

Fragmented Foundations

Societal Constitutionalism beyond the Nation State

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I. THE NEW CONSTITUTIONAL QUESTION

Horizontal effects of constitutional rights

The question of the 'horizontal' effects of fundamental rights, ie the question whether they impose obligations not only on public bodies but also directly on 'private governments', acquires much more dramatic dimensions in the transnational sphere than it ever possessed in the nation-state context. The issue becomes particularly controversial where infringements of human rights by transnational corporations are alleged. I shall single out a few glaring cases: environmental pollution and inhuman treatment of local population groups, eg by Shell in Nigeria; the chemical catastrophe in Bhopal; disgraceful working conditions in 'sweatshops' in Asia and Latin America; the policy of excessive pricing of pharmaceuticals in the South African Aids drama; child labour attributed to IKEA and Nike; allegations against Adidas of having footballs produced by forced labour in China; the use of highly poisonous pesticides in banana plantations; 'disappearances' of unionised workers; environmental damage caused by big construction projects. The list could easily be extended. The scandalous events fill volumes.

What converts the legal question—the horizontal effects of fundamental rights—into a burning political issue is the ongoing privatisation of government. Legal doctrines of horizontal effects usually dodge the tricky question of whether private actors are directly bound by fundamental rights provisions. A host of doctrines, according to which fundamental rights only have 'indirect' effects in the private sphere, have been devised.¹ Simplifying grossly, there are two main constructions, albeit with numerous variants. Under the state action doctrine, private actors are in principle excluded from the binding effect of fundamental rights unless

¹ For a comparative view, see D. Friedman and D. Barak-Erez (eds), *Human Rights in Private Law* (Oxford: Hart, 2001); G. W. Anderson, 'Social Democracy and the Limits of Rights Constitutionalism' (2004) 17 *The Canadian Journal of Law & Jurisprudence* 31–59; P. Alston (ed), *Non-state Actors and Human Rights* (Oxford: Oxford University Press, 2005); A. Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006).

some element of state action can be identified in their behaviour. This might be the case either because state bodies are to some degree involved or because the private actor fulfils more or less broadly understood 'public' functions. Alternatively, under the doctrine of the structural effect of fundamental rights, those rights are to be respected across the whole legal system, including private law provisions enacted by the state. However, the limitation of the effect of fundamental rights to the legal system implies that private actors themselves are not subject to any fundamental rights obligations.

Globalisation makes this puzzle even more difficult to solve. In the transnational sphere, the question whether private actors are bound by fundamental rights is much more acute than in the context of the nation state. Here, the otherwise omnipresent state and its national law are almost absent so that the state action doctrine and the theory of the structural effect of fundamental rights can be applied in only very few situations. At the same time, transnational private actors, especially transnational corporations, intensively regulate whole areas of life through their own private governance regimes. Thus, the question whether they are directly bound by fundamental rights can no longer be evaded.

Societal constitutionalism

The more general legal theoretical question of the problem sketched out above is: how is constitutional theory to respond to the challenges arising from these two major trends of privatisation and globalisation? This is what today's 'constitutional question' ought to be. Today's constitutionalism moves beyond the nation state. It does so in a double sense: constitutionalism moves into the transnational context and into the private sector.² While the old constitutions of the nation states were simultaneously liberating the dynamics of democratic politics and disciplining repressive political power by law, the point today is to liberate and to discipline quite different social dynamics—and to do this on a global scale. Is constitutional theory able to generalise the ideas it developed for the nation state and to re-specify them for today's problems? In other words, can we make the tradition of nation-state constitutionalism fruitful and redesign it in order to cope with the phenomena of privatisation and globalisation?³

Contemporary constitutional theory is still state centred. This is a real *obstacle épistémologique*. It makes constitutional theory badly equipped to deal with private government on a transnational scale. The alternative to be developed is constitutionalism without the state. For constitutional theorists, this amounts to breaking a

² For the sociological theory of societal constitutionalism, see P. Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage, 1969); D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992); Prandini in this volume.

³ For a more detailed account, see G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional theory?', in C. Joerges, I.-J. Sand, and G. Teubner (eds), *Constitutionalism and Transnational Governance* (Oxford: Hart, 2004), 3–28.

taboo.⁴ For them, a constitution without a state is at best a utopia—a poor one, to be sure. But this formula is not an abstract normative demand for remote, uncertain futures. Instead, it is an assertion of a real trend that can be observed on a worldwide scale.

