

## *The New Constitutional Question*

### I. A CRISIS IN MODERN CONSTITUTIONALISM?

During the last few years, a series of public scandals has raised the ‘new constitutional question’.<sup>1</sup> Multinational corporations have violated human rights; the World Trade Organization has made decisions that have endangered the environment or human health in the name of global free trade; there has been doping in sport and corruption in medicine and science; private intermediaries have threatened freedom of conscience on the Internet; there have been massive invasions of privacy through data collection by private organizations; and recently, with particular impact, global capital markets have unleashed catastrophic risks. Each of these scandals poses not just regulatory questions, but also constitutional problems in the strict sense. In the background is the question of the fundamental constitution of social dynamics, not simply of implementing state policies. Compared to the constitutional questions of the 18th and 19th centuries, the problems of today are different, but no less important. Then the concern was to release the energies of political power in nation states and at the same time to limit that power effectively. With the new constitutional question, the concern is to release quite different social energies—particularly visible in the economy, but also in science and technology, medicine and the new media—and to effectively limit their destructive effects.<sup>2</sup> Today, these energies—both productive and destructive—are being unleashed in social spheres beyond the nation state. The above scandals exceed the borders of the nation state in two ways. Constitutionalism beyond the nation state means two different things: constitutional problems arising outside the borders of the nation

<sup>1</sup> For the ‘demonstration effects’ of such scandals sparking public debates and political regulation, Mattli and Woods (2009) ‘In Whose Benefit?’.

<sup>2</sup> Allott (2001) ‘Emerging Universal Legal System’, 16 goes so far as to describe the new constitutional question as ‘the central challenge faced by international philosophers in the 21st century’.

state in transnational political processes, and at the same time outside the institutionalized political sector, in the 'private' sectors of global society.

### 1. *Nation-state constitution versus global constitution*

These scandals have sparked a debate that diagnoses a crisis of modern constitutions, with transnationalization and privatization of the political to blame. Arguments rage about a transnational constitutionalism, whose status—whether constitutional doctrine, sociological theory, political manifesto, or social utopia—remains unclear. Broadly speaking, the terms of the debate are as follows. One side heralds the decline of constitutionalism.<sup>3</sup> Its historically fully-developed form, so the argument goes, was taken in the political constitutions of the nation state. However, its foundations were being eroded, on the one hand by European integration and the emergence of transnational regimes and, on the other, by the transfer of political power to private collective actors. Alternative forms to national constitutions cannot be found in the transnational space. They are even said—because transnational politics suffers from chronic deficits, for example the non-existence of a demos, cultural homogeneity, political founding myths, a public sphere, political parties—to be structurally impossible. If this double crisis of constitutionalism can be counteracted at all, then it will be at most through re-nationalization and re-politicization, that is, constitutional institutions of the nation state (constitutional courts, parliaments, the public sphere) would need to be fully restored.

The opposing side in the debate juxtaposes a similar story of decline with the demand for a compensatory constitutionalization of world society itself.<sup>4</sup> Here too, globalization and privatization are blamed for the weakening of national constitutions. However, a new democratic constitutionalism could have a compensatory effect if it brought the unbridled dynamics of global capitalism under the domesticating power of a global polity. A constitution for international law; a deliberative global public sphere; regulatory policies formulated on a global scale; a transnational system of negotiation between global collective actors; a restriction of

<sup>3</sup> Especially: Grimm (2010) 'The Achievement of Constitutionalism'; Loughlin (2010) 'What Is Constitutionalisation?', 63 ff.; Fried (2000) 'Constitutionalism, Privatization, and Globalization'.

<sup>4</sup> Especially: Habermas (2006) 'Does the Constitutionalisation of International Law Still Have a Chance?'; Höffe (2001) *Königliche Völker*. In international law, Frowein (2000) 'Konstitutionalisierung des Völkerrechts'; de Wet (2006) 'International Constitutional Order'; Peters (2006) 'Compensatory Constitutionalism'.

society's power through global political processes: each of these, it is said, will potentially lead to a new democratic constitutionalism in global society.

