within the social system, in its specific historical situation, can determine its own function and contribution. This, then, is how constitutions contribute to the public interest; not centrally, in the political system, which sets out the public interest requirements for all areas of society, but rather decentralized within each and every single social system. Only an independent constitution can undertake to define the identity of a social system, its compatibility with society as a whole and its surrounding contexts. If transnational regimes develop these reflexive capabilities, and mobilize legal norms to support them, their status as constitutional subjects will be justified.

Transnational Constitutional Norms: Functions, Arenas, Processes, Structures

The subjects of societal constitutionalism take different characteristics, depending on whether they are formed in the national or in the transnational arena. We can mark this as a provisional outcome of the two previous chapters. New constitutional subjects have emerged in the course of globalization: international organization, transnational regimes and networks. They are characterized by denationalization and fragmentation, a high level of autonomy, and an issue-specific orientation. Despite the objections of nationally-minded constitutional scholars, there is no alternative but to recognize a considerable number of transnational institutions as constitutional subjects. As shown in the previous chapter, if we want to do justice to global realities, we will have to take on board three points: (1) The nation state can no longer be regarded as the only possible constitutional subject. (2) The fragmentation of global society into functionally defined regimes is today a reality. (3) It is not only public institutions in the narrow sense that are constitutionalized; this must also be conceded to institutions in the private sector.

Yet—as constitutional scholars continue to object—even if transnational regimes were candidates for constitutions, their rules do not display the specific characteristics of constitutional rules. What is going on under the heading of constitutionalization, they say, amounts only to a juridification of social spheres, either via public international law or via private ordering; but it in no way involves the emergence of genuine constitutional norms. In short: this is juridification, not constitutionalization. The norms of the WTO, ILO, ICC, ICANN, the lex mercatoria, the lex sportiva and other transnational regimes perform only regulatory functions, not constitutional ones. They cannot, it is said, bring about the interplay which can be observed in national politics between the arenas of public opinion and binding decision-making. Furthermore, the alleged constitutions within the transnational sphere display at best a hierarchy
of legal norms, but they cannot anchor this norm hierarchy in democratically organized political processes.\footnote{Grimm (2003) 'Constitution in the Process of Denationalisation', 66 ff.} These objections are no longer about constitutional subjectivity but about the quality of norms, and to answer them involves considerable analytical efforts—a merely metaphorical talk about constitution should certainly be avoided.\footnote{Wahl (2008) 'Verfassungsdanken jenseits des Staates. For a counter-critique, Holmes (2011) 'Rhetoric of Legal Fragmentation', 125 ff.} Whether or not transnational regimes are developing genuine constitutional law beyond mere ordinary law will be discussed by using four criteria.\footnote{Wahls criticism of advocates of a transnational constitutionalism, Wahl (2002) 'Leidegriff oder Allerweltsbegriff'.} That we do not limit ourselves to the criteria for a 'formal' concept of constitution is presumably self-evident at this point.\footnote{Klaubers (2009) 'Setting the Scene', 8 ff.} Instead, constitutions inside the state need to satisfy the requirements of a 'material' concept of constitution, according to which a constitution establishes a distinct legal authority which for its part structures a societal process (and not merely a political process, as is the case with nation-state constitutions) and is legitimized by it.\footnote{Kelsen (1934) 'Pure Theory of Law', 221 ff. Some transnational regime constitutions (eg the WTO) do in fact meet the three necessary conditions: (1) written document; (2) hierarchy of norms; (3) complicated procedure. Others, eg the lex mercatoria, only fulfill (2), to a small extent (3) and not (1), see Dahlhusen (2006) 'Legal Orders and their Manifestations'. They would thus belong to the class of informal or latent constitutions, as in the famous special case of the British state constitution. \textit{Loci classicae:} Dicé (1964 [1889]) Study of the Law of the Constitution, 23.} The norms of a transnational regime will have to pass the following quality tests in order to count as constitutional norms:

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

2. **Constitutional arenas**: is it possible to identify different arenas of constitutionalization—comparable to the arenas of organized political

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**I. CONSTITUTIONAL FUNCTIONS: CONSTITUTIVE/LIMITATIVE**

1. **Self-foundation of social systems**

In terms of systems theory, the political constitutions of nation states have the constitutive function of securing the autonomy of politics which has been acquired in the modern era in relation to 'other' religious, familial, economic, and military sources of power. They do so by formalizing the medium of political power.\footnote{Moving in this direction: Thornhill (2008) 'Towards a Historical Sociology', 169 F. Further on Luhmann's constitutional theory, Luhmann (1990) 'Verfassung als evolutionäre Erscheinung', Luhmann (1973) 'Politisiche Verfassungen im Kontext'.} In Thornhill's words:

constitutions (whatever their express and volitional design) normally have the function that they formulate objectivated rights regimes in order to support the abstraction of state power as an autonomous social commodity, and, as far as possible under different historical conditions, to ensure conditions facilitating the generalisation of power across society. In serving this purpose, then, it is also suggested here that constitutions usually provide a sensibilised political mechanism for a society, which uses right to identify and codify the fissures between otherwise interpenetrated social spheres, and which consequently underwrites the wider differentiation of all distinct spheres of exchange within society.\footnote{Thornhill (2011) 'The Future of the State' (manuscript), 18.}

**Mutatis mutandis**, other sectorial constitutions—the constitution of the economy, science, the media, and the health system—perform the parallel constitutive function, namely, of securing the autonomy of their specific medium, nowadays on a global scale. Each partial constitution makes use of 'constitutive rules' to regulate the abstraction of a homogenous communicative medium—power, money, law, knowledge—as an autonomous social construct within a globally-constituted function

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system. At the same time the constitutions make sure that the society-wide impact of their communicative media is guaranteed under different historical conditions. They develop organizational rules, procedures, competences, and subjective rights for both these orientations, codifying the separation between the social spheres and thus supporting the functional differentiation of society.

What is striking about the constitutions of the functional global regimes is how exclusively they promoted this constitutive function in the last few years—that is, how their attention focused solely on institutional conditions for their autonomy. The regime constitutions were obsessed with one overriding problem: that national boundaries are creating obstacles to an unrestrained global interconnection of function-specific communications not only in the economy, but also in science, education, health care, and the media. National ‘production regimes’ are made principally responsible for this problem: while they support effectively the function systems, their support ends at the boundaries of each nation state. To dismantle such nation-state barriers has become the primary constitutional aim of transnational regimes. Today’s global constitutionalism thus aims to accomplish two things: to break down the close structural couplings between the function systems and nation-state politics and law, and to enable function-specific communications to become globally interconnected. Constitutive rules thus serve to unleash the intrinsic dynamics of the function systems at the global level.

Both the advocates of the ‘New Constitutionalism’ and the proponents of an ordoliberal global economic constitution identify precisely this constitutive orientation of the global regimes, even if their political assessments are diametrically opposed. Such a worldwide ‘neo-liberal’ constitutionalization, aimed at achieving the autonomy of social subsystems (and of global markets in particular), has been promoted in the Washington Consensus of the past 30 years. It has produced not only specific political regulations but also fundamental constitutional principles. In the economy these have aimed at giving global corporations unlimited options for action, abolishing government shareholdings in corporations, combating trade protectionism, and freeing business corporations from political regulation.

The overriding constitutional principle of the International Monetary Fund and the World Bank is to open up national capital markets. For their part, the constitutions of the World Trade Organization (WTO) and likewise of the European internal market, the North American Free Trade Agreement (NAFTA), the Mercado Común del Cono Sur (MERCOSUR), and the Asia Pacific Economic Co-operation (APEC) are establishing constitutional safeguards for free trade and direct investment.

The lex mercatoria, too, which has developed a layer of constitutional norms on top of its ordinary contract law rules, focuses mainly on this constitutive function. ‘Private’ courts of arbitration have defined private property, freedom of contract, and competition as part of a ‘transnational public policy’. In the constitutions of multinational corporations, three ‘neo-liberal’ principles of corporate governance have been firmly established: almost unlimited corporate autonomy, the orientation of company law towards capital markets, and the establishment of shareholder value.

In order to enforce these principles, corporate constitutional politics have successfully dismantled nation-state production regimes whenever they impede the global expansion of corporate activities. The newly emerging global corporate constitutions therefore pursue two goals: to reduce the influence of nation-state politics and law on democracy.

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16 On the various production regimes as stable configurations of economies, politics, and law see Pi. 10.
corporate activities, and to promote the ‘rule of law’ insofar as it facilitates worldwide transactions. Constitutive constitutional norms of this kind serve to release the intrinsic dynamics of business corporations at the global level.

2. ‘Double movement’ of global constitutionalism

In the long run, however, the one-sided ‘neo-liberal’ reduction of global constitutionalism to its constitutive function cannot be sustained. It is only a matter of time before the systemic energies released trigger disastrous consequences—alongside their indubitably productive effects. Now a fundamental readjustment of constitutional politics will be required to deal with the outburst of social conflicts. This is the moment when Polanyi’s ‘double movement’ makes its presence felt, which, as Streeck argues, identifies

…the not just plural but inherently contradictory forces responsible for the specific dynamism of capitalist development, making it move, not linearly, but in its fits and spurts, and in cyclical waves of institutionalization and de-institutionalization.\(^{17}\)

In such processes of ‘dynamic disequilibrium’, which alternate between liberation and limitation of systemic energies, the tipping point has now been reached. After a long constitutive phase, combating the risks of unrestrained liberalization has now become indispensable.\(^{18}\)

Limitative constitutional norms are now needed rather than constitutive ones.

This is the situation after dismantling nation-state regulations at a transnational level. While global function-specific communication is no longer hindered by nation-state production regimes, the constitutive constitutional politics of the Washington Consensus has overridden many of the limitations that nation states placed on the dynamics of the function systems. Unburdened by nation-state restrictions, the systems are now placed to follow, globally, a programme of maximizing their partial rationality. Despite the fact that they differ in their theory assumptions, sociological analyses in the tradition of Karl Marx, Max Weber, and Niklas Luhmann all agree on the consequences of this diagnosis. Whether the


laws of motion of capital, or the rationalization of spheres of social action, or the dynamics of functional differentiation—all identify the destructive energies created by the one-sided function-orientation of a social sector. Globalization has an accelerating effect. The dismantling of national production regimes releases destructive dynamics in the global systems; destructive dynamics in which the one-sided rationality-maximization of one social sector collides with other social dynamics.

This dynamic pointedly raises the question of whether functional differentiation necessarily transforms the ‘normal’ self-reproduction of function systems into a compulsion towards unlimited growth. The theory of autopoietic systems has long broken with the axiom of classical structural functionalism, namely, the imperative of sheer system maintenance. Connectivity of recursive operations has become the new imperative—the autopoiesis is either continued or it is not.\(^{19}\) Beyond this, however, the disturbing question arises of whether functional differentiation secretly implies a peculiar growth compulsion. Since function systems orient themselves towards one and only one binary code, they destroy the inherent self-limitations which worked effectively in the multifunctional institutions in traditional societies. As a consequence, the self-reproduction of function systems and formal organizations follow an inexorable growth imperative.

Slightly inflationary tendencies in the symbol production would be the normal state of affairs; without them function systems become caught up in a shrinking spiral that threatens their productivity.\(^{20}\) Beyond such ‘normal’ growth, however, their recursivity seems to succumb to the pressure to accelerated repetition and growth. If so, what is it that triggers such ‘turbo-autopoiesis’? The infamous expansion tendencies of function systems—politicization, economization, juridification, medialization, and medicalization of the world—indicate indeed a compulsive growth dynamic, to a higher or lower degree in each function system. Observing in several systems a tendency to increased symbol production, Stichweh assumes indeed such an inherent growth imperative. He registers the difference between the normal state of ‘slightly inflationary growth processes’ and crisis-inducing excessive growth.\(^{21}\) The responsibility lies with the communicative media of money, power, law, truth, and love. They increase not only the motivations for accepting communication, but


\(^{20}\) Advocating such a concept for the economy is Binswanger (2009) Verwirrs zur Bündigung, 11 ff.

produce at the same time excessive growth expectations, a kind of 'credit' to future communications. The credit can only be redeemed through constantly greater contributions and their retroactive impact on likewise increasing expectations of 'credit', so that a spiral of growth arises. The pathological spiral of growth appears no longer to develop only in the economy, but rather in many, if not all, function systems.

This growth dynamic goes beyond the cycle of acceleration which Rosa diagnosed for today's 'high-speed societies'.\textsuperscript{22} Acceleration of social processes is merely a partial phenomenon of a larger growth dynamics which unfolds in three dimensions: not only temporal, but also substantive and social. While Rosa observes rightly the temporal dimension, its substantive dimension is realized in the growth imperative of symbol production, i.e. a tendency to multiply operations of the same kind. And in the social dimension, a social epidemiology, i.e. imitation, spreading, and contagion, has been identified, particularly the ‘herd behaviour’ in the financial markets.\textsuperscript{23}

Inherent pressures towards ever greater production have been for a long time identified in the economy. They are the precondition for its self-reproduction, but when they are spurred on, a sudden switch towards destructive tendencies occurs.\textsuperscript{24} But the pressure is also found in other function systems. Is it possible to identify the difference between ‘normal’ growth and its ‘pathological’ forms? In the case of law, we can clearly see that law not only resolves conflicts and returns to a position of rest. Rather, its own regulations actually generate conflicts, which then call for further regulation. Through its regulatory intervention in daily life, law itself produces the situations which then give rise to conflicts.\textsuperscript{25} And, at the same time, each norm generates problems of interpretation, which themselves generate further conflicts. Finally, the sheer mass of legal rules produces rule-conflicts which call for the production of yet more rules. It appears that the high autonomy of law enhances the number of conflicts. All this would still be the normal slightly inflationary tendency of law. What should be viewed critically, however, is a kind of dependency syndrome in the law, in which the production of norms comes to depend on external stimulants—economic contractual mechanisms and political legislation—which generate, at both national and transnational level, the much criticized pathologies associated with the excessive juridification of the world. Could these be the legal growth excesses of late modernity? In politics, the excessive growth pressures of the welfare state are the obvious candidate. In science, research generates ever greater uncertainty that can only be eliminated by more research which in turn generates new uncertainties. In this sphere, furthermore, the well-known pressures of 'publish or perish' have now reached such a level of intensity that ‘academic ghostwriting’ has become a growth industry posing a serious threat to the credibility of academic publishing.\textsuperscript{26} In all these contexts, it is necessary to distinguish between normal growth necessary for continuity and the growth excesses that threaten the maintenance of the system.

3. Self-constraint of growth pressures
It is important, then, to identify the dynamics which speed up the spirals of growth to such an extent that they tip into destructiveness. Growth acceleration in today’s globalized function systems is a heavy burden on themselves, on society and on the environment. It entails grave ‘consequences that arise from their own differentiation, specialisation and orientation towards high performance’.\textsuperscript{27} Three problem areas can be identified: (1) the collision of a particular sub-rationality with other sub-rationalities; (2) collision with a comprehensive rationality of world society;\textsuperscript{28} and (3) the collision of the function-maximization with its own self-reproduction. The evolutionary dynamics of these three collisions certainly have the potential to result in a societal catastrophe. But there is nothing necessary about the collapse, as Karl Marx postulated, and nothing necessary about Max Weber’s ‘iron cage’ of modernity. Niklas Luhmann is more plausible: the occurrence of catastrophe is contingent. It depends on whether countervailing structures will emerge which prevent the positive feedback catastrophe.