My thesis, in short, is that we are witnessing the emergence of a multiplicity of civil constitutions beyond the nation state. But the constitution of world society is not to be conceived exclusively within the representative institutions of international politics, and neither can it take place in a unitary global constitution overlying all areas of society. It is emerging incrementally in the constitutionalisation of a multiplicity of autonomous subsystems of world society.⁵

II. FRAGMENTED GLOBALISATION

This emerging societal constitutionalism can be grasped only if one appreciates the polycentric form of globalisation. And one is able to arrive at such an understanding only if one gives up five widespread assumptions of social and legal theory in order to replace them with somewhat unusual ideas.⁶ These five assumptions are considered in turn.

Rationality conflicts in a polycentric global society

A first assumption that must be given up is that globalisation of law is primarily a result of the internationalisation of the economy. The alternative to such an economy-led form of globalisation is 'polycentric globalisation'.⁷ The primary

⁴ D. Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447–63.

⁵ Authors who come close to this position are H. Brunkhorst, R. Prandini, U. K. Preuss, and N. Walker (in this volume); N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317–59; C. Walter, 'Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law' (2001) 44 *German Yearbook of International Law* 170–201, at 188 et seq; G. P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, Sonderforschungsbereich 597 (Bremen: Staatlichkeit im Wandel, 2007); K.-H. Ladeur and L. Viellechner, 'Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globales Privatrechtsregimes' (2008) 46 *Archiv des Völkerrechts* 42–73; H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005); M. Amstutz, A. Abegg, and V. Karavas, *Soziales Vertragsrecht: Eine rechtsevolutorische Studie* (Basel: Helbing & Lichtenhahn, 2006).

⁶ For a more elaborate discussion, see A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1045.

⁷ D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995), 62. See also J. W. Meyer et al, 'World Society and the Nation-State' (1997) 103 *American Journal of Sociology* 144–81; A. Schütz, 'The Twilight of the Global Polis: On Losing Paradigms, Environing Systems, and Observing World Society',

driver of this development is the functional differentiation of society. Each of several autonomous functional subsystems of society escapes its territorial confines and constitutes itself globally. This process is not confined to economic markets alone; it also encompasses science, culture, technology, health, the military, transport, tourism and sport, as well as, albeit in a somewhat retarded manner, politics, law, and welfare. Today, each of these subsystems operates autonomously at the global level.

What is of particular interest now is what might be called the external relations of these global villages. These relations are anything but harmonious. If anywhere, it is here that the notion of a 'clash of cultures' is appropriate. Through their own operative closure, global functional systems create a sphere for themselves in which they are free to intensify their own rationality without regard to other social systems or to their natural or human environment. In his pioneering analysis Karl Marx has shown the destructive potential of a globalised economic rationality. Max Weber went beyond that and deployed the concept of 'modern polytheism'. He identified the destructive potential within other areas of life and analysed the threatening rationality conflicts which arise. In the meantime, the human and ecological risks posed by highly specialised global systems, such as science and technology, have become apparent to a broader public.⁸ Where countries of the southern hemisphere are considered, it is clear that real dangers are posed by the conflicts between economic, political, scientific, and technological rationality spheres that instigate the 'clash of rationalities'. According to Niklas Luhmann's central thesis, the underlying cause for these risks is to be found in the rationality maximisation engaged in by different global functional systems, which cloaks an enormous potential for the endangering of people, nature, and society.⁹

In this light, the alleged violations of human rights by transnational enterprises are not only conflicts between individual rights—between the property rights of the firms and the human rights of the people. Rather, they represent collisions of institutionalised rationalities. They are embodied in the different policies of transnational organisations. Such problems are caused by the fragmented and operationally closed functional systems of a global society, which, in their expansionist fervour, create the most pressing problems of global society.

in G. Teubner (ed), *Global Law without A State* (Aldershot: Dartmouth Gower, 1997), 257–93; B. de S. Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Evanston, Ill.: Northwestern University Press, 2003); K. Günther and S. Randeria, *Recht, Kultur und Gesellschaft im Prozeß der Globalisierung* (Bad Homburg: Reimers, 2001), at 28 et seq; N. Luhmann, 'Der Staat des politischen Systems: Geschichte und Stellung in der Weltgesellschaft', in U. Beck (ed), *Perspektiven der Weltgesellschaft* (Frankfurt: Suhrkamp, 1998), 345.

⁸ See especially U. Beck, *Risk Society* (London: Sage, 1992).