## 2. *Impulses from constitutional sociology*

However, the constitution is too important to be left to constitutional lawyers and political philosophers alone. In opposition to the two sides of the debate, a third position must be staked out—and not just a middle position—that casts doubt on the premises of the first two and formulates the new constitutional question in a different way. The main problem is to overcome the obstinate state-and-politics-centricity of these positions. A sociological theory of societal constitutionalism that has so far remained unheard in the constitutional debate will be able to do that. It is based on four different variants of sociological theory. Primarily, it draws on general theories of social differentiation that move the internal constitutions of social subsystems to the centre of attention.<sup>5</sup> It is also based on the newly established constitutional sociology<sup>6</sup> further, on the theory of private government<sup>7</sup> and, finally, on the concept of societal constitutionalism.<sup>8</sup> Constitutional sociology moreover promises to link historical and empirical analyses of the constitutional phenomenon with normative perspectives.<sup>9</sup> 'With its assistance, the law becomes sensitive to the polyphonic articulation of social autonomy, which it not only sets free but also constitutionalizes by generating environmental responsibilities in the autonomies themselves.'<sup>10</sup>

What makes constitutional sociology so different? It projects the constitutional question not only onto the relationship between politics and law, but also onto all areas of society:

The claim that contemporary societies have an informal constitutionality that is neither normatively nor directly centred on states and that contain

<sup>5</sup> General sociological theories of social differentiation in the tradition of Emile Durkheim, Georg Simmel, Max Weber, Talcott Parsons, Pierre Bourdieu, and Niklas Luhmann give a different direction to the question of whether the state constitution can serve as a constitution for society as a whole, or whether social sub-areas have their own particular constitutions.

<sup>6</sup> Thornhill (2011) *A Sociology of Constitutions*; Thornhill (2010) 'Re-Conceiving Rights Revolutions'; Thornhill (2008) 'Towards a Historical Sociology'.

<sup>7</sup> Selznick (1969) *Law, Society and Industrial Justice*.

<sup>8</sup> Sciulli (1992) *Theory of Societal Constitutionalism*.

<sup>9</sup> Thornhill (2008) 'Towards a Historical Sociology', 163 ff.

<sup>10</sup> Wielsch (2009) 'Iustitia Mediatrix', 397.

multi-valent and multi-layered legal structures appears . . . to represent a key position in the legacy of the original sociological project of establishing a complex, non-naturalized and post-ontological conception of society and society's norms.<sup>11</sup>

This fundamentally alters the whole problematic. The question of constitutionalization arises not just for the state world of international politics and international law, but equally for other autonomous sectors of global society: in particular for the global economy, but also for science, technology, education, the new media, and the health service. In addition to limiting the expansionist tendencies of the political system, does a societal constitutionalism have the potential to stem the current—and no less problematic—expansionist tendencies of numerous other social subsystems when they endanger the integrity of individuals and institutions? Can constitutions effectively combat the centrifugal dynamics of subsystems in global society, thus contributing to social integration?<sup>12</sup> Sociological theories can give an impulse to these questions, which now have a new urgency in view of globalization and privatization. They question the basic assumptions of the contemporary debate on transnational constitutions and replace them with other assumptions which identify new problematics and suggest different practical consequences.<sup>13</sup>

<sup>11</sup> Thornhill (2011) 'Constitutional Law from the Perspective of Power', 244.

<sup>12</sup> First steps in the direction of a global societal constitutionalism, Teubner (2003) 'Global Private Regimes'; Teubner (2004) 'Societal Constitutionalism'; Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1014 ff.