When it becomes concrete, this contingency experience of the catastrophe may be regarded as the ‘constitutional moment’.\textsuperscript{29} This is not yet the

\textsuperscript{23} Informative, Stätheli (2011) ‘Political Epidemiology’.
\textsuperscript{24} Binswanger (2009) Vorwärts zur Mästigung.
\textsuperscript{26} In detail on these pressures of enhancement, Stichweh (2011) ‘General Theory of Function System Crisis’.
\textsuperscript{27} Luhmann (1997) Gesellschaft der Gesellschaft, 802.
\textsuperscript{28} A comprehensive rationality of world society? Caution is in order. There is no authority that could define this rationality. However, the possibility exists that the subsystems, from their decentralized perspective, reflect on a macro-rationality.
\textsuperscript{29} This is clearly a different use of the term than in Ackerman (2006) We the People, 266 ff., 285 ff.
moment when the self-destructive dynamic makes the abstract danger of a collapse appear—that is the normal state of things. Rather, it is the moment when the collapse is directly imminent. The functionally differentiated society appears to ignore earlier chances of self-correction; to ignore the fact that sensible observers draw attention to the impending danger with warnings and incantations. In the self-energizing processes of maximizing sub-rationalities, self-correction seems to be possible only at the very last minute. The similarity with individual addiction therapies is obvious: ‘Hit the bottom! It must be one minute before midnight. Only then, today’s addiction society has a chance of self-correction. Only then is the understanding lucid enough, the suffering severe enough, the will to change strong enough, to allow a radical change of course. And that goes not only for the economy, where warnings about the next crisis are regularly ignored. It goes too for politics, which does not react when experts criticize undesirable developments, but waits instead until the drama of a political scandal unfolds—and then reacts frantically. The Kuhnian paradigm shift in science appears to be a similar phenomenon, where aberrations from the current dominant paradigms are dismissed as anomalies until the point where the ‘theory-catastrophe’ forces a paradigm shift.

The constitutional moment refers to the immediate experience of crisis, the experience that an energy released in society is bringing about destructive consequences, the experience that can be overcome only by a process of self-critical reflection and a decision to engage in self-restraint. The phenomenon of social systems experiencing the dark side of their promise of progress is, ultimately, not a deviation from the ‘healthy’ course of things; it is not an error to be avoided. On the contrary, this experience almost seems to be a necessary precondition for changing their internal constitution. Ultimately, then, it is a system’s pathological tendencies that bring forth the constitutional moment, the moment of imminent catastrophe in which the decision is made between the energy’s complete destruction and its self-restraint.

Functional differentiation has entailed a daring experiment involving a move away from a grand unity of society to the release, instead, of a multitude of fragmented social energies which—because they are not limited by any built-in counter principles—have generated an enormous internal growth dynamic. Indeed, this process has made possible great achievements of civilization in the arts, science, medicine, economy, politics, and the law. Yet the dark side of each of these processes leads potentially to moments of catastrophe—constitutional moments—and is precisely what facilitates collective learning about self-constraint. For international politics, the year 1945 is the paradigm. It was the constitutional moment for a worldwide proclamation of human rights after the dehumanizing practices of political totalitarianism, the moment at which political power throughout the world was prepared to constrain itself. Similarly, 1789 and 1989 were moments at which, after a period of destructive expansionary tendencies, politics limited itself by firmly establishing the separation of powers and fundamental rights in political constitutions.

The constitutional moment is not limited to politics. In functional differentiation, all subsystems develop growth energies which are highly ambiguous in their productivity and destructiveness. In many sites the new constitutional question is arising, namely: ‘How much inward expansion does society generate in this way, how much monetarisation, juridification, scientificization and politicisation is it able to generate and to cope with, and how much of it at the same time (rather than, say, monetarisation alone)?’ During the recent phase of functional differentiation this becomes the key problem for social constitutions. This is the actual experience of late modernity following the triumphant victory of the autonomous function systems. It is no longer a matter of ‘What are the institutional conditions of possibility for their autonomy?’ Instead, ‘Where do the limits to the expansion of subsystems lie? The paradigmatic example is the economy, which is marking its triumphs and its defeats in the context of global turbo-capitalism.

4. ‘Capillary constitutions’

If excessive growth allows a social subsystem to get out of hand, there are two options: state intervention or internal constitutionalization. Permanent state control is, after the experiences of totalitarian systems, no longer seriously considered as an option. More suitable, instead, are political mechanisms for governing social processes, in the form of global regulatory regimes—albeit the significance of these is ambiguous. After all, what are the options available? Either administrative steering of global communication or externally imposed self-limitation of system options. If it is correct that the main concern is to avert the danger of the three collisions—the system’s self-destruction, environmental damage in the

broadest sense, endangerment of world society—then the second option is preferable. This is the message of societal constitutionalism. Any global constitutional order is faced with the task: How can a sufficiently large degree of external pressure be generated on the subsystems to push them into self-limitations on their options?

Why self-limitation and not outside limitation, though? Does not experience show that self-limitation merely serves to set the fox to keep the geese and that excesses can only be prevented through outside influence? Equally, though, does not experience also show that attempts at trying to control internal processes through external interventions regularly end in failure?32 At this point societal constitutionalism does a difficult balancing act between external intervention and self-direction.33 A ‘hybrid constitutionalization’ is required in the sense that in addition to state power, external societal forces—that is, formal legal norms and ‘civil society’s counter-power from other contexts (media, public discussion, spontaneous protest, intellectuals, protest movements, NGOs, trade unions, professions and their organizations)’34—exert such massive pressure on the expansionist function system so that it will be constrained to build up internal self-limitations that actually work.

However, workable limitations can take effect only within the system’s own logic, not outside it.

Every function system determines its own identity … elaborating semantics of self-interpretation, reflection, and autonomy. The mutual dependencies of the subsystems can no longer be normed in general. Indeed they can no longer be legitimized at all as a condition for order at the overall social level.35

The difficult task of co-ordinating the function of a social system and its environmental tasks at a sufficiently high level can be tackled only through system-internal reflection, which can certainly be prompted from the outside but cannot be replaced.36 This is why there can be no external political definition of transnational sectoral constitutions, but only indirect political impulses or constitutional irritations. The knowledge regarding which kind of self-limitation can be selected does not even exist as such. It cannot simply be accessed, but rather has to be generated internally first. Endogenous growth imperatives can be combated only with endogenous growth inhibitors. The knowledge required to do so cannot be built up by an external observer as centrally available experiential knowledge, but only out of the combined effect of external pressures and internal discovery processes.

High cognitive demands are nevertheless made of national and international interventions by the world of states and by other external pressures, for the very reason that they cannot simply direct behaviour, but ought instead to create irritations selectively. The state cannot intervene directly so as to achieve particular desired situations or the assessment of “results”; rather, it must observe the social systems, and direct its intervention more specifically at their self-transformation.37 When subsystemic rationality develops self-destructive tendencies, external political interventions are indeed unavoidable, however, they need to be geared ‘to create new possibilities through the breaking open of self-blockades; but not to superimpose a different state rationality’.38 Political-legal regulation and external social influence are only likely to succeed if they are transformed into a self-domestication of the systemic growth dynamic. This requires massive external interventions from politics, law, and civil society: specifically, interventions of the type suited to translation into self-steering.

The task would be, with a bit of luck, to combine external political, legal, and social impulses with changes to the internal constitution. Again with Derrida, changes to the ‘capillary constitution’ itself are necessary, down to the very arteries of the communication circulation, ‘where their fineness displays a microscopic form’ and where they cannot be touched by the influences of the ‘capital constitution’ of the state.39 It seems that Derrida was inspired here by the Foucauldian reformulation of the concept of power: the problem of today’s societies lies not with the excesses of juridical power wielded by the political sovereign, but rather in the phenomenon of ‘capillary power’, achieved through progress in scientific

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disciplines and dependent on technology. This capillary power permeates the social body through to its very microstructures.\textsuperscript{40}

No one knows in advance how such a capillary constitutionalization might work in practice. Ex ante prognoses are by definition impossible. And, for that reason, there is no alternative but to experiment with constitutionalization. The application of external pressure means that the self-steering of politics, or law, or other subsystems, creates such irritations of the focal system, that ultimately the external and internal programmes play out together along the desired course. And that cannot be planned for, but only experimented with.\textsuperscript{41} The desired course for social sub-constitutions is, as has been said, limitations of the endogenous tendencies towards self-destruction and environmental damage. This is the core of the constitutional problematic, this difficult handling of the focal subsystem’s self-transformation and that of their environmental systems.

5. Devil and Beelzebub

It is noteworthy that it is the political system, of all things, which has assumed an historic role as a precursor, in its own sphere, for exactly this paradoxical undertaking: subjecting its own expansion to its self-limitation.\textsuperscript{42} Only Beelzebub can cast out the devil! The history of political constitutions of the nation states teaches us a lesson regarding the way in which a social system can limit its own possibilities, increased immensely by functional differentiation, through relying upon its own resources. It cannot be over-emphasized that these self-limitations did not arise automatically by reason of functional imperatives, but rather only under immense external pressure, as the result of fierce constitutional battles. In this auto-limitative role, politics of the nation states has set the benchmark of how constitutions can assist a social system to limit, for itself, its own growth compulsions.

The limitations had different lines of attack, of course, depending on the expansion tendency of the political system. As a countermovement to political absolutism in the early modern period, political separation of powers was intended to divide absolute power, and to restrain the sub-powers through their mutual control. Rechtsstaat principles were intended to place normative limits on the prerogative of the all-powerful sovereign. Following the separation of politics, administration, and justice, the politicization tendencies within administration and justice were supposed to be restricted. And, finally, fundamental rights were intended as the great civilizing achievement with which politics would itself abstain from politicizing individual and institutional spheres of autonomy within society. In today’s changed conditions, new self-limitations are added to these classical limitations. On the one hand, fierce competition among western industrialized states, and the enforced modernization politics of the developing states have transformed the threat to the natural environment into an urgent problem of the political constitution, which can only be addressed through transnational constitutionalization. On the other hand, politics has to answer with constitutional self-limitations to the famous-infamous ‘growth-acceleration-laws’ of the welfare state. To guarantee the independence of the central banks and to set effective limits to national debt is quite clearly to engage in matters of constitutional importance.\textsuperscript{43} The constitutional importance of the question of whether subsidies and other excessive state expenditures should be subjected to a test of sufficient connection with the public welfare is, in contrast, rather more hidden. Social-scientific and political performance reviews by authorities independent of the state (similar to audit courts), which render errors visible and avoidable could be among the currently urgent constitutional self-limitations of the politics of the welfare state.

What does this mean, though, for other sub-constitutions? How to transfer the limitative function from politics to other social subsystems is guided by the criterion of societal compatibility that imposes restrictions on the subsystems:

Affiliation to society therefore places all subsystems in their own functions and capacity for variation under conditions of structural compatibility. The constitution has the function for the political system of reformulating such conditions of social compatibility for internal use, ie in a decidable form.\textsuperscript{44}

Constitutional self-limitation in the sense of compatibility with society is not a problem particular to politics, but one facing all subsystems

\textsuperscript{40} Foucault (1976) ‘Räuberwerke des Überwachens und Strafens’, 45.

\textsuperscript{41} External attempts at irritation and internal reaction must converge in the direction of a common difference minimization, see Luhmann (1997) ‘Limits of Steering’, 43 ff.; Luhmann (1988) ‘Politische Steuerung’; Luhmann (1990) ‘Steuerung durch Recht’. This interplay of several self-regulation processes is what the systems-theoretical control theory aims at, not, as is frequently claimed, solely at the self-regulation of the economy or another social system.

\textsuperscript{42} On this thesis with copious historical material, Thornhill (2008) ‘Towards a Historical Sociology’.


\textsuperscript{44} Luhmann (1973) ‘Politische Verfassungen im Kontext’, 6.
in society. Similarly, compatibility may be imposed externally, but it cannot entirely be defined from the outside: it must largely be produced from within the system. While politics construes its constitution according to the power-building model and must use power to ensure its self-constraint, other social systems must align their independent constitutions and their constraints to their communicative media (eg economics to payment operations, science to cognitions, the mass media to news operations). This sets the form of the internal constitution and its limitation. The original meaning of 'constitution', once a medical expression for the condition of the body as ill or healthy, is still present in each constitution, because there are always two aspects to interventions: the proper functioning of the internal organs and the suitability of the body to the life in its environment.

In order to inhibit pathological compulsions to grow, stimuli for change, which follow the historical model of the self-limitation of politics, need to generate permanent counter-structures that will take effect in the payment cycle down to its finest capillaries. Just as in political constitutions power is used to limit power, so the system-specific medium must turn against itself. Fight fire by fire; fight power by power; fight law by law; fight money by money. Such a medial self-limitation would be the real criterion differentiating the transformation of the 'inner constitution' of the economy from external political regulation.

II. CONSTITUTIONAL ARENAS: INTERNAL DIFFERENTIATION IN SOCIAL SYSTEMS

A further question arises, namely, whether societal constitutions also provide, similar to political constitutions, the institutions to guarantee the 'possibility of dissent as a precondition of an independent selectivity distributed within the society'. In liberal constitutionalism it is the legal institutions of property and liberty that perform this task in society (and especially in the economy). However, this is not enough in the present situation. What is needed is a stronger politics of reflection in today's globally constituted function systems in which disputes can be conducted regarding their contributions to the environment and their overall social role. It is particularly urgent in the global economy

for the possibility of dissent to be backed up by economic constitutional norms. In the past it has been the system of collective bargaining, co-determination, and the right to strike that have in particular enabled new constitutionally supported guarantees of dissent within society to exist within the economy. Ethics commissions and external mechanisms of support for 'whistleblowers' in enterprises play a similar role.

Societal constitutionalism sees its point of application wherever it turns the existence of a variety of 'reflection-centers' within society, and in particular within economic institutions, into the criterion of a democratic society. The internal differentiation of function systems into an organized-professional sphere and a spontaneous sphere plays a key role in the interplay between these reflection-centres. Within the organized-professional sphere, a further differentiation can be observed between decentralized organizations and centralized self-regulating institutions. The political constitutions have already given shape to the corresponding internal differentiation of politics. In their organizational parts, they enacted detailed sets of norms, procedural rules for elections and for parliamentary and governmental decisions. Yet even the other function systems are constitutionalizing different internal areas, not only the organized-professional area (ie corporations, banks, Internet intermediaries, health organizations, professional associations, and universities) but also their spontaneous area (ie the various function-specific constituencies).

1. Spontaneous sphere

The internal differentiation into an organized-professional sphere and a spontaneous sphere is most clearly manifested in the economy (corporations/consumers) and in politics (government/public opinion), but is also evident in the law, in the media, and in the health system. It is the starting point for societal constitutionalism, as reflexive politics is realized

48 On the differentiation between the spontaneous sphere and the organized-professional sphere of function systems and their relevance for democratization of (world) social sub-areas, Thibaut (2003) 'Global Private Regimes'. The concept of 'partial publics' developed by Habermas approximates to the phenomenon here termed spontaneous sphere, but underestimates the link to the rationality criteria of different function systems, Habermas (1996) Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, 359 ff.
49 Luhmann (1973) 'Politische Verfassungen im Kontext', 178.
50 Luhmann (1973) 'Politische Verfassungen im Kontext', 182.
in different ways in each of the two spheres. The democratic quality of each social sector depends on their mutual interplay. In politics, the organized sphere consisting of political parties and state administration is mirrored by the spontaneous sphere, i.e., the electorate, associations, and public opinion. Analogously, the relation between the spontaneous sphere of the market and the organized sphere of the corporations is firmly established in the economy. Although organized business has been able to enhance their technical expertise, organizational capacities, and financing techniques to a huge extent, the corporate sector has not succeeded in bringing the economic sphere as a whole under its control. This means that, in both politics and economics, there is a highly rationalized domain of decision-making exposed to a chaotic challenge that it ultimately cannot control. The organized sphere of decision-making certainly does not receive any clear signals from the spontaneous sphere. It is condemned to freedom—and only once the critical decisions have been made, the specific mechanisms of responsibility begin to work that reside in democracy or in the market.

This 'spontaneous/organized' difference is the focal point for a constitutionalization which extends beyond the current constitutional situation. The precarious balance between the spontaneous and the organized sphere needs to be continually recalibrated, particularly countering the tendency of the organized sphere to dominate the spontaneous sphere. If one wants to enhance the democratic potential beyond the classical constitutional institutions (participation, deliberation, electoral mechanisms in politics, and decentralized market mechanisms in the economy) then one would need to extend the means by which the spontaneous sphere can control the organized sphere.

The dualism between spontaneous and organized spheres is a basic principle of functional differentiation. Its constitutional and democratic dimensions, however, are rarely recognized. Although in each social system decision-making potential is specialized, organized, and rationalized to a high degree, democratic constitutionalism relies on the inability of the organized-professional sector to assume total control. Instead, it is itself exposed to the control of numerous decentralized, spontaneous processes of communication. In the American and French Revolutions, this critical difference was deliberately worked into the state constitution in the form of the spontaneity of democracy and of human rights in contrast to the formal organization of the highly rationalized state. In other areas, by contrast, constitutional efforts to support the precarious relationship between the spontaneous and the organized sphere are rather weak.

