F. Hegel, note 19 *supra*, §. 247, and C. Schmitt, *Land und Meer. Eine Weltgeschichtliche Betrachtung*, (Stuttgart: Klett-Cotta, [1942] 2008).

<sup>52</sup> P.F. Kjaer, “The Under-complexity of Democracy”, in: G.-P. Callies *et al.*, note 45 *supra*, pp. 531-542.

<sup>53</sup> For similar insights which, however, remain restricted to public transnational structures, see N. Walker, “Beyond boundary disputes and basic grids: Mapping the Global disorder of normative orders”, in: (2008) 6 *International Journal of Constitutional Law*, pp. 373-396.

zones” between the various orders, in the sense that organisational structures which rely on the network form “surround” virtually all hierarchical structures, be it in the form of inter-state networks between nation state bureaucracies,<sup>54</sup> or in the form of Comitology or Social Corporate Responsibility structures in the form of partnerships between, for example, research institutions and firms. The function of such networks is the transfer of meaning components (*Sinnkomponente*) from one order to another. Thus, networks are neither the basic components of society,<sup>55</sup> nor are they “mini-systems” which, themselves, are functionally-differentiated.<sup>56</sup> Instead, they are structures which stand transverse to the functionally-differentiated structures of society. In this sense, they can also be understood as functional equivalents to the (neo-) corporatist structures which have emerged as a consequence of radical increases in complexity and functional differentiation.

This “in-between” status means that they lack the “purity” of functional systems. Thus, they are doubled-edged structures which can provoke, on the one hand, de-differentiation, and, on the other, structures which serve as channels of reflexivity which increases the ability to observe external developments, thereby increasing the possibility of adaptation. They are the social forms “... where co-operation and trust and domination and compliance are actually produced”.<sup>57</sup> Their function is to combine a multitude of rationalities. For example, within risk regulation, networks combine scientific, environmental, and economic, as well as legal, forms of rationality.<sup>58</sup> They are the no-man’s-land between functional systems, and, as such, they are the political battlefields upon which the continued struggle for the appropriate delineation of meaning spheres is fought out. The move towards increased reliance on functional differentiation implies a transformation of the function of politics, in the sense that the transnational layer of the political system,

---

<sup>54</sup> A.-M. Slaughter, *A New World Order*, (Princeton NJ: Princeton University Press, 2004).

<sup>55</sup> For this view, see K.-H. Ladeur, “Towards a Legal Theory of Supranationality – the Viability of the Network Concept”, (1997) 3 *European Law Journal*, pp. 33–54.

<sup>56</sup> For this view, see A. Fischer-Lescano & G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, (Frankfurt aM: Suhrkamp Verlag, 2006).

<sup>57</sup> M. Granovetter, in: G. Krippner *et al.*, “Polanyi Symposium: a conversation on embeddedness”, (2004) 2 *Socio-Economic Review*, pp. 109–135, at 116.

<sup>58</sup> P.F. Kjaer, “Rationality within Reach? On Functional Differentiation as the Structural Condition of Legitimacy in European Chemicals Regulation”, *European University Institute Working Paper*, 18, 2007.

which continuously gains in importance *vis-à-vis* the nation-state layer, is oriented towards such functional-delineated conflicts, rather than towards territorial or class-related conflicts. An appropriate conceptualisation of transnational structures is, therefore, conditioned by the development of a new context-specific concept of the political; a concept, which, however, can only be developed upon the basis of a radical break with the Weberian concept of the political, which continues to guide the contemporary nation state disciplines of social science, and which exercises systematic methodological sabotage *vis-à-vis* attempts to understand the political character of the transnational space.

As networks are not only the forms through which reflexivity is increased, but also serve as channels of access through which asymmetries can be transformed into colonising tendencies, the danger of instrumentalisation is omnipresent. This danger is being increased by the structural tendency to closure, which characterises most networks. Such closure is not only the result of hegemonic battles, but also a reflection of an organisational need of stability, which again leads to the establishment of narratives, unchallenged assumptions, considered to be self-evident truths, and circular recruitment, in which only those who confirm the already-established world-view can obtain access. These structural deficits highlight the potential role of law *vis-à-vis* the network phenomenon, in the sense that constitutionalisation and proceduralisation can serve as tools which are deployed in order to ensure symmetry, discursive diversity and continued openness. The differences between the operational mode of comitology structures, which rely on a detailed procedural framework, and the Open Method of Co-ordination (OMC) processes are very illustrative, in so far as the absence of a formalised legal framework creates a structural basis for the de-differentiation processes within the latter.<sup>59</sup>

The challenge to legal scholarship thus seems to be the endeavour to take these European experiences into the global setting, as well as to develop a framework which makes it possible to seek a constitutionalisation of private

---

<sup>59</sup> For empirical illustrations of this point, see P.F. Kjaer, note 58 *supra*; *idem*, “Formalisation or De-formalisation through Governance?” in: Rainer Nickel (ed): *Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification*, (Oslo: Arena RECON Report, 2009).



governance structures of the kind surrounding multinational companies as well. Such an endeavour will, however, have to go beyond classical public and private international law. If one insists on national legal structures and international law, understood as an “in-between nations” form of law, to be the only law, then, the consequence is that one would have to accept a “legal gap”, in the sense that substantial areas of society - and thus of the social reality of individuals - will remain beyond the law. Although nation-state law remains central and might serve as a “law of last resort”,<sup>60</sup> a “complete constitutionalisation” implies the need to develop new legal structures which reflect the structural reality of a society in which substantial societal processes unfold beyond nation configurations.<sup>61</sup>

---

<sup>60</sup> U.K. Preuss, note 7 *supra*.

<sup>61</sup> A. Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures”, (2006) 19 *Leiden Journal of International Law*, pp. 579–610.