<sup>13</sup> Today many authors have (with important differences of detail) registered such phenomena of transnational societal constitutionalism: Collins (2012) 'Flipping Wreck'; Collins (2011) 'The Constitutionalisation of European Private Law as a Path to Social Justice'; Holmes (2011) 'Rhetoric of Legal Fragmentation', 121 ff.; Viellechner (2011) 'Constitution of Transnational Governance Arrangements', 449 ff.; Steinhauer (2011) 'Medienverfassung'; Calliess and Zumbansen (2010) *Rough Consensus and Running Code*; Thornhill (2011) 'Constitutional Law from the Perspective of Power'; Thornhill (2010) 'Niklas Luhmann and the Sociology of Constitutions', 16 ff.; Kjaer (2010) 'Metamorphosis of the Functional Synthesis', 532 f.; Lindahl (2010) 'A-Legality', 33 ff.; Prandini (2010) 'Morphogenesis of Constitutionalism', 316 ff.; Preuss (2010) 'Disconnecting Constitutions from Statehood', 40 ff.; Renner (2011) *Zwingendes transnationales Recht*, 229 ff.; Tuori (2010) 'Many Constitutions of Europe'; Anderson (2009) 'Corporate Constitutionalism'; Backer (2009) *Transnational Corporate Constitutionalism*; Joerges and Rödl (2009) 'Funktionswandel des Kollisionsrechts II', 767, 775 ff.; Kuo (2009) 'Between Fragmentation and Unity', 456 ff.; Wielsch (2009) 'Epistemische Analyse des Rechts', 69 ff.; Buchanan (2008) 'Reconceptualizing Law and Politics'; Schneiderman (2008) *Constitutionalizing Economic Globalization*; Amstutz, et al. (2007) 'Civil Society Constitutionalism'; Brunkhorst (2007) 'Legitimationskrise der Weltgesellschaft', 68 ff.; Bieling (2007) 'Konstitutionalisierung der Weltwirtschaft'; Tully (2007) 'Imperialism of Modern Constitutional Democracy', 328 ff.; Karavas (2006) *Digitale Grundrechte*; Calliess (2006) *Grenzüberschreitende Verbraucherverträge*, 226 ff., 335 ff.; Koselleck (2006) 'Begriffsgeschichtliche Probleme', 369 ff.; Schepel (2005) *Constitution of Private Governance*, esp. 412 ff.; Walter (2001) 'Constitutionalizing (Inter)national Governance'.

What are the questionable premises that set the debate off in the wrong direction? With which assumptions should they be replaced?

## II. FALSE PREMISES

### 1. *Societal constitutionalism as a genuine problem of globalization?*

The uncontrollable dynamic of global capital markets, the obvious power of transnational corporations, and the dominance of epistemic communities with their non-legitimized 'experts' in the largely law-free spaces of globality, lead both advocates and opponents of transnational constitutionalism to the false assumption that the constitutional deficiencies of transnational institutions can for the most part be explained with reference to globalization.<sup>14</sup> The weakness of international politics is said to be responsible for the disarray in global society. Three phenomena are prominent: (1) nation states are de-constitutionalized by the transfer of government functions to the transnational level and, at the same time, the partial assumption of these functions by non-state actors; (2) the extra-territorial effects of nation-state actions create a law without democratic legitimation; (3) there is no democratic mandate for transnational governance.<sup>15</sup>

In truth, what we are concerned with here is not a new compensation problem, but a basic deficiency of modern constitutionalism. Since the time of its nation-state beginnings, constitutionalism has been faced with the unresolved question of whether and how the constitution should also govern non-state areas of society. Are the economic, scientific, educational, medical, and other social activities to be subjected to the normative parameters of the state constitution? Or should social institutions develop their own constitutions autonomously? Since its very beginning, modern constitutional praxis has oscillated between these two poles. At the same time, the question arose in empirical analyses and in normative programmes: are social sub-constitutions intended to allow state regulation of social sub-areas, or to protect their autonomy? Or to assimilate social decision-making processes with those of politics? Or to render social institutions politically independent?

It is at this point that the above-mentioned sociological theories intervene, placing the origin of the constitutional question in processes of societal differentiation. The problematic of societal constitutionalism

<sup>14</sup> Representative views in the volume edited by Dunoff and Trachtman (2008) *Ruling the World?*

<sup>15</sup> Peters (2006) 'Compensatory Constitutionalism', 591.

was not caused by globalization, but earlier by the fragmentations of the social whole and the autonomization of the fragments during the heyday of the nation state. This has now been considerably aggravated by globalization. Analysing various concepts of societal constitutionalism can help to explain why it is that, in the nation state, institutional solutions to the problematic remained in a singular condition of latency.<sup>16</sup> In light of the enormous draw of the state constitution, social sub-constitutions always appeared in a strange twilight, although for very different reasons. Liberal constitutions could conceal the question in the shadow of constitutionally-protected individual freedoms. In sharp contrast, the totalitarian political systems of the 20th century attempted to eliminate the autonomy of social sub-areas completely, thus concealing the question of independent societal constitutions by subjecting all areas of society to the state's authority. The welfare states of the late 20th century, in turn, never officially recognized autonomous sub-constitutions due to their political claim to rule. At the same time, however, they achieved a peculiar balance between a state constitutionalism, which progressively extended its principles to social spheres, and a constitutional pluralism, in which the state in fact respected a certain autonomy of social sub-constitutions.