Is it possible to institutionalize constitutional guarantees that will grant the spontaneous spheres greater controls over the organized sphere? The opportunities associated with globalization suddenly become visible here, in stark contrast to the numerous fears that globalization will generate nothing but risks to democracy and the rule of law. The dynamic of globalization opens chances to reshape the relation between the spontaneous and organized spheres. This is because globalization frees many societal sectors from the constraints of nation-state-based politics. The pack is now reshuffled. Research, education, healthcare, the media, the arts—globalization offers the opportunity to strengthen their autonomy and to institutionalize the 'spontaneous/organized' difference in a dual constitution.

Global research appears to display a remarkable tendency towards developing a global spontaneous sphere. The catchwords here are depoliticization, de-bureaucratization, forms of non-economic competition, pluralization of research financing, and competition between institutions funding research. Similar tendencies can be seen in the education sector, where global competition between universities is forcing them away from their political and bureaucratic patronage, exposing them more fully to the controlling dynamics of their own spontaneous sphere.

Societal constitutions ought therefore to direct their attention towards safeguarding the internal politicization of the spontaneous sphere against the dominance claims of the organized-professionalized sphere. The global protest movements that can currently be observed in the various function systems offer increased re-politicizing, re-regionalizing, and re-individualizing opportunities that expose the organized sphere to stronger control by the spontaneous sphere. Current catchwords include Brent Spar, Gorleben, animal rights protests, companynamesucks.com, Stuttgart 21, WikiLeaks, indignados, Occupy Wall Street. These civil-society protests are directed not (only) against the state but against the organized-professional core of the economic system and of other function systems.31

Constitutionalizing the spontaneous sphere in the economy would mean to protect the politicization of 'private' consumer preferences. If preferences are not simply taken as given but are openly politicized through consumer activism, consumer campaigns, boycotts, product criticism, eco-labeling, eco-investment, public interest litigation, and other demands for ecological sustainability, this should not be taken as

31 Some authors see in these direct contacts a new political quality, Crouch (2011) The Strange Non-Death of Neoliberalism; O'Brien et al. (2002) Contesting Global Governance, 2.
external political intervention in a self-regulating economy. Rather, such politicization changes the internal constitution, as it touches on the most sensitive part of the payment cycle, namely, the willingness of consumers and investors to pay. One constitutional question is: What is the political legitimacy of this new ‘ensemble politics’? Other questions immediately arise about fundamental rights: How can autonomous preferences be protected from restriction by corporate interests? Is there no coincidence that horizontal effects of fundamental rights have been thematized in cases to do with product criticism, exposure of harmful working conditions and ecological protest against environmentally damaging corporate policies, whistle-blowing against organized irresponsibility. Economic citizens’ fundamental rights have been developed against repeated attempts by corporations to restrict them. In the future—again, conjured by catchwords such as companyname.com and Wikileaks—such economic fundamental rights will become politically more exploitative and will require greater legal protection. Such economic rights should not be oriented solely to market efficiency (as in concepts of market failure, information asymmetry or incomplete contracting), but rather to their social and environmental compatibility.

2. Organized-professional sphere

In the organized-professional sphere of social subsystems, the main constitutional problem is to deal with what can be called the motivation-competency dilemma: Actors outside the professional organizations—in particular the general public, the courts, and state politics—are usually highly motivated to achieve the limitation of function systems, but they lack the knowledge, the practical competence, and the enduring energy to actually implement such changes. By contrast, these competences are highly developed in the organized-professional sphere; however, given the interest in system

... combine ... external (countervailing) pressure—be it from the state, or unions or labour rights NGOs, comprehensive and transparent monitoring systems, and a variety of ‘management systems’, interventions aimed at eliminating the root causes of poor working conditions.

Here again, direct interventions from outside ought to be replaced by indirect pressures. They would take the form of learning pressures, i.e. external influences that compel transnational organizations to engage in learning adaptation. Both elements are needed to facilitate interaction between external pressure and internal adaptation: a change in cognitive

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54 Binswanger (2009) ‘Vorwärts zur Machtigung’, 150 ff., 157 ff. explicitly makes this correlation. He proposes concrete company law reforms: “The joint stock company is a product of the 19th century that must be modernised. My proposal is to divide their capital into registered shares with restricted transfer and bearer shares. Registered shares are of infinite duration but cannot be traded on the stock exchange and may only be sold over-the-counter at the earliest after three years. Bearer shares however will have a life of 20 to 30 years and will then be redeemed at their original purchase price. They may be traded on the stock exchange.... This would significantly reduce speculation, slow the senseless maximisation of profits and help prevent future economic and financial crises.” Binswanger, ‘Die deutsche Wirtschaft wächst zu schnell’, Spiegel-Online dated 12 December 2010.
structures and pressure directed at achieving this. Otherwise, the demands from society will remain ineffective external impulses. This is where the reciprocal closure of social systems becomes relevant. 'L'ouvert s'appuye sur le fermé.' The closure requires, for its part, a new kind of reciprocal opening. There is little prospect of a direct transfer of norms then; instead, learning pressures are built up—that is, other mechanisms of reciprocal opening.

An important transformation in the course of globalization becomes visible at this point. Luhmann characterized this as follows:

that, at the level of the self-consolidating world society, it is no longer norms (in the form of values, prescriptions or purposes) that steer the prior selection of knowledge but that, conversely, the problem of learning adaptation acquires structural primacy, so that the structural conditions of all subsystems' capacity to learn have to be supported.  

As a consequence, imposing legal rules from the outside will no longer be the typical communication between corporations and their various stakeholders. Rather, non-legal media, expert knowledge, political power, social pressure, as well as monetary incentives and sanctions will induce learning processes in the corporate codes, indeed almost force them to occur. Cognitive primacy does not mean that the corporate codes lose their normative quality, functioning only as cognitive expectations. Rather, what is de-normatized are the communicative relations between stakeholders and corporations, because they switch from the normative to the cognitive; the corporate codes themselves retain their normative quality.

What does the first element of the learning pressures—cognitive learning—look like? The impulses sent out from the learning processes are only 'templates' for the corporate codes—behavioural models, principles, best practices, recommendations. They trigger learning processes over and beyond the boundaries of different communicative media. It is their separation that brings about cognitive added value and this is always generated whenever the sparks of perturbation leap across the boundaries between the systems involved and are able to lead to normative innovations there.

The special learning effect is: The stakeholders formulate norms from which the corporations can read which societal expectations are being directed at them without having to take every single one on board. The demands of society and the state compensate for the tunnel view developed by the private codes and prompt them to develop an orientation towards transnational public policy. In this indirect manner, state agencies, protest movements, and civil society organizations provide constitutional learning impulses.

What does the second element—pressure—look like? Legal sanctions do not play a decisive role as learning pressures. Instead, non-legal sanctions are responsible for forcing corporations to take the protests of NGOs and state soft law as learning impulses to change their codes. To begin with, inter-organizational power—one-sided pressure and political exchange—coerces corporations into developing their codes of conduct. It is here once more apparent that external pressure is an indispensable condition for external norms of soft law exerting any impact whatsoever. Nation states and international governmental organizations alike have been able to generate power resources to do this, albeit only to a limited extent. The powerful pressures exerted by protest movements, NGOs, unions, non-profit organizations, professions, and public opinion have proven much more effective to date. Often it is economic sanctions that make the crucial difference in the end—the sensitivity of consumers on whose purchasing behaviour the corporations depend, and that of certain investor groups who use their investment decisions to exert economic pressure on the corporations. As for the recent financial crisis, it remains to be seen whether governments will adopt an effective lead role in placing external pressure on the corporations. The latest news on this front gives more cause for scepticism than optimism.

Thus, behind the metaphor of 'voluntary codes' lies anything but voluntariness. Transnational corporations adopt their codes neither because they accept the appeal to the public interest nor because they are

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45 Luhmann (1975) 'Weltgesellschaft', 63 (my emphasis, CT).
47 Murphy (2003) 'Taking Multinational Corporate Codes'.
48 Abbott and Snidal (2009) 'Strengthening International Regulation', 506 summarize: 'These norms are "voluntary" in the sense that they are not legally required; however, firms often adhere because of pressure from NGOs, customer requirements, industry association rules, and other forces that render them mandatory in practice.'
49 A detailed analysis of the correlation between external pressure and internal corporate structure in Howard-Grenville et al. (2008) 'Constructing the License to Operate'. 
motivated to do so by corporate ethics. They act ‘voluntarily’ only when subjected to massive learning pressures from the outside. The learning process does not occur within the legal system, running from state norms to corporate codes via a validity transfer, but only in a roundabout way via other function systems. It is not yet sufficient to describe this as legal sanctions being replaced by social sanctions. This would be to conceal the important consequences brought about by such roundabout learning pressures. Rather, system boundaries are transgressed in complicated ‘translation processes’ and a cycle of perturbation emerges between social and political expectations, pressures exerted by political and societal power, the knowledge operations of epistemic communities, and economic sanctions, and the enactment of corporate codes. When the UN, ILO, and EU formulate soft law recommendations on the conduct of transnational corporations, they do not have a direct legal effect, rather they are transformed in a complicated ‘translation process’. The original content of the soft law norms is radically altered when they are ‘translated’ into the language of expert knowledge that devises models and organizes monitoring; into the inter-organizational power of political negotiations between international organizations, NGOs, and transnational corporations; into the power of the reputation mechanisms of the public sphere and the power of monetary incentives and sanctions; and, finally, into the legal language of the hard law of internal corporate codes. This indirect link between external and internal processes illustrates the self-constitutionalization of corporations. It comes about not via intrinsic, voluntary motivations, nor via the sanction mechanisms of the law, but rather on the basis of external learning pressures alone.

3. The self-regulatory sphere of the communicative medium

Alongside the spontaneous sphere and the organized-professional sphere, there is a third constitutional arena within function systems. There are institutions responsible for the self-regulation of the communicative media—power, money, law, and truth. Constitutionalization establishes rules for those institutions, their competences, and procedures for internal reflection.

We shall illustrate this with an example—plain money reform—which has been proposed in recent years as a means of combating the growth excesses of the global financial system. As a response to the global financial crisis, a variety of regulatory mechanisms have been proposed. They include abolishing bankers’ bonuses, increasing banks’ equity, the Tobin tax, quality controls on financial products, increased national and international state supervision of banks (especially hedge funds), stricter controls on capital and stock transactions, better accounting regulations and risk assessment. Typically, they are based on a factor analysis in which individual factors are isolated via causal attributions and made responsible for the crisis. The regulatory aim is to introduce countervailing factors into the causal chain in order to rule out that the crisis is repeated. Their chances of success shall not be disputed here, but they do share one problem: fatta la legge trovato l’inganno, ie no sooner has the law been passed than strategies are devised for circumventing it. The Achilles heel of such regulations is that national and international rules alike are constantly being dodged to great effect. Given the enormous energies invested in evading them, it is not possible to implement ex ante mechanisms.

A more fundamental approach sees the factors in a factor analysis merely as interchangeable conditions and seeks to uncover the underlying dynamics themselves. If one wants to tame the underlying dynamic which produces the increasingly sophisticated strategies of evasion then the ‘inner constitution’ of the global financial economy itself needs to be changed. One instructive example is the above-mentioned plain money reform proposed by economists and social scientists. In the UK, in Switzerland, and in Germany, political initiatives have been established which confront the public with concrete proposals for the financial constitution. Their starting point is the monetary mechanism at the heart of the economic constitution. Money creation has long ceased to be a monopoly of the central banks, which create money by printing paper currency not tied to the gold standard. The rapid and widespread increase in money on deposit in current accounts, the spread of non-cash transactions, the triumphal march of the new communications technologies and—a particularly powerful factor—the globalization of

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64 In an empirical case study on the Marine Stewardship Council, Illis (2009) ‘Sustainable Development and Fragmentation’ identifies such translation process as responsible for the success of corporate constitutionalism.
money and capital transactions have all helped wrest the monopoly on money creation from the national central banks. As a result, it is now the global commercial banks which, for their part, have *de facto* acquired the ability to create money, independently of the central banks, even if money on deposit is euphemistically described merely as a money surrogate. In Europe the ratio of money deposits to paper currency is 80:20 while, in the UK, deposit money accounts for 92% of total money in circulation. The website of the German *Bundesbank* states: 'The main source of money creation today is loans issued by the commercial banks (active money creation): the borrower's current account is credited with the amount of the loan taken out (sight deposit), thereby immediately increasing the overall money supply in the economy.'

This is effectively *creatio ex nihilo*, because the loans issued via money deposits by the commercial banks are not covered by existing savings in the banks; rather, they can be disbursed more or less at will in line with the banks' sovereign calculations of risk. The public central banks can influence this private money creation only indirectly, in particular by raising or lowering the prime lending rate. The massive money creation by private banks is now being held responsible for the excessive growth pressures in the global finance sector. In effect, it uses advance financing to compel the real economy to grow to an extent that creates negative externalities to society. At the same time, private money creation is instrumentalized for an unheard-of increase in self-referential financial speculation.

The banks behave like any other economic actor: pro-cyclically and self-interestedly, without any macro-economic strategy and without any political or social responsibility. As a result, the banks create money with excessive pro-cyclicality. This gives rise, at times, to extreme excesses in the economic and stock market cycles:

- in the ups and highs of an oversupply of money and the consequent price inflation as well as, increasingly, capital market price inflation (speculation bubbles, asset price inflation),
- in the downs and lows of crises—as a result of imploding stock market capitalisation/asset values and payment defaults—scarcity of money and monetary drain from the economy. The

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71 <http://www.bundesbank.de/bildung/bildung_glossar_g.php>.

72 Huber (2009) Geldordnung II.


74 Binswanger (2009) *Verwirztes zur Mäßigung*, 11 ff, differentiates between a necessary growth imperative and a socially harmful growth pressures.
behaviour. Indeed, to a large extent even individuals resistant to the lures of addiction have to conform to these imperatives upon pain of exclusion from the game. At the same time, however, individuals with the relevant psychological disposition are drawn to this game, so that individual and social addictive behaviour may then become mutually reinforcing.

As a tried-and-tested antidote, ecologically oriented economists propose plain money reform. The addictive drug of money on deposit must be taken away from the commercial banks—this promises an effective ‘withdrawal treatment’. Commercial banks will be prohibited from creating new money via current account credits. They are restricted to arranging loans on the basis of existing money, while the creation of money becomes again the sole prerogative of the national and international central banks.

The most important long-term measure for preventing excessive speculation on the financial markets, which is harmful to the public interest, is to end the money-creating activities of the commercial banks. The aim is to put a stop to the excessive pro-cyclical expansion and contraction of the money supply and replace it with a stabilized money supply policy based on the real economy.75

The aim of seigniorage reform is:

1. to allow only the central banks to create money—cash as well as non-cash credit;
2. to put this money into circulation free of debt (without interest rates or amortization) through public expenditure; and, to this end
3. to stop banks from creating money on the basis of sight deposits.76

Achieving this decisive reform would require a simple but fundamental change to the legal rules governing central banks at national, European, and international level. With regard to the European Central Bank’s statute, the current Article 16 would have to be changed (see words in italics):

The Governing Council shall have the exclusive right to authorize the issue of legal tender within the community. Legal tender comprises coins, banknotes and sight deposits. The ECB and the national central banks may issue such means of payment. The coins, banknotes and sight deposits


Issued by the ECB and the national central banks shall be the only such tender to have the status of legal tender within the Community.77

Given the globalization of financial markets, plain money reform ultimately requires global constitutional solutions. However, even the protagonists of the idea think the chances of a uniform global solution are difficult, given the likely resistance of leading nation states. Nonetheless, they think that initiatives undertaken by individual nation states on their own (or, better still, co-operative arrangements among a few nation states)—at least for relatively strong states that have a stable government, a strong economy, and a stable convertible currency—are by all means conceivable and even realistic.78 Regional solutions of this kind within economic blocs are most likely to occur in the euro zone, and to a lesser extent in the USA or Japan. The best possible solution today would be to see a global financial constitutional regime emerging from co-operation between the central banks in a ‘coalition of the willing’.

Plain money reform plays a part, then, in two opposing thrusts towards constitutionalization on the global markets and which (in reference to Polanyi’s ideas, mentioned above) can be described in terms of a ‘double movement’ of transnational constitutionalism.79 It first supports the expansion of subsystems using constitutive norms, but then seeks to inhibit them through the use of limitative norms. As for financial constitutions, the expansion of purely economic orientations would trigger counter-movements throughout the world that seek to reconstruct the ‘protective mantle of culturally specific institutions’.

The protagonists of societal constitutionalism have identified collegial institutions in different social spheres as suitable social bodies that can judge and decide over such self-limitations. They are pleading for their institutionalization qua constitutions.80 Collegial institutions are reflexive bodies aimed at social self-identification in two senses: they establish the specific rationality and normativity of the social sphere and they seek to make them compatible with their environments. The collegial institutions function as a kind of think-tank for the sub-constitution, which for its part governs the ecological relations of the social system.

79 Polanyi (1944) Great Transformation.
Plain money reform shifts the weight of such collegial institutions from the commercial banks back to the central banks. In doing so, it can be seen as an incisive self-constraint of the growth imperatives of the economic payment cycle. Its protagonists herald it as an effective withdrawal treatment against the addictive behaviour of the credit sector. Three expansion-constraining effects are particularly prominent:

1. Expansionism of private banks is limited by banning them from money creation ex nihilo. This is likely to have the effect of curbing the speculative use of current account credit.

2. Expansionism of the global financial markets in relation to the real economy is limited so that their relationship is now determined by the central banks and no longer by the private banks. The coupling of the financial and the real economies is no longer dependent on the profit motivations of the commercial banks, but rather on the macro-economic considerations of the central banks.

3. Expansionism of the financial and the real economies in relation to other social sectors and to the natural environment is constrained by eliminating the growth imperatives intensified by current account credit. "This is not about abandoning growth, but about reducing exponential growth imperatives and pressures." Private banks will no longer create money as an unsecured bill of exchange on the future. If money creation is carefully tailored through by the central banks in terms of its overall social and ecological impacts then it will block the socially harmful growth imperative. This is the most important aspect of such an externally imposed self-limitation.\(^{82}\)

III. CONSTITUTIONAL PROCESSES: DOUBLE REFLEXIVITY

Our interim result is: transnational constitutionalism goes far beyond a mere juridification of societal spheres, rather, it performs constitutional functions via constitutive and, especially today, limitative rules. Furthermore, constitutional arenas can be identified in each social system, in parallel to the internal differentiation of the political system into a public sphere and an organized-professional sphere (itself divided into decentralized and centralized institutions). The next question is whether it is possible to identify genuine constitutional processes and structures in the transnational sub-constitutions. We shall examine again the case of plain money to see whether such norms represent constitutional processes and structures—in the strict sense, not just metaphorically.

1. Reflexivity of the social system

Though lawyers may not like to admit it, law does not play the primary role in state constitutions and other sub-constitutions. The primary aspect of constitutionalization is always to self-constitute a social system: the self-constitution of politics, the economy, the communications media, or public health.\(^{83}\) Law, in such processes, plays an indispensable yet merely supporting role. An exacting definition of societal constitutionalism would have to realize that constitutionalization is primarily a social process and only secondarily a legal process. A useful definition of social constitutions puts it as follows:

... to view the entire objective and conceptual apparatus of constitutionalism (including rights, normative texts, and even constitutional courts) as a bundle of institutions produced from within political power itself—as the necessary yet self-generated preconditions of power's positive and differentiated autonomy.\(^{84}\)

Not only in politics but also in other social fields, the constitution in the first instance serves to enable the self-formation of a social system. Politics, the economy, science, and the mass media generate their own autonomy by, among other things, formalizing their own communicative medium.\(^{85}\) Constitutional processes are a case of 'double closure' in the sense described by Heinz von Foerster.\(^{86}\) Social systems develop first-order closure by linking their self-produced operations with one another and thereby setting themselves apart from the environment. They develop second-order closure by applying their operations reflexively to their operations. Thus, science secures its autonomy when it succeeds in establishing a second level of cognition in addition to the first-

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\(^{81}\) Binswanger (2009) Vorwärts zur Mässigung, 12.

\(^{82}\) See evidence in Fn. 68.


\(^{85}\) Prandini (2010) 'Morphogenesis of Constitutionalism', 310.

order operations orientated towards the binary true/false code. The first-order operations are then tested against the truth-values of the second level—the level of methodology and epistemology.\(^7\) Politics becomes the autonomous power-sphere of society when it directs power processes via power processes, and produces the double closure of politics through electoral procedures, modes of organization, delineation of competences, separation of powers, and fundamental rights. The economy becomes autonomous when, within the money cycle, payment operations are used not only to effect transactions but to steer the money supply itself.\(^8\) In this way, when double closure defines external boundaries and internal identity, subsystems become autonomous in the strict sense. This 'medial reflexivity' produces for each function system the 'form in which the medium acquires distinctiveness and autonomy'.\(^9\)

However, medial reflexivity together with cognitive and normative reflections on socially compatible identity formation\(^9\) do not yet generate constitutions in the technical sense, but enable only the self-foundation—not yet the constitutionalization—of social systems. Epistemology, the over-(em)powering of power, and control of the money supply do not yet comprise social constitutions as such, but simply reflexive operations of their own system. The mere constitution of medial autonomy is not to be equated with its constitutionalization.\(^9\) We should only speak of constitutions in the strict sense when the medial reflexivity of a social system—be it politics, the economy, or some other sector—is supported by the law or, to be more precise, by the reflexivity of the law. Constitutions emerge when phenomena of double reflexivity arise—the reflexivity of the self-constituting social system and the reflexivity of the law that supports self-foundation.\(^9\)

\(^7\) Luhmann (1990) Wissenschaft der Gesellschaft, 469 ff.

\(^9\) Reflexivity is limited neither to the application of operations to operations, nor to the process of social identification, but appears also as a medial reflexivity (self-application of communicative media) that is usually accompanied by both cognitive and normative reflexivity.

\(^9\) The terms constitution/constitutionalization were provisionally defined in the previous chapter in order to make plausible to transpose constitutional subjectivity from states to regimes. The question now is to make clear the particularities of both processes.


2. Reflexivity of the legal system

Societal constitutions are thus defined as structural coupling between the reflexive mechanisms of the law (that is, secondary legal norm creation in which norms are applied to norms) and the reflexive mechanisms of the social sector concerned. This definition has the same starting point as Luhmann’s concept of constitution, namely, that the state constitution is a structural coupling between politics and law.\(^9\) However, structural coupling is merely a necessary and not yet a sufficient condition, as a whole range of political-legal phenomena, such as legislation and judicial decisions on political conflicts, are themselves structural couplings between politics and the law. We will need to frame the coupling relationship in more specific and yet also in more general terms. More specific: not every coupling between politics and the law generates constitutional qualities (eg regulatory legal norms that seek to achieve political goals), but only the coupling between medial reflexivity in both systems. More general: a constitution emerges not only in the political system, as imagined by Luhmann, but rather in each social system provided its reflexivity is supported by secondary legal norms. Moreover, a certain denseness and duration of structural couplings needs to exist, which distinguishes constitutions from the numerous situations in which law and a social sphere is only occasionally and loosely coupled. Then the typical constitutional dynamics emerge as an institutionalized co-evolution between the two social systems involved. In order to distinguish constitutions from other instances of structural coupling, it seems advisable to choose for them the more demanding term of 'binding institution' between law and social sphere.\(^9\)

Secondary legal norms are thus required in every constitution.\(^9\) Primary legal norms in a social sphere would represent merely its juridification, not its constitutionalization. In fact, no constitution at all is estab-
lished if only primary norms for behavioural control were enacted.96 The same is true for merely conflict-solving or regulatory norms. The situation becomes critical only when norms of norms—that is, secondary norms—prescribe how the identification, setting, amendment, and regulation of competences for the issuing and delegating of primary norms are to occur.97 Political and civil society constitutions only come to be formed when these two reflexive processes are closely linked to one another—in other words, when reflexive social processes that render societal rationalities autonomous through their self-application are juridified via legal processes that are themselves reflexive.98 We should only speak of an independent constitution in the strict sense when this sophisticated interplay arises, when a subsystem and the law are permanently and strictly (rather than merely temporarily and loosely) coupled. Here we encounter the curious doubling of the constitutional phenomenon that rules out the widespread understanding of a fusion in one constitutional phenomenon (ie one uniting the legal and the social order). The two extremes of constitutional theory, associated with the names of Hans Kelsen and Carl Schmitt, need to brought into an interrelation.99 'Constitution' can be reduced neither to a legal phenomenon nor to a social phenomenon. It is always a double phenomenon, a linking of two actual processes. From the point of view of law, it is the production of secondary legal norms, a process peculiarly interwoven with the fundamental structures of the social system. From the point of view of the constituted social system, it is the generation of fundamental structures of the social order, structures that at once inform the law and are themselves regulated by it.100 Only on this condition does it make sense, in terms of both legal sociology and legal doctrine, to speak of a political global constitution, of a global economic constitution, of a global constitution of the education and science system, or of the digital constitution of the Internet.

What is the reason, though, why secondary legal rules are supplementing social reflexivity? Law comes into the self-foundation processes of social systems when they cannot fully accomplish their autonomy. This happens either when the social system cannot be adequately closed by its own first-order and second-order operations, or when reflexive social processes are unable to stabilize themselves or, especially, when they are becoming paralysed by their paradoxes. In such cases, additional closure mechanisms come in to support the self-foundation of social autonomy. The law is one of them—not the only one, but one among several. The self-description of ‘state’ acts as one of these closure mechanisms: “The political system is only differentiable at all when it describes itself as a state.”101 The closure of institutionalized politics is not accomplished without formal limitation to collectively binding sovereign action. Similarly, the structural coupling of politics to law supports the autonomization of politics. The reflexive application of power processes to power processes cannot be exposed to the constant fluctuations of power itself. Legal norms have to stabilize the reflexive effects of the institutions for acquiring and exercising power.

More important still is how the law is defusing the paradoxes of political power. The paralysing paradox of the self-binding nature of the sovereign has been normalized (though not resolved) in the past by the establishment of the rule of law.102 By analogy, the self-foundation of every social system necessarily has to cope with the paradoxes of self-reference, ie the paradox of its self-founding. One way of dealing with it is to externalize the paradox—among others, to the law. This, at any rate, is what happened in the political constitution. The same can be observed in other social systems: their paradoxes are externalized to the law. When a social system gives itself a legal constitution, it finds an escape from the deficiencies of self-foundation and its paradoxes. Thus the autonomy of a social constitution is never autonomy in pure

96 This reflects Dieter Grimm’s argument against transnational constitutionalism: a ‘constitution’ in Europe or in world society or in private orders is simply juridification, Grimm (2009) ‘Gesellschaftlicher Konstitutionalismus’.


98 Mattias Kumm sketches out a (transnational) constitutional pluralism that comes close to this. He stresses, in his ‘practical conception of constitutionalism’, that constitutional norms claim original rather than derivative authority. They achieve this in a deliberative process of free and equal individuals and they set out substantive principles. Kumm, however, somewhat one-sidedly stresses ‘the justiciability of social processes’. And he does not sufficiently make clear the double reflexivity of constitutions. If so this would explain that the claimed original authority is established in the autonomy of the social system, and the substance of the constitutional principles (which have for Kumm almost natural law quality) results from reflection practices within the social system. Kumm (2010) ‘The Best of Times and the Worst of Times’, esp. 212 ff.; Kumm (2009) ‘Cosmopolitan Turn in Constitutionalism’.


100 Wahl (2016) In Defence of Constitution’ criticizes transnational constitutionalism to reduce the constitution to a mere hierarchy of legal norms, without support in social reality. Quite the opposite:


form; it always contains elements of heteronomy. The Self must first be defined heteronomously through legal norms in order to be able to define itself.\footnote{Lindahl elaborates this thought for political constitutions, but then transfers it onto other sub-constitutions, Lindahl (2007) 'Constituent Power and Reflexive Identity'; Lindahl (2010) 'A-Legality', 33 ff.}

Law’s role in support of self-foundation varies quite markedly from one system to another. Science requires almost no support at all from stabilizing legal norms to achieve autonomy. Methodology, the philosophy of science, and epistemology are themselves capable of hammering in the boundary stakes that mark out the realm of science.\footnote{Informative here, Stichweh (2007) 'Einheit und Differenz im Wissenschaftssystem'.} Despite all the worrying phenomena of corruption in the academic world, it seems superfluous to attach a legally binding self-description to science as a collective qua scientific community, or even for the scientific community to be incorporated in parallel to the formal organization of the state in order to secure the scientific credentials of knowledge. The law plays thus a relatively small role in the scientific constitution. Although law is needed to guarantee freedom of science and to secure the formal organization of universities, science basically has arrived at its autonomy without legal support.

The economy, by contrast, requires a huge amount of support from the law for its self-foundation, albeit not to the same extent as politics. As is well known, the institutions of property, contract, competition, and currency form the cornerstones of an economic constitution. These are all based on double reflexivity, that is, on the application of economic operations to economic operations and on the application of secondary norms to primary norms of the legal system.

Plain money reform illustrates how the economic constitution externalizes to the law its paradox that threatens to paralyse economic processes. Both solvency and insolvency are generated in the banking sector; the banking system is founded on the paradox of self-reference, on the unity of solvency and insolvency. 'The banks have the key privilege of being able to sell their own debts at a profit.'\footnote{Luhmann (1988) Wirtschaft der Gesellschaft, 145.} This paradox can be defused when medial reflexivity comes in, that is, when money supply operations are applied to money operations. This reflexivity is however inherently unstable. It can only be stabilized by an internal hierarchization of the banking sector, which is in turn backed up by strict norms imposed through binding law. The parallels with the hierarchization of the political system and with the stabilizing role of state constitution are obvious. Legal norms of procedure, competence, and organization, which regulate the way the central banks are set up and work in their relations with the commercial banks, in this way contribute to coping with the paradoxes of the economic cycle.

However, the elimination of paradoxes from the money cycle is always precarious: there is a constant danger that new paradoxes will arise. The hierarchy between central banks and commercial banks, supported by economic constitutional law, has not removed the paralysis of the financial system for all time:

The logical and empirical possibility of the entire system collapsing, and a return of the paradox and of a total blockade of all operations by the original equation solvent = insolvent cannot be ruled out in this way, but it is rendered sufficiently improbable.\footnote{Luhmann (1988) Wirtschaft der Gesellschaft, 146.}

Actually it is not ‘sufficiently improbable’—this was revealed by the latest financial crisis. The excessive growth compulsion in global financial transactions has brought to light the possibility of the banking sector becoming insolvent. This is exactly the point where plain money reform comes in, relying on mechanisms of double reflexivity. Without this reform, central banks will not be able to exert sufficient control over the money market; they can only indirectly ‘stimulate or de-stimulate [it] through interventionary events’.\footnote{Luhmann (1988) Wirtschaft der Gesellschaft, 117.}

At present, they can exert indirect control via the prime lending rate, which makes lending easier or more difficult. Their direct control of money supply is limited to creating paper currency but fails to get to grips with deposit money, which is now predominant throughout the world. Now, plain money reform transforms the reflexivity of the money medium. Money creation will be undertaken exclusively by the central banks. The secondary payment operations of the central banks (that is, money supply decisions, the creation of cash and deposit money, payments to the state, citizens or banks) are applied reflexively to primary payment operations (purchase and credit). Their juridical reflexivity (that is, the application of norms to norms) is in turn changed by plain money reform. The commercial banks are prohibited by law from creating deposit money. The central banks’
monopoly on money creation is prescribed by law. Restricting money creation competences, preventing the recurrence of paradox and total blockage, stabilizing the self-reflexive conditions of payment operations—this is how law in a plain money reform plays the limitative role of an economic constitution.

IV. CONSTITUTIONAL STRUCTURES: HYBRID META-CODES

1. Coding and meta-coding

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

This somewhat complex constellation can be observed most clearly in the modern state constitutions. Here, constitutional courts use explicitly the ‘constitutional/unconstitutional’ difference as the governing meta-code for two binary-coded systems, namely, law and politics. This does not result in law and politics merging into a single system, nor does the constitution itself become a social system in its own right. The constitution remains a process of structural coupling between two autonomous systems, politics and law. What the constitutional code does is to coordinate them closely, not to transform them in a unitary entity.