Globalization did not, then, create the problem of societal constitutionalism. But, by destroying its latency, it dramatically changed it. In light of the much weaker draw of transnational politics compared to the nation state, the acute constitutional problems of other sectors of global society now appear in a much harsher light. On what legitimating basis do transnational regimes regulate whole areas of social activity, right down to the details of daily life? What are the limits of global capital markets in their expansion into the real economy and other areas of society? Can fundamental rights claim validity in the state-free areas of global society, particularly in relation to transnational organizations? Contrary to the terms of the current debate, it is not the case that the emergence of global society has brought with it a wholly new constitutional problematic. In fact, the societal constitutionalism that has actually long existed in nation states today faces the question of whether and how it must transform itself under the conditions of globality. The continuity of the problematic stems from the functional differentiation of society that has expanded through transnationalization into the whole world. Its discontinuity can

<sup>16</sup> This is the subject of chapter 2.

on the other hand be attributed to the fact that global society has developed its own structures and has accelerated growth tendencies that are unknown to the nation state.

The normative question, then, is no longer how hitherto constitution-free social spheres of global society might be constitutionalized. The question is rather, how can nation states' experiences with societal constitutionalism be transformed under the different conditions of globality? In particular, how is the role of politics for transnational sub-constitutions then to be formulated in the magical triangle of politics, law, and autonomous social spheres? Resignation? Guidance? Supervision? Complementarity? Replacement of *la politique* by *le politique*?<sup>17</sup>

## 2. Constitutional emptiness of the transnational?

The current debate is marked by false *tabula-rasa* assumptions regarding the non-existence of constitutional norms in social sub-areas, not only within the nation state, but also in the transnational sphere. While modern constitutionalism was able to take root in nearly all nation states, it was weakened, so it is said, by the increasing transfer of state responsibilities from the nation state to new transnational organizations, regimes, and networks. At this transnational level, however, a constitutional emptiness is believed to prevail. And it is only against the background of this supposedly constitution-free area of globality that the argument arises as to whether constitutionalism is at an end or is in fact experiencing a renaissance.

It can be empirically confirmed that the constitutional emptiness of the transnational is a false assumption. Social scientific analyses of a 'new constitutionalism', together with long-standing investigations by economists and commercial lawyers of emerging institutions of a global economic constitution, not to mention international law studies on the growing significance of transnational constitutional norms, suggest exactly the opposite. Constitutional institutions have already established themselves in the transnational sphere with an amazing density.<sup>18</sup> Despite the failure of the constitutional referendum, it is now only rarely denied that the European Union

<sup>17</sup> Discussed in particular at the end of chapter 4.

<sup>18</sup> On actually existing global constitutionalism from the viewpoint of international law see eg Klabbers (2009) 'Setting the Scene', 3; on the 'New Constitutionalism' see Schneiderman (2008) *Constitutionalizing Economic Globalization*, 328 ff. For the ordoliberal view of the global economic constitution: Behrens (2000) 'Weltwirtschaftsverfassung'.

has its own independent constitutional structures.<sup>19</sup> But it is also the case that other international organizations, transnational regimes, and their networks are in the meantime not only significantly juridified, but also undergoing a process of constitutionalization. They have become parts of a global (if thoroughly fragmented) constitutional order, albeit one that has not reached the density of national constitutions. The global institutions that emerged from the treaty systems of the 1940s—the Havana Charter, GATT, Bretton Woods; the new arrangements of the Washington consensus—the IMF, World Bank, WTO; and the recently initiated public debate concerning a ‘global finance market constitution’; these all speak the language of a real existing global societal constitution that is undergoing a process of change.

The new constitutional question must be reformulated, then, for a second time. As discussed in more detail in the next chapter, not only have social sub-areas in nation states already developed independent constitutions, but it is also the case that genuine constitutional structures have long existed in the transnational sphere. In this respect too, then, it is not the creation *ab ovo* of new constitutions in a constitution-free globality that is at stake, but rather the transformation of an already existing transnational constitutional system. The new constitutional reality is only concealed by the fact that an equivalent of the constitutional subject of the nation state is not so easily recognizable at the transnational level. A world state as a new constitutional subject is a utopia—and a bad one at that. Immanuel Kant knew as much. But what then are the new constitutional subjects under the conditions imposed by globality?<sup>20</sup> The system of international politics? International law? International organizations? Transnational regimes? Global networks? New assemblages, configurations, or ensembles? The constitutionally relevant question is whether such configurations are at all capable of bearing constitutions. The answer depends on whether such non-state institutions exhibit sustainable analogies to the nation-state *pouvoir constituant*; to the self-constitution of a collective; to democratic decision-making; and to the organizational part of a political constitution in the strict sense.