Such hybrid meta-codings also crop up—usually implicitly, occasionally explicitly—in the structural couplings of law with other social systems in the form of their constitutional codes. Today's global economy also operates with such a hybrid meta-code. It serves as a fictitious unity formula for two quite different types of constitutional acts in the economy. While the economic constitutional code assumes hierarchical precedence over both legal and economic binary codings, it adopts a different meaning in each of these two aspects, depending on whether it controls the economic or legal code. On the economic side, it facilitates the reflection of the public interest and seeks forms of socially and environmentally sustainable economic activity. On the legal side, it introduces the division between ordinary law and constitutional law, judging legal acts whether or not they are in line with the values in the economic constitution.

Thus, although the economic constitutional code presents itself superficially as a single distinction directrice of 'constitutional/unconstitutional', it actually functions in two modes, either as the economic or as the legal meta-code. This is an interesting special case of an 'essentially contested concept'—the same term is interpreted in very different ways in different contexts. The code's Janus-face results from the mutual closure of the economy and the law which excludes that the economic constitution creates one unitary social system. Instead of merging within one economic constitution, both systems remain separated and attached to their own operational mode, economic transactions, and legal acts. Accordingly, the 'constitutional/unconstitutional' difference is merely a common umbrella formula for different operations which take on quite different significance depending on their context. The constitutional code is an observational scheme that creates different worlds of meaning in the law and in the economy.

2. Hybridity

According to the double nature of the code, legal practice and economic practice each develop their own programmes for the economic constitution. These programmes first only emerge from the recursive application of a system's own operations to its own operations, yet then cause constant mutual irritations and thereby trigger a co-evolutionary dynamic of economy and law. If, in law, the meta-code is given hierarchical

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108 This much-discussed formula goes back to Gailie (1956) 'Essentially Contested Concepts'. In our context it is not different theories, but rather different social systems that use the same binary code, attributing different meanings to it.

precedence over the code 'legal/illegal', a re-entry of the 'law/economy' difference occurs within the law. Basic principles of the economic system are transformed into legal constitutional principles that vary, according to the historical situation: property, contract, money economy, competition, social market economy, ecological sustainability. The law reconstructs fundamental principles of the existing economy as legal principles and fleshes them out in individual economic constitutional norms.

This is where we find the real justification of the 'material' concept of constitution in contrast to the formal and the functional concepts: constitutional law cannot be reduced to certain decision-making procedures, but demands justification via substantive constitutional principles.\(^\text{110}\)

This would not be comprehensible without the re-entry of fundamental principles of the social system into the legal system. The principles are certainly not prescribed by natural law, but rather the result of historically changing reflection in the social system, which the law then reconstructs as substantive constitutional principles.\(^\text{111}\)

Something comparable occurs in the opposite direction: the metacoding causes the re-entry of the 'law/economy' distinction into the economic system—again, in a historically variable way: the economic reconstruction of the principle of contract, the social obligations of property, limits to competition, principles of the rule of law in the economy, fundamental rights in corporations, the binding nature of principles of ecological sustainability. In this way economic operations are bound to the reconstruction of constitutional law.

The reciprocal re-entry of economy and law thus gives rise to two different 'imaginary spaces' of the economic constitution, two different constitutional programmes, one in the economy, one in the law. These are directed, jointly but separately, towards the constitutional code. That the same term means different things in each context becomes especially clear with property and contract, the classic constitutional principles. In economic terms, property means 'the disjunction of the requirements for consensus', as a precondition for certain successful communications.\(^\text{112}\)

In legal terms, property is defined quite differently. Contract also takes on a different meaning as a transaction in the economy, as the binding consensual act in law.\(^\text{113}\) 'The economic constitution uses both concepts according to context. It represents a language game with a peculiar dual structure that is subject to the distinction directrice of the unitary meta-code.\(^\text{114}\) But the language game does not become an autonomous system with a unitary 'language', unitary structures, unitary boundaries, or unitary self-descriptions. Rather, as above, it forms a peculiar 'binding institution' in which law and economy are closely coupled to and mutually irritate one another. It produces a bilingualism that requires continual translation efforts in both directions.

To return to our example: plain money reform would change both economic and legal constitutional programmes. In the economic context, it would reformulate the public interest principles of money creation for the central banks. Toward which goals should the central banks direct the creation of money—toward averting inflation or toward limiting excessive growth imperatives as well? In the legal context, it would change the legal principles of an economic constitution. Under a plain money regime, money creation by private banks, for example, would violate the economic constitution and not only ordinary law. The judgment would be supported not by the ordinary legal code but by the economic constitutional code and by the programmes of economic reflection developed in association with it.

Plain money reform would thus reach deeply into the capillary constitution of the global economy. It conforms to the definition of a social constitution presented here with respect to all four characteristics. First, plain money reform performs constitutional functions, of both a constitutive and especially a limiting kind. Second, it operates in the constitutional arena of the self-regulation of the economy. Third, it participates in the double reflexivity of law and the economy by determining the rules of money creation. And, fourth, it subjects the activities of commercial banks and central banks to the hybrid meta-code of the economic constitution by changing the constitutional programmes of both, the economy and the law.

\(^\text{110}\) This supports the abovementioned thesis advanced by Kumm (2010) 'The Best of Times and the Worst of Times', 214 ff. that transnational constitutional law must also legitimize itself via substantive constitutional principles and not merely via procedures. But how do these principles for their part legitimize themselves? Certainly not by declaring them as non-derivative norms; rather, recourse is needed to the reflexive practices in the globalized social system itself. And here again the paradox of self-reference is emerging. The constitution deals with it externalizing the ultimate justification for constitutional legal norms into discursive practices of the focal social system.

\(^\text{111}\) See Wiethöltzer's concept of the 'legal constitutional law' possessed by the collision principle levels for Law./Morals, Law./Politics, Law./Economy etc., or in more exact and general terms law as the 'structural coupling' of 'environment-systems'. In contemporary translation, 'legal protection' and 'institution protection' would then become 'legal production protection' for freedom functions. Wiethöltzer (1994) 'Argumentation im Recht', 119.


\(^\text{113}\) On the double character of institutions in structural couplings of law and economy, Teubner (1998) 'Legal Irritants'.

\(^\text{114}\) Tuori (2010) 'Many Constitutions of Europe' comes close to this language game of two languages.
V. THE POLITICS OF SOCIETAL CONSTITUTIONALISM

1. La politique versus le politique

And what about politics? By promoting a high degree of autonomy for social sub-institutions, does not societal constitutionalism de-politicize society? Is the constitutionalization of the economy—in the three constitutional arenas, ie safeguarding civil society protest, promoting ecological responsibility of corporations, and introducing plain money—not itself a politically explosive affair? The definitive answer to both questions is: Yes and No. As indicated above, social constitutions are paradoxical phenomena. They are not a part of society’s political constitution and yet they are a highly political matter for society. The paradox can be made bearable when one uses a dual concept of the political, as is today advocated in various different forms—le politique versus la politique. For example, cultural theorists argue that the political cannot be completely monopolized by constitutional politics; the political may include ‘formalizing’ society in the medium of law, but it also includes something that ‘remains external to’ all political and legal form, something that ‘societies carry with them constantly as their non-socialized Other’.

The dual meaning of the ‘political’ will be conceived here as follows. First, it means institutionalized politics, the political system of states. The independent social constitutions distance themselves from this form of politics; they need a high degree of autonomy towards the political constitution. And as far as institutionalized politics participate in the making of social sub-institutions, a marked degree of ‘political restraint’ is required. Second, the political refers to politics in society outside institutionalized politics, in other words, to the ‘internal’ politicization of the economy itself and that of other social spheres, i.e. the politics of reflection on their social identity. Here social systems are dealing with their own founding and decision-making paradoxes—a process that is always problematic and can never be determined ‘technocratically’. And in this respect the independent constitutions of society beyond the state are highly political. Let us again look at plain money reform. As far back as 1791, Jefferson demanded that the right to issue money should be withdrawn from the banks and restored to the people. But who are the people to whom this right accrues? How can the creation of money be restored to the people? After all that has been said, the answer can only be this: the creation of money belongs to the public sphere, but not to the sphere of the state. Nationalized money creation? No. Money creation localized in the public sphere? Yes. By public sphere, we do not mean an intermediate sphere between the state and society. Rather, a defensible concept of the ‘public’ nowadays rests on deconstructing the traditional public/private distinction (as a criterion for demarcating social sectors), while at the same time reconstructing it, but now within each individual social sector. The creation of money is obviously one of the most important public functions of the economy. It is part of the public infrastructure of the economic sector. It is a public asset, at the core of the economic constitution. This is why it is necessary to withdraw the task of creation of money from the commercial banks, geared towards private profit, and to make it a monopoly of public—but non-state/non-governmental—institutions, namely, the central banks.

Why, though, should the political constitution of the state not have the privilege of regulating the fundamental structures of social sub-spheres?

Above, we discussed this as a question of internal versus external regulation, and now it is posed again in terms of democratic theory which claims the overall responsibility of democratic politics for society. After all, it is the most noble of privileges of the democratic sovereign to give society a constitution. Why, then, auto-constitutionalization rather than political actor? The fundamental structures of modernity make it necessary to


116 Focusing the difficult relationship between politics and societal constitutionalism, see the comments by Limilos Christodoulidis, Hans-J Lindahl and Chris Thornhill, all in Social and Legal Studies 2011, 209–232.


120 Jefferson (1813) ‘Thomas Jefferson to John Wayles Eppes’.


122 Some authors indeed register a multiplicity of social sub-institutions, then however postulate the primacy of the political partial constitution, Joerges and Rödl (2009) Funktionswandel des Kollisionsrechts II, 767, 775 ff. This diagnosis may have been adequate for the nation state, but is no longer so for transnational relations, Kjaer (2010) ‘Metamorphosis of the Functional Synthesis’, 498.
determine anew the relationship between representation, participation, and reflection. In the functionally differentiated society, the political constitution cannot take on the role it is still expected to play—namely, to determine the fundamental principles of the other subsystems—without a problematic self-blocking of society, as actually occurred with the totalitarian regimes of the 20th century. Social constitutionalization can proceed in modernity only by each subsystem developing reflexive mechanisms for itself, rather than these being ordained by politics. This reflexivity of subsystems is forcibly brought about. No longer do the mone res partes represent the society, with all parts of society participating (as in the stratified society); instead, the bourgeois society has made participation and representation identical and has simultaneously revoked them. We need to abandon the notion that politics represents society in the state and that the other parts of society—people or subsystems—participate in it. No subsystem of society—not even politics—can any longer represent society as a whole, even if political ideas still adhere to this. Instead, societal development is at a stage where

...psychic and social systems must develop reflexive processes of structural selection—processes of thinking of thinking or of loving of love, of researching about research, of norming norms, of financing expenditure, or of overpowering those in power.

And this is the very place to localize the symbolic dimension of the constitution as well, which was discussed in the previous chapter. Vesting correctly speaks of the need for a shared belief in the 'unity' of the constitution, in the idea of the constitution as a common bond that needs to articulate and draw attention to itself. He seeks to apply this to society as a whole and to grant the social subsystems only 'follow-on constitutions', for which the big questions of collective identity are not posed, but rather just technical issues regarding their application. With this artificial separation, however, he fails to capture the reality of global constitutional fragments and the reflexive dynamics going on within them. It is not the world society as a whole, but rather the constitutional fragment which, to use Vesting's words, is 'dependent on a symbolically filled space'.

123 On this, Thornhill (2006) 'Towards a Historical Sociology', 188 ff. and above in chapter 2, under II.
125 Vesting (2012) 'Ende der Verfassung?' (manuscript), 5, 17.
126 Vesting (2012) 'Ende der Verfassung?' (manuscript), 11.
127 This formulation is close to the position of Grimm (2009) 'Gesellschaftlicher Konstitutionalisimus', 81, who at least gives societal constitutionalism 'in the shadow of public power... a limited chance of success'.

2. In the shadow of politics

Thoroughgoing state regulation of the economic or other social sub-systems is not socially adequate, while constitutional impulses by the state certainly are. From what has been said so far, it seems plausible that politics—in concert with other societal forces—needs to exert massive external pressure in order to force changes in the capillaries of money circulation. This indeed would be the appropriate division of labour between the social subsystems. Social systems have the best chance of acquiring an appropriate constitution when they develop it in the shadow of the political system. To do justice to the role of the political system, Renner has suggested that we regard the economic constitution as a trilateral structural coupling between economy, law, and politics. Numerous structural couplings do indeed exist between politics, economy, and law, such as the tax system and the lobbying activities. But these are typically not compressed into the sort of above-described 'binding institution'. In reality there is not one trilateral, but just two bilateral 'binding institutions': one in the economy/law relation (via the institutions of property, contract, competition, and currency) and the other in the law/politics relation (constitutional legislation and constitutional jurisprudence). By contrast, the existing structural couplings in the relationship politics/economy are not so close that they would become a binding institution. Political interventions are never (or only seldom) undertaken directly as the translation of power processes into payment acts; instead, they are mediated via the legal system, through legal acts. Conversely the same is true for the levying of taxes. And in economic constitutions, the bonds between politics and the economy are occasional rather than permanent and are repeatedly loosened by a de-coupling of the economy from politics. Political interventions in the economic constitution, then, cannot be qualified as operations within a binding institution, but rather as external constitutional impulses.

The most important external impulses obviously occur during the founding act of a social constitution, as political decisions each mediated via the legal system. Establishing a financial constitution requires political impulses. Generally speaking, constituting an autonomous economy presupposes a strong political system. The mafia-like conditions that
prevailed in Russia after the events of 1989 provide plentiful material for the negative consequences that ensue when a capitalist economy is created in one fell swoop, without introducing simultaneously the rule of law. Transnational politics has been most convincing in its response when, at the moment of financial crisis, an international co-ordination of initial rescue measures was set up. To this extent, we can certainly say that independent constitutions in society are politically imposed. However, whether or not an independent constitution is being effectively set up and will function in the long term depends on the social system itself. Here, the decisions are made, whether the external political impulses are accepted and transformed internally on a continuous basis. Without these, the constitutional irritations from politics dissipate and there is no chance of any lasting change in the economic constitution. It is not the external 'big decision' of politics, the mythical founding act that creates the constitution, but rather internal 'long-lasting chains of interconnecting communicative acts which successfully establish a constitution as the "supreme authority"'. The irritations by political legislation need to be taken up by the economy in such a way that they can be fed into the capillaries of money circulation; only then does a constitution literally 'come into force' beyond its merely formal validity. The political constitutional impulse is limited to the founding act and to fundamental changes; otherwise, constitutional autonomy towards politics is required.

In the shadow of politics' has an additional meaning. Establishing a constitution necessarily relies on the law; the law in turn necessarily relies on the monopoly of politics when it comes to the physical use of force. Economic and social sanctions on their own are often insufficient for stabilizing the norms of the economic constitution. Plain money reform, too, needs the sanctions of law backed by political power if any unauthorized money creation by commercial banks has to be banned and any evasion strategies to be thwarted. However, such support by the law of the state does not transform an economic constitution into a state constitution. All that occurs is that the state's power is mediatised through the law; it is de-politicized to a certain extent and placed at the disposal of the economy's independent constitution.

The shadow must remain a shadow, though. Constitutional autonomy of the central banks towards politics is indispensable. A discretionary intervention of politics in concrete decisions regarding the creation of money must be avoided at all costs. The political independence of the central banks is indeed in itself a constitutional requirement. The fundamental principle is self-direction of payment flows by payment flows. The reason why the power games of politics in money creation needs categorically to be ruled out, is the acute risk of inflation which arises through the constant temptations of politics and particularly of democratic politics. 'It is more than doubtful that any democratic government with unlimited powers [can withstand inflationary pressure]' For once, Friedrich von Hayek may well be right, even if he is once more wide of the mark in his conclusion that the creation of money should be completely privatized.

3. Internal politics of social subsystems

Far from shadowy, by contrast, is the ‘internal’ politicization of the economy itself—indeed it is physically very evident. It is reinforced and simultaneously channelled via constitutionalization processes. Above we have already discussed the political dynamic outside of state politics, which is unleashed in the ‘private’ markets by politicizing consumer preferences and ecologizing corporate constitutions. Societal constitutionalism effectively calls for sites of political reflection to be firmly established in the spontaneous sphere and in the organized sphere of the economy. After all, with their monopoly on money creation, the central banks perform eminently political functions. What are the social consequences of expanding/constricting the money supply? In these public debates the ‘internal politics’ of the economy is realized—via the politicization of consumers, companies, and central banks.

This is where controversies are fought and binding decisions taken on whether the growth impulses by money creation have already become excessive or not. The socio-political decision on whether the financial system should be prescribed withdrawal treatment cannot be made dependent on private profit-making. Only public institutions within the economy, i.e.

118 Vesting (2009) 'Politische Verfassung', 613 criticizes rightly the constitutional 'big decision'.


121 Hayek (1979) Denationalisation of Money, 22 f.

122 This extraordinary political dynamic outside of institutionalized politics, much more viable today, should make authors such as Brunckhors (2007) 'Legitimationskrisen der Weltsiedlung', 76 ff. or Wahl (2010) 'In Defence of Constitution', 240 f. wonder whether they can maintain their vehement criticism of societal constitutionalism, ie that it de-politicizes society.
the central banks, can decide, motivated by the proper functioning of the money system and its compatibility with society as a whole.

Obviously central banks make socio-political decisions with far-reaching implications when they decide about the creation of money. Nonetheless, this does not make them part of the political system. They do not participate in the formation of power and consensus for establishing collective decisions and are not tied into the political power circulation running from the public, via the parliament, the administration, the associations, and back again to the public. Neither are they politico-economic hybrids comparable to parliaments, for example, executing both political and legal acts. Central banks do not have dual membership, in the economic and in the political systems. They are comparable to constitutional courts, which are situated at the hierarchical apex of the legal system and adjudicate highly political issues without themselves becoming part of the political system.134 ‘Guardians of the constitution’ is perhaps the appropriate metaphor: Just as parliaments and constitutional courts are the guardians of the political constitution, so are central banks and constitutional courts the guardians of the economic constitution. Indispensable to their constitutional politics is a high level of autonomy.135

Even if central bankers like to portray themselves as apolitical experts who execute, lege artis, decisions that are strictly linked to their professional mandate, in reality they make genuinely political decisions. Decisions about money supply are no mere technocratic execution of predictable calculations.136 Central banks have a broad range of political options available to them; they are exposed to the risk of great uncertainty; they have to justify their actions towards the public; and they are responsible for the correctness of the decisions they take. This is the eminently political content of reflexive practices within the economy; they adjudicate the relation between the economy’s societal function and its contributions to the environment. Monetary policy that is independent of institutionalized politics has to be transparent and accountable.

The autonomy of the central banks is also a necessary precondition for the plain money reform. Alongside the executive and legislative of the political system and the judicative of the legal system, the central banks are

'political' in society. David Kennedy rightly highlights the connection between constitutionalization and decentralization:

Our objective would be to carry the revolutionary force of the democratic promise, of individual rights, of economic self-sufficiency, of citizenship, of community empowerment, and participation in the decisions that affect one's life to the sites of global and transnational authority, however local they may be. To multiply the sites at which decisions could be seen and contested, rather than condensing them in a center, in the hope for a heterogeneity of solutions and approaches and a large degree of experimentation.

The difference between the two concepts of the political becomes explosive when the question of democracy within society is explicitly raised. The institutions of society do indeed have to be legitimated not only in relation to their specific constituency, but in relation to the whole society. But this need not mean that it has to occur through institutionalized political channels. This cannot be addressed in detail here. At any rate, one should not simply transfer democratic procedures that have been specially developed for political systems. It would have to be framed differently for the institutions of society, perhaps as described by Wolfgang Streeck:

Democratization... as a process by which local arenas of negotiation and decision-making are simultaneously empowered and committed to action by the state and society, as opposed to one in which state-implemented majority resolutions are produced on the norms and rules of a just co-existence.

In this view, democracy in society will be realized through procedures which are oriented toward the social responsibility of decentralized collective actors. To give an example, it may suffice to mention the participation of transnational publics in private regimes. The Aarhus Convention has enacted three principles of public participation: (1) access to information; (2) public participation in decision-making procedures; and (3) access to the courts in environmental matters. This makes the administrative apparatus of public and private regimes more responsive to the social substrate, ie to world society itself (and not to its political system, the international community of states). It integrates it into the process of creating modes of action, and connects decision-making (in the legislative, executive and judicative apparatuses) and debate (among different global publics) with one another so that the duality between spontaneous and organised spheres in the formation of a social constitution—so significant in terms of the theory of democracy—can be established.

The dynamics generated by external state-political constitutional impulses and by internal constitutionalization is, as mentioned, not an automatic consequence of functional imperatives. Instead, it only arises in phases of crisis and is triggered by protest against excessive growth. These are the constitutional moments in which social energies of such intensity may be activated that catastrophe can be averted. Looking back in history, the year 1929 was such a constitutional moment. Nation states were faced with the constitutional decision of whether to abolish the autonomy of the economy and pursue a totalitarian politics of either a socialist or fascist kind—or to establish, a 'New Deal' and a welfare state as limitative constitutions of the economy. And what about today? Was the banking crisis of 2008 systemic just so threatening that it triggered a new constitutional moment, only this time one for the interconnected global economy? Was it a moment that lifted self-restraint of the global financial constitution into the realm of possibility? Or has the bottom not after all yet been reached, enabling the old addictive behaviour to return throughout the world?

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141 In a similar direction argues Crouch (2011) 'The Strange Non-Death of Neoliberalism. The argument comes close to the intentions of Buchanan (2006) 'Legitimating Global 'Trade Governance', 662 ff. in spite of her critical arguments against constitutionalist and pluralist approaches.


143 This would correspond to the above-mentioned insights of the early Habermas who, following a critique of parliamentarism, called for a realization of the democratic potential of social processes, an insight that the later Habermas (and his followers) has obviously lost sight of, Habermas (1992 [1962]) The Structural Transformation of the Public Sphere, 181 ff.


Transnational Fundamental Rights: Horizontal Effect

I. FUNDAMENTAL RIGHTS BEYOND THE NATION STATE

As regards fundamental rights, transnational constitutionalism is completely plausible. Who could deny the worldwide validity, higher right, and constitutional rank of universal human rights? The alternative would be the hard-to-swallow opposing view of comprehending fundamental rights in nation-state law as higher-ranking constitutional law 'in accordance with their nature', but qualifying the same fundamental rights in the various agreements on transnational human rights as ordinary law, denying them priority over other legal rules. Therefore it is plausible to attribute international human rights ex ovo constitutional status. It would be equally difficult to make the validity of fundamental rights in the various transnational regimes dependent on the contingencies of agreements under public international law. Their claim to universality demands worldwide legal validity. Finally, it will be difficult to deny the effects of fundamental rights in non-state areas against private transnational actors. The numerous scandals involving breaches of human rights by transnational corporations that have been brought before national or international courts, have frequently—despite considerable uncertainty as to their legal source—seen the courts protecting fundamental rights against private actors.

Does this mark another return of natural law? Natural law arguments are quite successful in justifying the worldwide validity of fundamental rights. Sober legal positivism has little chance against the pathos of human rights, even where this involves the technical question of their legal validity. But given the incontestable pluralism of world cultures, particularly interreligious conflicts, constructing universally valid human rights under natural law will always lead to a swift collapse. If then natural law and positive law are equally doubtful, what is the basis for the global validity claim? It cannot depend on the outcome of the philosophical controversy between universalists and relativists. Is simply 'colere pubblicum' at work here as a source of global law, producing human rights via scandalization? But how then would such social norms be transformed into positive law? Constitutional rights in transnational regimes raise two questions: (1) How, starting from the nation states' fundamental rights and the positivization of human rights in public international law agreements, can fundamental rights claim validity in transnational regimes, whether these are public, hybrid, or private? (2) Do fundamental rights within such regimes oblige also private actors, ie do fundamental rights also have a horizontal effect in the transnational sphere?

1. Extraterritorial effect of national constitutional rights?

Ladeur and Viellechner extend the validity of fundamental rights to transnational 'private' regimes. They are sceptical of the view that they will spontaneously emerge via scandalization; they are equally sceptical of a general constitutionalization of public international law. Their solution in contrast is: nation states' fundamental rights 'expand' into transnational 'private' regimes. They give three reasons: intensified porosity of national and international law, networking of national constitutional courts, and increasing exchangeability of private and public law.

The construction is suggestive, as it straightforwardly finds transnational validity of fundamental rights on secure nation-state sources.

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2. The major differences between guarantees of human rights under international law are documented by Hamin (2003) Menschenrechte.
5. On ways to escape the alternatives of universalism and relativism, see the subtle argumentation of Menke and Pollmann (2007) Philosophie der Menschenrechte, 71 ff.
of law. At the same time it transfers well-developed constitutional doctrines from nation states to transnational regimes. But their category error cannot be ignored. ‘Expansion’ is an ambivalent term, concealing the distinction between two fundamentally different processes. In the language of sources of law, the authors equate the sources of the content of fundamental rights with the sources of their validity.\textsuperscript{6} Or, in another language, the authors do not take into account that decisions and argumentations in law form closed cycles, which may well be reciprocally irritating but do not merge into one another.\textsuperscript{7} There is no doubt that national fundamental rights provide the model for the content of their transnational equivalents; nor is there any doubt that the content of the national standards, principles, and doctrines of basic rights is transferred in a transnational argumentation cycle. This however tells us nothing about whether—and if so how—fundamental rights actually achieve normative validity in transnational regimes. This requires a decision, an act of validation within an institutionalized law production, the need for which cannot be concealed by referring to substantive similarities in national and transnational contexts. It is only a detailed analysis of their sources of validity, as Gardbaum does, that can clarify their validity, scope, and enforcement. A bold general assertion of human rights expansion beyond national boundaries cannot achieve that. Nor, in view of numerous differences between nation states in their fundamental rights catalogues, is it possible to speak of an ‘expansion’ of these standards: at best we can speak of a choice between them.\textsuperscript{10} Nor do the porosity of national and international law or the exchangeability of public and private law help here. A legally structured and constitutionally (legitimized) process must be identified that positivizes fundamental rights as valid and binding within a transnational regime. Here, however, the authors simply lead us into the mysteries of ‘interlegality’.\textsuperscript{11} In sum, ‘expansion’ might simply be a transitional semantics. It realizes the horizontal effect of fundamental rights in transnational regimes, but cannot yet admit the regime’s own constitutional contribution. Such transitional semantics are well known from the debate on judge-made law in nation states.\textsuperscript{12} As an effective palliative, this semantics exploits the validity of national constitutional law, whose ‘expansion’ over two borders (national/transnational, public/private) would not seem to cause any great uneasiness.

The same objection applies to authors who base transnational fundamental rights upon universal legal principles (of the ‘civilized peoples’?). Kumm, for instance, argues that general constitutional principles are governing the transnational space, but he does not clarify which lawmaking processes carry their positivization. Nor does he distinguish clearly between argumentation and decisions.\textsuperscript{13} Similarly, the comparative law method, loved by all, is exposed to this objection when it is supposed to found the validity of transnational standards.\textsuperscript{14} Neither differentiates clearly enough between the incontestable exemplary function of principles, the differing content of legal orders, and the legal decision-making process regarding their validity.

2. Global colère publique

Does this then mean that the colère publique, defined by Emile Durkheim as a source of law, directly validates fundamental rights?\textsuperscript{15} Luhmann calls it the ‘contemporary paradox’ that globally, given the turbulent world situation and the vanishing relevance of nation states, fundamental rights are not, as is usually the case, first set as norms of law that may subsequently be breached, but are rather validated by their very violation and the subsequent outcry.\textsuperscript{16} The actual existence of this paradox is confirmed by a familiar sequence of events: protest movements and NGOs uncover

\textsuperscript{6} On the sources of law, for instance Röhl and Röhl (2008) Allgemeine Rechtslehre, 519 ff.


\textsuperscript{10} Klosel (2012) Prozedurelle Unternehmensverfassung (manuscript), 62. ‘This moves the positivization process within the regime to the forefront.’


\textsuperscript{12} Despite the pioneering work of Josef Esser (1956) Grundzüge und Norm, here too the transitional semantics (Rechtsinterkommunikation) of law as Gewaltgebetrecht are not yet dead, even if they are on their deathbed, see the ambiguities in Röhl and Röhl (2008) Allgemeine Rechtslehre, 571 ff.


\textsuperscript{14} ‘It is intended to prove the universal validity of an ordre public transnational in which fundamental rights play an important role, but it says nothing about the lawgiving role of the conflict resolution body which, having compared various legal orders, implements a concrete norm; see for example Lalive (1987) ‘Transnational or Truly International Public Policy’, 295.

\textsuperscript{15} Durkheim (1933) The Division of Labor in Society.

dubious practices by multinational corporations; a scandal develops; the
media decry these practices as violations of human rights; the courts
finally recognize a human rights violation. Ladeur and Viellechner are
of course right when they object to the jurisgenerative force of scandals
and argue that ‘normative expectations of global society’ cannot alone
create law. Institutionalization is required to anchor such expectations,
and this cannot solely be attributed to the colère publique. But Luhmann
calls this practice a paradox, and paradoxes cannot of themselves
constitute legal validity. Only a de-paradoxification will permit law
to arise from scandalization. And here we need to observe closely how
today’s legal practice will cope with this paradox, and which distinctions
it will draw on to validate fundamental rights in the face of such scandal-
ization. And here again, valid law can only arise where the condemnation
of dubious practices is for its part reflexively observed by operations
governed by the legal code and incorporated into the recursiveness of legal
operations.

3. Regime-specific standards of fundamental rights

Rather than assuming an expansion of national rights or designating
social norms as legal rules, it is far more plausible to rely on the concrete
decisions which establish validity in regime-specific institutions. Renner
follows this line in detailed analyses of private global regimes. Taking
as examples transnational arbitration under the lex mercatoria, the tribu-
nals on international investments, and the Internet panels of the ICANN,
he shows in detail how these instances, step by step, positivize concrete
standards of fundamental rights and do so within a legal procedure that

is, for its part, enacted by private ordering. Neither national fundamen-
tal rights, nor rules of international private law, nor mere social norms
form the legal source for fundamental rights in these regimes. Nor is the
increasing networking of national courts, cited by Ladeur and Viellechner,
capable of creating their validity in transnational regimes. While this net-
working strengthens the existing global legal system, strict internal bor-
ders of legal validity exist within global law, and these can only be crossed
by an explicit validity decision—in these cases, private arbitration.

It is the decision practice of transnational regimes themselves that
enacts fundamental rights within their borders. Thus, beyond state pos-
tivization, a ‘social’ positivization of fundamental rights is the driving
force behind their gradual universalization. In public international law
regimes, it is a matter of course, that fundamental rights gain validity,
but only when human rights conventions positivize them. Otherwise,
for example, they cannot claim validity against international organiza-
tions or transnational regimes. A more difficult situation arises where,
as in the World Trade Organization, judge-made law creates human
rights. Genuine court institutions have developed from simple panels
designed for conflict resolution, which, in the Appellate Body, even have
a second instance. If fundamental rights are recognized here, it is these
conflict resolution bodies and not the international agreements which,
in a process similar to common law, positivize the standards of funda-
mental rights that are valid within the World Trade Organization. The
same can be said of the private arbitration tribunals of the International
Chamber of Commerce (ICC), the International Center for the Settlement
of Investment Disputes (ICSID), and the ICANN when they positivize funda-
mental rights. They of course are influenced by different nation-state
orders, general legal principles, doctrinal models, and even philosophical
arguments. But the actual validity decision is made by the arbitration tri-
nunals themselves when they select between different standards of funda-
mental rights and specify which fundamental rights are binding in the
particular regime. And scandalization by protest movements, NGOs, and
the media are indeed involved in such lawmaking processes where the
scandalized norms are, via secondary rules, integrated into global law.