### 3. Reducing transnational governance to political processes?

In addition to these two prevalent misconceptions—that nation states did not acknowledge partial constitutions in civil society, and that

<sup>19</sup> On this debate, see Walker (2008) ‘Post-Constituent Constitutionalism’; Weiler and Wind (2003) *European Constitutionalism Beyond the State*.

<sup>20</sup> This is the question raised in chapter 3.

transnational spheres are constitution-free—there is a further misconception, whereby the current debate underestimates the radicality of a societal constitutionalization. The need for a constitution is only attributed to the emergence of political ‘governance’ that is different from ‘government’, that is, from traditional nation-state governmental practices. ‘Governance’ is regarded as the result of social-political-administrative interventions through which public and private actors solve social problems.<sup>21</sup> The networking of specialized bureaucracies from various nation states with private actors from the transnational corporations, trade associations, NGOs, and hybrid regimes are now identified as the new problematic of global governance; a problematic that must now be surmounted by constitutional institutions.<sup>22</sup> Prominence is given to the constitutional limitation of political power, whose particular feature is that it is partially ‘socialized’.

Doubtless this socialization of political power is one of the central elements of global governance. Nonetheless, the analysis does not go far enough. It simply trivializes the problem to suggest that the power constellations of global governance, comprising new, private actors, need to be limited with constitutional norms. Here again the blinkered nature of politico-legal constitutional theories becomes apparent, focused even in respect of transnational relationships only on political phenomena in the narrow sense. In contrast, a sociological view shows that the constitutionalization of particular global social spheres of activity—that is, outside of international politics—is the actual problem.<sup>23</sup> The problems associated with societal constitutionalism in global society only become visible when we transcend political processes in the narrow sense, making clear that private actors not only participate in the political power processes of global governance, but also establish their own regimes outside of institutionalized politics.

The differences between social sub-constitutions and a political constitution come, then, to the fore. Sociological analysis of the global subsystems—the economy, science, culture, and mass media—raises difficult questions.

<sup>21</sup> Kooiman (2000) ‘Societal Governance’, 139 f.

<sup>22</sup> For a well thought-out concept of governance, Grande, et al. (2006) ‘Politische Transnationalisierung’; Neyer (2004) *Postnationale politische Herrschaft*.

<sup>23</sup> This is made clear in Rosenau’s typologies of global governance. His first typology initially reduces the social actors—multinational corporations, NGOs, markets, informal elite groups, partial public spheres—to their participation in political governance: Rosenau (2000) ‘Change, Complexity, and Governance’. His second typology then gives prominence to particular social orders, Rosenau (2004) ‘Strong Demand, Huge Supply’, 31, 41.

Are today's global subsystems developing a dynamic of uncontrolled growth that must be subjected to constitutional restrictions? Do analogies exist in these sectors to the self-limitation of such expansive dynamics, in particular as regards the political separation of powers? To what extent must we generalize the principles of political constitutions in order to avoid the pitfalls of 'methodological nationalism'? How must we respecify those principles for the particularities of a social institution in the global sphere?<sup>24</sup> Such a method of generalizing and respecifying will investigate whether, in transnational sub-areas, an equivalent can be identified to national constitutions as regards functions, arenas, processes, and structures.<sup>25</sup>

Transnational sub-constitutions do not strive towards a stable balance, but rather follow the chaotic pattern of a 'dynamic disequilibrium' between contradictory developments—between the autonomization and the limitation of the function logic of subsystems.<sup>26</sup> To date, the new global constitutional orders have for the most part established only *constitutive rules*, which have normatively supported the freeing up of various rationalities at the global level. Today, however, it has become clear that there is a need for reorientation. After long historical experience with the expansionist tendencies of globalized subsystems and, following the shocks of endogenous crises, counter-movements are now appearing, which—after violent social conflicts—formulate *limitative rules* in order to counteract self-destructive tendencies and to limit damage to their social, human, and natural environments. It is true that political arguments have always thematized the 'vertical' constitutional problem: what are the limits to be imposed on the new global regimes in their relation to nation states? But the more serious 'horizontal' constitutional problem was not even considered: 'whether the autonomy of the function systems might not lead to mutual burdens to the limits of their structural adaptability with their very differentiation'.<sup>27</sup>