National courts are considerably involved. In the lawmaking processes
of transnational regimes, they are often called upon to recognize and
enforce arbitral decisions. They influence regime constitutions when

they invoke *ordre public* and refuse to enforce transnational arbitral rulings because they violate fundamental rights. Thus, national courts participate in the gradual development of a common law of transnational fundamental rights. We should not succumb here to the positivistic temptation and argue that ‘in the last instance’ national law becomes the source of the fundamental rights in transnational regimes. This argument has already been demonstrated as false in the debate about the *lex mercatoria*, when exequatur decisions of national courts were supposed to anchor the *lex mercatoria* in national law. The whole argument is based on an incorrect demarcation of the national and the transnational and cannot comprehend the entwining of the two. These courts’ decisions have dual membership; they participate in the decision chains of two autonomous legal orders. The court decisions are and remain operations of the relevant national law, but they participate at the same time in the lawmaking of the autonomous regime. This dual membership in different chains of operations is not unusual. It is practically the rule where autonomous systems develop structural and operational linkages. This leads to an entwinement—but not a fusion—of national and transnational legal orders. The judicial sequences only ‘meet’ for a moment in the concrete judicial ruling; their validity operations otherwise have very different pasts and futures in their respective legal orders.

‘Common law constitution’ appropriately describes how fundamental rights are positivized in transnational (public and private) regimes: an iterative decision-making process occurs between the rulings of arbitration tribunals, decisions of national courts, contracts of private actors, social standardizations, and the scandalization actions of protest movements and NGOs. Klabbers aptly formulates the answer to the choice posed here:

... is constitutionalization a spontaneous process, a bric-a-brac of decisions taken by actors in a position of authority responding to the exigencies of

1. **Beyond state action**

Even if transnational regimes, public and private, positivize their respective standards of fundamental rights, the question nevertheless remains of whether these fundamental rights bind only state actors or whether they also apply to private actors. Their effect on private actors is much more acute in the transnational than in the national sphere. This is because multinational corporations regulate whole areas of life so that we can no longer avoid the question. It is however extraordinarily difficult to invoke the state action doctrine here which is probably the best-known solution in the nation states. According to this doctrine, private actors can only violate fundamental rights if an element of state action can be identified in their activities. It may be discovered either because state bodies are somehow involved or because the private actors perform some public functions. In the transnational sphere, however, there is none of the

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25 Subler ideas on the entwinings of the two spheres are developed by Sassen (2006) * Territory, Authority, Rights—From Medieval to Global Assemblages*.


28 Klabbers (2009) ‘Setting the Scene’, 23 with reference to Hurrell (2007) *Global Order*, 53. ‘To avoid misunderstanding, contrary to Klabbers, the position here is that a global constitution will indeed dissolve into numerous sector constitutions.


general ubiquity of state action that can be found in the nation state, so that state action is only discernible in relatively few situations.

We should again consider the concept of generalization and respecification and now use it to horizontalize fundamental rights. The first step is to generalize the narrow application of fundamental rights in state contexts—only understandable in the historical context—and to transform it into a general principle with society-wide validity. In a second step the concrete content of fundamental rights, their addressees and beneficiaries, their legal structures and their implementation, must be carefully tailored to the independent logic and independent normativity of different social contexts.

The other currently widespread doctrine, which is called structural effects of human rights, has become generally established in differing variants in Germany, South Africa, Israel, and Canada in particular. Implicitly, this doctrine uses the concept of generalization and respecification. It generalizes fundamental rights, from state-centred rules into general values, which are ‘radiating’ into non-state areas. It then respecifies these general values by adapting them to the particularities of private law.

From a sociological viewpoint, however, both generalization and respecification need to be re-oriented. If fundamental rights will be effective in different global domains with their peculiar social structures, hardly any guidance can be expected from a generalization drawn on the philosophy of values. And it is just as inadequate to orient their respecification only towards the peculiarities of private law. Neither value philosophy nor private law doctrine offer sufficient guidance for this task.

2. Generalization: communicative media instead of general values

The generalization should instead first identify what is the addressee of fundamental rights in the political system. This is not the state, but rather political power. Fundamental rights are directed against power, against the system-specific medium of political communication. They need to be freed from this narrow focus and to be generalized towards other communicative media that actually function in society. Luhmann and

Thornhill have clarified the relations between fundamental rights and the medium of power. Formalizing the power medium is, as already discussed in the previous chapter, the main function of political constitutions. They ensure the long-term survival of political autonomy that has been wrung from 'external' religious, familial, economic, or military power sources. Law supports this autonomization, in which the medium of power gains its own forms. 'Fragmented' power positions are juridified: competences, subjective rights, and human rights. In these three structural components the power medium finds its decentralized forms. Power communication is staged in modern politics as a power game in the form of legal positions. The operations of the political process are carried out in the form of rights, the structural components of power. The compact medium of power is dissolved into rights as its individual components, which are then used as building blocks in the power formation process.

Fundamental rights, as legal forms of the power medium, take on a double role in politics. It is not sufficient only to emphasize the protection of the individual against the might of the state. Fundamental rights rather exercise simultaneously inclusionary and exclusionary functions. They permit the inclusion of the overall population in the political process, taking the form of the right to political participation. These are the active civic rights, above all the right to vote, but also the political rights in the narrower sense of freedom of opinion, assembly, and association. At the same time, however, fundamental rights have the effect of excluding non-political social spheres from the political field, marking the borders between politics and society and guaranteeing social institutions protection against their politicization. Such exclusion simultaneously ensures the operability of politics itself, by removing certain themes that would otherwise overtax it. This de-politicization thus not only serves to protect areas of autonomy within society but also the integrity of politics itself. Both the inclusionary and exclusionary dimensions of fundamental rights contribute to maintaining the functional differentiation of society:


34 Remarkably, that touchstone of modern political systems, the right to vote, does not have the status of a full-fledged fundamental right in Germany, Klein in: Maunz/Dürig, Grundgesetz Art. 38 GG, para. 135 ff.
The semantic fusion of sovereignty and rights might be seen as the dialectical centre of the modern state and of modern society more widely. On the one hand, these concepts allowed the state to consolidate and to preserve a functional realm of political power and to diminish the role of most social forces. On the other hand, their concepts also allowed for an abstracted and distorted international order, where the most social forces, including the media, were subordinated to global economic and political interests.

The rights of individuals and groups are not absolute. Instead, fundamental rights must be balanced against other interests and values. This requires evaluating conflicting claims and determining the relative weight of each. The protection of fundamental rights is essential to the functioning of a democratic society, but it must be balanced against other considerations such as national security, public order, and the rights of others. The challenge is to ensure that fundamental rights are protected while also respecting the needs and interests of all members of society.
their ‘indirect’ effect that is important, but now in the sense that state-directed human rights need a context-specific transformation.

Finally, it is not sufficient to direct fundamental rights exclusively to phenomena of economic and social power as some authors indeed suggest. They bind fundamental rights too closely to the power medium and ignore the dangers that arise from other communicative media.46 Similarly, Thornhill accepts constitutionalization in society if—and only if—communication in the various subsystems occurs via the power medium. He ultimately presents constitutional theory as a power theory and then understands the third-party effect of fundamental rights as transformations in constitutional rule as correlated with internal transformations in the substance of power and as adjusted to new conditions of society’s power.47 That however ignores the subtler workings of fundamental rights in society. If they are supposed to guarantee possibilities of communication in various social fields, then they need to protect against the dangers to individual and institutional integrity posed by numerous communicative media, not only by power.

III. INCLUSIONARY EFFECT OF FUNDAMENTAL RIGHTS: RIGHT TO ACCESS

The discussion on third-party effect has, as mentioned, so far concentrated on the protective function of fundamental rights against social power phenomena while neglecting their inclusion function.48 But this is exactly where a major problem of late-modern societies appears, whose socially harmful effects have only become visible in the most recent phases of globalization. The problem lies in the inclusion paradox of functional differentiation. On the one hand, function systems have as their members not strictly delineated population groups, as is the case in stratified societies (class, stratum, caste); each function system rather includes the entire population, but strictly limited to its function. The inclusion of the entire population in each function system represents

the basic law of functional differentiation. On the other hand, it is the very internal dynamics of function systems that cause entire population groups to be excluded. Such function-specific exclusions moreover reciprocally reinforce each other ‘if extensive exclusion from the function system (eg extreme poverty) leads to exclusion from other function systems (eg schooling, legal protection, a stable family situation).’49 Exclusions of whole segments of the population, as for instance in the ghettos of major American cities, are thus not the legacy of traditional social structures, but rather products of modernity. This poses the disturbing question of whether it is inherent to the logic of functional differentiation that the various binary codes of the world systems are subordinate to the one difference of inclusion/exclusion.50 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?

Here, societal constitutionalism aims at constructing constitutionally guaranteed counter-institutions in different social areas. Then, fundamental rights act not only as spaces of individual autonomy, but also as guarantees to include the entire population into the function systems.51 Now it becomes clear what it means to orient the generalization and respéification of fundamental political rights towards function-system specific media instead of abstract values. In politics the right to vote and political rights of an active civic nature are intended to permit the entire population access to the political power medium. If this principle of political inclusion is generalized then access to the communicative media in all function systems is not only permitted, but is actually guaranteed by fundamental rights. However, this cannot be implemented in such general terms, for instance via a political access right to society. ‘With functional differentiation, the regulation of the relationship of inclusion and exclusion is transferred to function systems and there is no longer any central authority (even if politics would gladly take on this role) to supervise the

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46 Reducing fundamental rights to phenomena of ‘social power’ as an analogy to political power is widespread in labour law. This is understandable in view of organisational power, but reduces the third-party question to a mere phenomenon of power and ignores more subtle violations of human rights. See for instance Gamillscheg (1964) ‘Grundrechte im Arbeitsrechts’. Similar reductions can be found in explicitly political concepts of the horizontal effect of fundamental rights, eg in Anderson (2005) Constitutional Rights, 33 ff. and in Tuor (2010) ‘Many Constitutions of Europe’, 11 ff.


48 This function is not once mentioned in the leading German commentary, Hordergen in: Maunz/ Dürrig, Grundgesetz (2010), Art. 1 GG, paras. 65 ff.


subsystems in this regard. It is rather the task of a careful respecification to formulate the function-system specific conditions in order to permit access to diverse social institutions. Essential services in the economic system, compulsory insurance in the health system, and guaranteed access to the Internet for the whole population are cases where the third-party effect of fundamental rights would guarantee undistorted access to social institutions.

'Internet neutrality' is an informative example of a right to inclusion. The technology of the Internet initially guarantees that no obstacles exist to freely accessing the markets for Internet applications. The right to free and equal access to the Internet as an artificial community asset is in principle guaranteed by technology and requires no additional legal support. In the meantime, however, this principle has become endangered through new digital tools that group different applications into classes, to which Internet services are then offered at varying conditions. Network neutrality will be violated if network operators differentiate between various classes and grant highest priority to the highest-paying users ('access tiering'). This is a clear case of access discrimination. Other cases are the manipulation of the search algorithm via Google or blocking actions by network operators. Here, the technology-based neutrality of the Internet requires the additional law-based protection afforded by fundamental rights of inclusion. In its horizontal effect the fundamental right of non-discrimination—right of access to non-political institutions—would be respecified in the Internet as an obligation to enter into a contract: 'Access rules should ensure that all users of the medium in principle possess the same freedoms (possibilities of action). Internet operators would thus be forbidden to discriminate between comparable applications. Guarantees of fundamental rights would guarantee free access to the social institutions within the Internet by the overall population.

Finally, such rights of inclusion might also realize greater socio-political aspirations. Brunkhorst correctly argues that the project of constitutionizing global civil society will remain only partial if it is not accompanied by a strengthening of democracy. However, often stronger democratic legitimation tends to mean simply that social processes should be more closely bound to institutionalized politics. Brunkhorst himself demands that sub-institutions should be legitimized by the political processes of the European Union. Others put their hopes for democratic legitimacy in a recourse to the politics of nation states. Still others give primacy to a constitution of global politics above all other partial constitutions, with the consequence that democratic legitimacy can only be delivered from there.

The arguments presented here tend in the opposite direction. Societal constitutionalism aims to strengthen the democratic potential in civil society itself. Wiethöller engages for the political in 'society as society'. The political is realized 'not just from the "democratic" unified will-formation of citizens in politics, but it also "organises" institutions for decision-making, communication and education processes' within civil society. Normative consequence is to translate the horizontal effects of fundamental rights into participation rights outside the political system, in different areas of society: 'The societal part of the human being is his or her "citizen's right", which overcomes the traditional private law/public law dichotomy.' The normative guideline would be to transform rights of inclusion into active citizen's rights within the social sub-areas. In nation-state contexts, for instance, the co-determination movement was successful in institutionalizing active citizen's rights in enterprises as well as in other social organizations. It is currently an open question whether, in transnational contexts, the stakeholder movement will construct equivalent institutions in the context of Corporate Social Responsibility.

IV. EXCLUSIONARY EFFECT OF FUNDAMENTAL RIGHTS

While such rights of inclusion into diverse social spheres are still only rudimentary, the horizontal effect of fundamental rights in their protective function is already considerably further advanced. In the transnational context this concerns in particular the violations of fundamental rights by multinational corporations that are brought before the courts.

56 eg Renner (2011) Zwingendes transnationales Recht, 244 f.
57 Joerges and Rödl (2009) 'Funktionswandel des Kollisionsrechts II', 777 ('not otherwise conceivable').
In their exclusionary role, fundamental rights react as well to the differentiation of function systems and the autonomization of their communicative media. But now the problem is the expansion of function-specific boundaries and guarantees to exclude from the function system areas of autonomy are looked for. First, and visible everywhere since Macchiavelli, politics becomes autonomous. It becomes detached from the diffuse moral-religious-economic ties of the old European society, and extends to infinity the usurpation potential of its special medium, power, without any immanent restraints. Its operative closure and its structural autonomy let it create new environments for itself, vis-à-vis which it develops expansive, indeed downright imperialist tendencies. Absolute power liberates unsuspected destructive forces. Centralized power for legitimate collective decisions, which develops a special language of its own, indeed a high-flown rationality of the political, has an inherent tendency to totalize them beyond any limit.60

Its expansion goes in two divergent directions. First, it crosses the boundaries to other social areas of action. Their response in the resulting conflicts is to invoke their autonomous communicative spheres free from intervention by politics, whether as institutional or as personal fundamental rights. Fundamental rights demarcate from politics communicative areas of autonomy allotted either to social institutions or to persons as social constructs.61 Here, it is the exclusionary rather than the inclusionary function of fundamental rights that becomes effective. Fundamental rights set boundaries to the totalizing tendencies of the political power medium by depoliticizing society’s spheres of autonomy. Second, in its endeavours to control the human mind and body, politics expands with particular verve across the boundaries of society. Their defences become effective only once they can be communicated as protest in the forms of complaints and violence. These individual protests are translated into political struggles of the oppressed against their oppressors, and finally end up, through historic compromises, in political guarantees of the self-limitation of politics vis-à-vis people.

Orienting fundamental rights towards protection against the state worked only so long as the state could be identified with society, or at least the state could be regarded as society’s organizational form, and politics as its hierarchical co-ordination. As other highly specialized communicative media (money, knowledge, law, medicine, technology) gained in autonomy it became clear that the individual/state dualism is an insufficient description of modern society. It is exactly at this point that the third-party effect of exclusionary fundamental rights becomes relevant, as protection against the expansive tendencies of social institutions. The fragmentation of society multiplies the boundary areas between autonomized communicative media and individual and institutional spheres of autonomy.62

Thus the problem of human rights cannot simply be limited to the relation between state and individual, or the area of institutionalized politics, or even solely to power phenomena in the broadest (Foucault’s) sense. Specific endangerment by a communicative medium comes not just from politics, but in principle from all autonomized subsystems that have developed an expansive self-dynamics. For the economy, Marx clarified this particularly through such concepts as alienation, fetishism, autonomy of capital, commodification of the world, exploitation of man by man. Today we see—most clearly in the writings of Foucault, Agamben, and Legendre63—similar threats to integrity from the matrix of the natural sciences, of psychology and the social sciences, of technologies, of medicine, the press, radio and television (keywords: Dr Mengele,64 reproductive medicine, extending life in intensive care units, the ‘Lost Honour of Katharina Blum’65).

Accordingly, the fragmentation of society is today central to fundamental rights as protective rights. There is not just a single boundary concerning political communication and the individual, guarded by human rights. Instead, the problems arise in numerous social institutions, each forming their own boundaries with their human environments: politics/individual, economy/individual, law/individual, science/individual.