The negative externalities of expanding systems, as well as their self-destructive potentials became apparent in the recent crisis of the capital

<sup>24</sup> On generalization and respecification (as opposed to analogy, which either uses vague relations of similarity or generalizes only and fails to respecify), see Parsons and Ackerman (1966) 'Concept of "Social System"'. Respecifying political fundamental rights for economic organizations: Schierbeck (2000) 'Operational Measures', 168.

<sup>25</sup> This is the subject of chapter 4.

<sup>26</sup> The historical 'double movement' between the expansion of markets and their subsequent limitation is analysed by Polanyi (1995 [1944]) *Great Transformation*, 106 ff., 182 ff. The argument appears in generalized form—not just for the economy, but for many social spheres—as release of autonomies and legal prohibitions that follow negative experiences in Wiethölter (2005) 'Just-ifications of a Law of Society', 76.

<sup>27</sup> Luhmann (1997) *Gesellschaft der Gesellschaft*, 1087. In detail, regarding the mutual burdens of transnational regimes and political-legal reactions: Fischer-Lescano and Teubner (2004) 'Regime-Collisions', 1005 ff.

markets. The previously existing global capital market constitution was not simply the result of a blind evolutionary process during which markets automatically globalized themselves. It happened rather with the active participation of politics and the law. The dismantling of national barriers and an explicit policy of deregulation led to a politically desired and legally stabilized global financial market constitution that set free uncontrolled dynamics. But limitative rules which would replace national regulations were not on the political agenda; indeed, for many years they were resisted as counterproductive. Only with the near-catastrophe we have experienced, does it appear that collective learning processes will in future seek constitutional limitations. Wolfgang Streeck considers this as a hopeless task, since national or international rules are repeatedly and successfully circumvented. Given the efforts put into such evasion, he asserts that *ex ante* regulation is impossible.<sup>28</sup> But such obsessive pessimism is not much better than its counterpart, obsessive optimism. We should rather try to get to grips with the evolutionary dynamics of near-catastrophes in these cases. Political-legal regulation is in fact evolving according to the dictum: '*fatta la legge, trovato l'inganno*', but it could equally well be said: '*fatto l'inganno, trovata la legge*'. New rules produce new circumventions, but also new circumventions produce new rules. An evolutionary learning process works in both directions, but will only have a *post factum* effect. And, rather than any model of a rational learning process, the mutual adjustments seem to follow the pattern, well-known from the drug scene, of 'hitting the bottom'.<sup>29</sup>

Thus the agenda of a transnational constitutionalism also changes in this context: it is not the *creation*, but rather the fundamental *transformation* of a pre-existing constitutional order. A particularly urgent task is to limit the negative externalities of the social dynamics unleashed. And it is here that the global financial constitution and the constitution of *trans*-national corporations in particular come under the constitutional microscope.

#### 4. Reducing the third-party effects of fundamental rights to the states' duties of care?

The debate about fundamental rights within transnational 'private' spaces suffers from similar deficiencies. It addresses socialization tendencies but at the same time remains fixated on the state. The scandals involving breaches of human rights by transnational

<sup>28</sup> Streeck (2009) *Re-Forming Capitalism*, 236 ff.

<sup>29</sup> Discussed in detail in chapter 4, under I.3.

corporations, outlined above, are usually discussed as a problem of the 'horizontal' or 'third-party-effect' of fundamental rights. Fundamental rights, originally guaranteed exclusively against the states, are now supposed to become effective against 'third parties'—private transnational actors. However, the resulting duties of care are imposed not on the private actors themselves but on the international community of states.<sup>30</sup>

This approach misinterprets the horizontal effect of fundamental rights in several respects. In its fixation on the state, it rather puts the cart before the horse. Instead of imposing duties on those transnational private actors who breach fundamental rights, it obliges the community of states alone to protect against these breaches. The contentious issue of whether private actors are themselves bound by fundamental rights is thus consciously obscured. And all this is done as if it were a question of the states' power of definition as to whether fundamental rights exist in social spheres. Finally, one cannot regard the horizontal effect of fundamental rights as purely a problem of power. This would miss its real task: to limit expansionist tendencies of social subsystems that do not function through the medium of power.