60 The institutional side of rights is emphasized by Ladeur (2004) Kritik der Abwölbung in der Grundrechtsdogmatik, 64: ‘Fundamental rights contribute to the self-reflection of the private law, when—as with the horizontal effect of communicative freedom—it is about the protection of non-economical interests and goods.’
62 The experiments carried out on people by Dr Mengele were once regarded as an expression of a sadistic personality or as an enslavement of science through totalitarian Nazi policy. More recent research reveals that the experiments are better regarded as the product of the expansionist tendencies of science. They are propelled by its intrinsic dynamics, to seize absolutely every opportunity to accumulate knowledge, especially as a result of the pressure of international competition, unless it is restrained by external controls. See Schmuhl (2005) Grenzüberschreitungen.
Everything then comes down to the identification of the various frontier posts, so as to recognize the violations that endanger human integrity by their specific characteristics. Where are the frontier posts? In the various semantic artifacts of ‘persons’ in the subsystems: homo politicus, economicus, juridicus, organisatorius, retailis, etc. While they are indeed only constructs within communication that permit attribution of action, they are at the same time real points of contact with individual human beings ‘out there’.64 It is through the mask of the ‘person’ that the social systems make contact with flesh-and-blood people; while they cannot communicate with them, they can massively irritate them and in turn be irritated by them. In tight perturbation cycles, communication irritates consciousness with its selective ‘enquiries’, conditioned by assumptions about rational actors, and is irritated by the ‘answers’, in turn highly selectively conditioned. It is in this recursive dynamics that the ‘exploitation’ of man by the social systems (not by the man!) comes about. The social system as a highly specialized communicative process concentrates its irritations of human beings on the social person-constructs. ‘Sucks’ mental and physical energies from them for the self-preservation of its environmental difference. It is in this specific way that Foucault’s disciplinary mechanisms develop their particular effects.65

V. THE ANONYMOUS MATRIX

If violations of fundamental rights stem from the totalizing tendencies of sectorial rationalities, there is clearly no longer any point in seeing their horizontal effect as if rights of private actors have to be balanced against each other. But this is still the dominant opinion in constitutional law.66 The origin of the infringement of fundamental rights needs to be examined more closely. The imagery of ‘horizontality’ unacceptably takes the sting out of the whole human rights issue, as if the sole point of the protection of human rights was that certain individuals in society threaten the rights of other individuals. Violation of the integrity of individuals by other individuals, whether through communication, simple perception, or direct physical action, is, however, a completely different set of issues that arose long before the radical fragmentation of society in our time. It must systematically be separated from the fundamental-rights question.67 In the European tradition it was formulated by attributing to persons, as communicative representatives of actual human beings, ‘subjective rights’ against each other. This was philosophically expanded by the theory of subjective rights in the Kantian tradition, according to which ideally the citizens’ spheres of arbitrary freedom are demarcated from each other in such a way that the law can take a generalizable form. Legally, this idea has been most clearly developed in the Classical law of tort, in which not merely damages, but the violation of subjective rights are central.

Now, ‘fundamental rights’, as here proposed, differ from ‘subjective rights’ in private law as they are not about mutual endangerment of individuals by individuals, ie intersubjective relations, but rather about the dangers to the integrity of institutions, persons, and individuals that are created by anonymous communicative matrices (institutions, discourses, systems). Fundamental rights are not defined by the fundamentality of the affected legal interest or of its privileged status in the constitutional texts, but rather as social and legal counter-institutions to the expansionist tendencies of social systems. The Anglo-American tradition speaks in both cases indifferently about ‘rights’, thereby overlooking from the outset the distinction between subjective rights and fundamental rights, while in turn being able to deal with them together. By contrast, criminal law concepts of macro-criminality and criminal responsibility of formal organizations come closer to the pertinent issues being considered here.68 These concepts affect violations of norms that emanate not from human beings but from impersonal social processes that require human beings as their functionaries.69 But these concepts conceive only the dangers stemming from ‘collective actors’ (states, political parties, business firms, groups of companies, associations) and ignore the dangers stemming from the anonymous ‘matrix’, from autonomized communicative processes (institutions, function systems, networks) that are not personified as collectives. Even human rights that are directed against the state should not be

66 Influential Bundesverfassungsgericht BVerfG 89, 214 ff. (Vertragschaft); Alexy (1994) Theorie der Grundrechte, 484.
67 Certainly people can do far worse to each other by violating rights of the most fundamental kind (life, dignity). But this is not (yet) a fundamental-rights question in this sense, but a question of the Ten Commandments, the fundamental norms of criminal law, and the law of tort. Fundamental rights in the modern sense are not opposed to perils emanating from people, but to perils emanating from the matrix of social systems.
69 For clarification it has to be emphasized here the individual responsibility does not disappear behind the collective responsibility, but rather that both exist in parallel, although subject to different conditions.
seen as relations between political actors (state versus citizen), i.e. as an expression of person-to-person relations. Instead, such human rights are relations between anonymous power processes, on the one hand, and tortured bodies and hurt souls on the other. This notion is expressed in communication only very imperfectly, not to say misleadingly, as the relation between the state as 'person' and the 'persons' of the individuals.

It would be repeating the infamous category error of the tradition were one to treat the horizontal effect of fundamental rights in terms of the weighing up of subjective rights between individual persons. That would just end up in the law of tort, with its focus on interpersonal relations. And we would be forced to apply the concrete fundamental rights directed against the state wholesale to the most varied interpersonal relations, with disastrous consequences for elective freedoms in intersubjectivity. Here lies the rational core of the excessive protests of private lawyers against the intrusion of fundamental rights into private law, though these complaints are in turn exaggerated and overlook the real issues.

The category error can be avoided. Both the 'old' state-centred and the 'new' poly-contextual human rights question should be understood as people being threatened not by their fellows, but by anonymous communicative processes. These processes must in the first place be identified. Foucault has seen them most clearly, radically de-personalizing power phenomena and identifying today's micro-power relations in society's capillaries in the discourses/practices of 'disciplines'.

The human rights question in the strictest sense must today be seen as endangerment of individuals' integrity of body and mind by a multiplicity of anonymous, autonomized, and today globalized communicative processes. The fragmentation of world society into autonomous subsystems creates not only new boundaries outside society between subsystem and human being, but also new boundaries between the various subsystems inside society, on which the expansionist tendencies of the subsystems work in their specific ways. It now becomes clear how a new 'equation' replaces the old 'equation' of the horizontal effect. The old one was based on a relation between two private actors—a private perpetrator and a private victim of the infringement. Now, on one side of the new equation there is no longer a private actor as the violator of fundamental rights, but the anonymous matrix of an autonomized communicative medium. On the other side there is no longer simply the compact individual. Instead, owing to the presence of new boundaries, the protection of the individual, hitherto seen in unitary terms, splits up into several dimensions. On this other side of the equation, the fundamental rights have to be systematically divided into three dimensions:

— institutional rights that protect the autonomy of social processes against their subjugation by the totalizing tendencies of the communicative matrix. By protecting, for instance, the integrity of art, family, or religion against totalitarian tendencies of science, media, or economy, fundamental rights take effect as 'conflict of law rules' between partial rationalities in society;

— personal rights that protect the autonomous spaces of communication within society, attributed not to institutions, but to the social artefacts called 'persons'.

— human rights as negative bounds on societal communication where the integrity of individuals' body and mind is endangered by a communicative matrix that crosses boundaries.

It should be stressed that single fundamental rights are to be allocated to these dimensions not on the basis of one-to-one, but with a multiplicity of overlaps. Some fundamental rights are mainly to be attributed to one dimension or the other (e.g. freedom of art and property primarily to the institutional dimension, freedom of speech primarily to the personal dimension, and freedom of conscience primarily to the human dimension). It is all the more important, therefore, to distinguish the three dimensions carefully within the various fundamental rights and to pay attention to their various legal forms and conditions of realization.


76 Foucault's problem is however that he is obsessed with the phenomenon of power, which leads him to inflate the concept of power meaninglessly. As a consequence he cannot discern the more subtle effects of other communication media.


Transnational Fundamental Rights: Horizontal Effect
VI. JUSTICIABILITY?

The ensuing question for lawyers is: Can 'horizontal' effects of human rights be reformulated from a focus of conflicts within society (person versus person) to conflicts between society and its ecologies (communication versus body/mind)? In other words, can horizontal effects be transplanted from the paradigm of interpersonal conflicts between individual bearers of fundamental rights to that of conflicts between anonymous communicative processes, on the one hand, and concrete people on the other?

The difficulties are enormous. To name but a few:

How can a system/environment conflict 'between' the universes of communication and consciousness be addressed at all by communication as a conflict, as social conflict or indeed as legal conflict. A real Lyotard style of problem: if not as litige, then at least as différend? Failing a supreme court for meaning, all that can happen is that the individual experience endures the infringement and then fades away unheard. Or else it gets 'translated' into communication, but then the paradoxical demand will be for the infringer of the right (society, communication) to punish its own crime! That means expecting poachers to turn into gamekeepers. But bear in mind that by institutionalizing political fundamental rights, nation states have managed, however imperfectly, precisely this gamekeeper-poacher self-limitation.

How can the law describe the boundary conflict, when after all it has only the language of 'rights' of 'persons' available? Can it, in this impoverished rights talk, in any way reconstruct the difference between conflicts of fundamental rights that are internal to society (person-related) and external to society (human-related)? Here we reach the limits not only of what is conceivable in legal doctrine, but also the limits of court proceedings. In litigation there must always be a claimant suing a defendant for infringing his rights. In this framework of mandatory binarization as person/person-conflicts, can human rights ever be asserted against the structural violence of anonymous communicative processes? The only way this can happen—at any rate in litigation—is simply to re-use the category error criticized above, but immanently correcting it, in an awareness of its falsehood, by introducing where possible a difference. That means individual suits against private actors, whereby human rights are asserted: not the rights of persons against persons but of flesh-and-blood human beings against the structural violence of the matrix. In traditional terms, the conflict with institutional problems that is really meant has to take place within individual forms of action. We are already familiar with something similar from existing institutional theories of fundamental rights, which recognize as their bearers not only persons, but also institutions. Whoever enforces political freedom of expression is simultaneously protecting the integrity of the forming of the political will. But the point here is not about rights of impersonal institutions against the state but, in a multiple inversion of the relation, about rights of individuals outside society against social institutions outside the state.

Is this distinction, plausible in principle, so precise that it is in fact justiciable? Can person/person-conflicts be separated from individual/individual-conflicts, on the one hand, and these separated in turn from communication/individual-conflicts on the other, if after all communication is enabled only via persons? Translated into the languages of society and the law, this becomes a problem of attribution. Whodunnit? Under what conditions can the concrete endangerment of integrity be attributed not to persons or individuals, but to anonymous communication processes? If this attribution could be achieved, a genuine human rights problem would have been formulated even in the impoverished rights talk of the law.

In an extreme, almost irresponsible simplification, the 'horizontal' human rights problem can perhaps be described in familiar legal categories as follows. The problem of human rights in societal contexts governed by private law arises only where the endangerment of body/mind integrity comes from social 'institutions' (and not just from individual actors, where the traditional norms of private law then apply). In principle, institutions include private formal organizations and private regulatory systems. The most important examples here would be national and international business firms and other private associations; and private standardization and similar private rule-setting mechanisms as private regulatory systems. On the other hand, the fact that 'institutions' represent only imperfectly those chains of communicative acts, representing a danger to integrity, that are really intended through their characterization

78 For a good criticism of rights talk, see Glendon (2000) 'Rights Talk'.
as a special medium: the term does not fully grasp the expansive dynamics which is the whole sense of the metaphor of the anonymous 'matrix'. But for lawyers, who are oriented toward rules and persons, ‘institution’ has the priceless advantage of being defined as a bundle of norms that can at the same time be personified. The concept of the institution could accordingly provide a signpost for the respecification of fundamental rights in social sectors (much as it can be employed for the state as institution and as person in the field of politics). The outcome would then be a formula of ‘third-party effect’ that would also seem plausible to a black-letter lawyer. It would not regard the horizontal effect as a balancing between the individual bearers' fundamental rights, but instead as the protection of human rights, personal rights, and rights of discourse vis-à-vis social institutions.

These difficulties with justiciability show how inappropriate the optimism is that the human rights problem can be solved using the resources of legal doctrine. Even institutional rights confront the law with the boundaries between other social subsystems. Can one discourse do justice to the other? This dilemma has been analysed by Lyotard. But it is at least a problem within society, one Luhmann sought to respond to with the concept of justice as socially adequate complexity. The situation is still more dramatic with human rights in the strict sense, located at the boundary between communication and the individual human beings. All the groping attempts to juridify human rights cannot hide the fact that this is, in the strict sense, impossible. How can society ever ‘do justice’ to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them? In the light of grossly inhuman social practices, the justice of human rights is a burning issue—but one which has no prospect of resolution. This has to be said in all rigour.

If the positive construction of justice in the relation between communication and human being is definitively impossible, then what is left—if we are not to succumb to post-structuralist quietism—is only second best. In legal communication, we have to accept that the problem of system/environment can only be experienced through the inadequate sensors of irritation, reconstruction, and re-entry. The deep dimension of conflicts between communication on the one hand and human beings

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84 This may explain the high value that is ascribed to the prohibition in law by authors with such different theoretical backgrounds as Rudolf Wietbölter and Pierre Legendre: Wietbölter (2005) 'Justifications of a Law of Society'; Legendre (1994) Le crime du corporal Lortie, 145 ff.
One consequence of the increase in interest in constitutions and constitutional law in recent years is a growing innovative literature in constitutional theory. The aim of Oxford Constitutional Theory is to provide a showcase for the best of these theoretical reflections and a forum for further innovation in the field.

The new series will seek to establish itself as the primary point of reference for scholarly work in the subject by commissioning different types of study. The majority of the works published in the series will be monographs that advance new understandings of the subject. Well-conceived edited collections that bring a variety of perspectives and disciplinary approaches to bear on specific themes in constitutional thought will also be included. Further, in recognition of the fact that there is a great deal of pioneering literature originally written in languages other than English and with regard to non-anglophone constitutional traditions, the series will also seek to publish English translations of leading monographs in constitutional theory.
Preface

...let thy company bind thee hand and foot to the mast’—Ulysses followed Circe’s advice and was able to enjoy the sirenes’ singing without falling for their deadly temptation. Freedom through self-restraint is Ulysses’ constitutional message which has been echoed by political constitutions since they began to constrain the power of the nation state. In this book the message is applied to constitutions beyond the nation state, to the constitutions of transnational regimes which increasingly govern our daily lives. Their expansive tendencies are in urgent need of being constrained by constitutional rules.¹

This book grew out of the lively debates of the ‘constitutionalists’, a discussion group at the Wissenschaftskolleg zu Berlin. Petra Dobner, Dieter Grimm, Martin Loughlin, Fritz Schepel, Alexander Somek, and Rainer Wahl had such powerful objections to the concept of ‘constitutionalism beyond the nation state’ that I thought I needed to write a book to deal with them adequately. I benefited from the institutional support and the intellectual climate of the Exzellenzcluster ‘Normative Ordnungen’ in Frankfurt, the Hague Institute of International Law, and the International University College in Turin. In preparing this book I co-operated closely with Poul Kjaer, whose forthcoming monograph on ‘The Structural Transformation of Democracy: Elements of a Theory of Transnational Constitutionalism’ develops complementary analyses on transnational societal constitutionalism from the political sciences perspective. Anna Beckers and Soo-Hyun Oh supported the whole process from the beginning with substantive assistance and constructive critique. Last but not least, I should mention the discussions of the seminar on private law theory which I held in Frankfurt for several years together with Rudolf Wiethölter. His ideas on Rechtsverfassungsrecht inspired me more than the text can tell.

¹ Homer, Odyssey tr. by Samuel Butler (1900).
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Abbreviations

APEC  Asia Pacific Economic Co-operation
CBD  Convention on Biological Diversity
FAO  Food and Agriculture Organization of the United Nations
ICC  International Chamber of Commerce
ICJ  International Court of Justice
ICSD  International Center for the Settlement of Investment Disputes
ICTY  International Criminal Tribunal for the former Yugoslavia
IGC  Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
ILO  International Labour Organization
IPL  international private law
MERCOSUR  Mercado Común del Cono Sur
NAFTA  North American Free Trade Agreement
UNEP  United Nations Environment Programme
WHO  World Health Organization
WIPO  World Intellectual Property Organization
WTO  World Trade Organization