If the task is to use constitutional means to limit the expansionist tendencies of social subsystems, it is no longer possible to sustain either the state-centricity of fundamental rights, nor their attribution to individual actors, nor their exclusive focus on social power phenomena, nor their definition as spheres of autonomy protected by subjective rights. Can fundamental rights be made effective against social communicative media themselves, rather than against social actors? Is the concern to protect not only individuals, but also social institutions against expansive social media? Must the horizontal effect of fundamental rights be implemented through organization and procedures, rather than through subjective rights?<sup>31</sup>

But nor can the third-party effect simply be limited to the 'negative' function of fundamental rights, that is, to the protection of individual autonomy. It must also take into account their 'positive' function: their role of active civic empowerment. In state constitutions, this is reflected in the

<sup>30</sup> For example the UN Human Rights Committee, General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, paras. 6–8; Clapham (2006) *Human Rights Obligations of Non-State Actors*, 241 ff.; McCorquodale and Simons (2006) 'State Responsibility for Extraterritorial Violations'; Anderson (2005) *Constitutional Rights*, 126 ff.

<sup>31</sup> Chapter 5 attempts to answer these questions.

political rights to participate in public affairs, but it is virtually unknown in the debate on horizontal effects. The challenge is to delineate active civic rights not only in the power medium of politics, but also in the communicative media of other social systems.<sup>32</sup>

##### 5. *A unitary, cosmopolitan global constitution?*

A final problem concerns the unitary bias of the very term constitution, which also impacts on world society in its use. International lawyers as well as political philosophers advance arguments for a unitary constitution of the entire world community.<sup>33</sup> While they reject the idea of a world state as unrealistic, they nevertheless present the ‘international community’ as the substrate for an emerging global constitution; no longer, as in traditional international law, merely a community of sovereign states, but now as an ensemble of political and societal actors and a legal community of individuals.<sup>34</sup> International constitutional law is conceived as far as possible in parallel with nation-state constitutional law: constitutional norms at the top of a legal hierarchy, with the whole globe as a unitary jurisdiction, encompassing all national, cultural, and social spheres.<sup>35</sup>

The very marked fragmentation of world society, emphasized by sociological analyses, causes acute difficulties for such a cosmopolitan constitutionalism. Fragmentation is regarded, if at all, as a shortcoming to be eliminated, not as a challenge requiring the redefinition of the constitutional problems facing world society. The alternative view is this: if constitutionalism can be applied only to the fragments of global society, then the unitary global constitution must be abandoned and attention concentrated instead on the fundamental conflicts between these fragments. In this case an all-embracing constitutional law will be able to function—if at all—not as a unitary law, but simply as a global ‘constitutional conflict of laws’.<sup>36</sup>

<sup>32</sup> This is discussed in chapter 5, under III.

<sup>33</sup> Fassbender (2007) ‘We the Peoples of the United Nations’, 281 ff.; Höffe (2005) ‘Vision Weltrepublik’.

<sup>34</sup> Different variants of a cosmopolitan constitution are analysed by Rasilla del Moral (2011) ‘At King Agramant’s Camp’.

<sup>35</sup> For a critique of these ‘constitutional illusions’, Fischer-Lescano (2005) *Globalverfassung*, 247 ff.

<sup>36</sup> First steps in this direction: Fischer-Lescano and Teubner (2004) ‘Regime-Collisions’, 1017 ff.

Moreover, a transnational constitutionalism will have to conform to the *double fragmentation* of world society.<sup>37</sup> As a result of the first fragmentation, the autonomous global social sectors insist stubbornly on their own constitutions, in competition with the constitutions of nation states. Moreover, unitary standards of a global constitution are rendered utterly illusory by the second fragmentation of the world into various regional cultures, each based upon social principles of organization that differ from those of the western world. If one wishes to conceive at all of a 'global constitution', the only possible blueprint is that of particular constitutions for each of these global fragments—nations, transnational regimes, regional cultures—connected to each other in a constitutional conflict of laws.<sup>38</sup>

<http://www.pbookshop.com>

<sup>37</sup> On transnational law reacting to the double fragmentation of world society: Teubner and Korth (2011) 'Two Kinds of Legal Pluralism', 27 ff.

<sup>38</sup> This is the theme of chapter 6.