⁹ N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1997), at 1088 et seq.

Transnational regulatory regimes

Secondly, we must give up the idea that legal systems only exist at the level of the nation state. Law has now established itself globally as a unitary functional system of the world society. Despite its unity at the global level, law must reckon with a multitude of internal contradictions. Thus, legal unity within global law is redirected away from normative consistency towards operative 'inter-legality'.¹⁰

A new internal differentiation of law has taken place. This new differentiation within law is the result of the drastic impact of social differentiation upon law. For centuries, law had followed the political logic of nation states and was manifest in the multitude of national legal orders. Each of them had its own territorial jurisdiction. In the last fifty years, however, in a rapidly accelerating expansion, transnational regulatory regimes, most prominent among them the World Trade Organization, established themselves as autonomous legal orders at the global level. In contrast to common assumptions, the emergence of global legal regimes does not entail the integration or convergence of legal orders. Rather, societal fragmentation impacts upon law in a manner such that political regulation of differentiated societal spheres requires the parcelling out of issue-specific policy arenas which juridify themselves.

Consequently, the traditional differentiation, in line with the political principle of territoriality, into relatively autonomous national legal orders is overlain by a principle of sectoral differentiation: the differentiation of global law into transnational legal regimes, which defines the external reach of their jurisdiction along issue-specific rather than territorial boundaries.

Transnational 'private' regimes

But this is still not sufficient to furnish us with a comprehensive understanding of legal globalisation. No light has yet been shed upon the equally rapid quantitative growth of non-statal 'private' legal regimes. Only these regimes give birth to 'global law without the State', which is primarily responsible for the multidimensionality of global legal pluralism.¹¹ A full understanding of this multidimensional legal pluralism can be obtained only if one gives up the third assumption in social and legal theory: that law derives its validity exclusively from processes of law-making initiated by the state, that law, to qualify as such, must either be derived from its well-known internal sources or from officially sanctioned international sources. Thus, we must extend our concept of law to encompass norms operating beyond the legal sources of the nation state and international law.

'Transnational communities', or autonomous fragments of society, such as the globalised economy, science, technology, the mass media, medicine, education, and transport, are developing a strong 'norm hunger', an enormous demand for regulatory

¹⁰ B. de S. Santos, 'State Transformation, Legal Pluralism and Community Justice: An Introduction' (1992) 1 *Social and Legal Studies* 131–42; M. Amstutz, 'Vertragskollisionen: Fragmente für eine Lehre von der Vertragsverbindung', in M. Amstutz (ed), *Festschrift für Heinz Rey* (Zürich: Schulthess, 2003), 161–76.

¹¹ On the discussion of legal pluralism, see P. S. Berman, 'The Globalization of Jurisdiction' (2002) 151 *University of Pennsylvania Law Review* 311–545, at 325 et seq.

norms, which cannot be satisfied by national or international institutions. Instead, they satisfy their demand through a direct recourse to law. Increasingly, global private regimes are creating their own substantive law. They make use of their own sources of law, which lie outside the spheres of national law-making and international treaties.¹²

Today, the most prominent private legal regimes are the *lex mercatoria* of the international economy and the *lex digitalis* of the Internet.¹³ To these, however, we must add numerous private or private–public instances of regulation and conflict resolution which create autonomous law with a claim to global validity.¹⁴ These postnational formations are organised around principles of finance, recruitment, coordination, communication, and reproduction that are fundamentally postnational and not just multinational or international. Among them are multinational enterprises building their own internal legal order but also transnational regimes which regulate social issues worldwide. These private regimes clash frequently with the legal rules of nation states and other transnational regimes.

Constitutionalism in transnational regimes

The fragmentation of global society and its impact on law have ramifications for constitutional theory. At the global level, the locus of constitutionalisation is shifting away from the system of international relations to different social sectors, which are establishing civil constitutions of their own. According to the concept of constitutional pluralism, it is appropriate to speak of the ‘constitution’ of collective bodies outside the confines of the nation state when the following conditions, specified by Neil Walker, have been met:

- (i) the development of an explicit constitutional discourse and constitutional self-consciousness;
- (ii) a claim to foundational legal authority, or sovereignty, where sovereignty is not viewed as absolute;
- (iii) the delineation of a sphere of competences;
- (iv) the existence of an organ internal to the polity with interpretative autonomy as regards the meaning and the scope of the competences;
- (v) the existence of an institutional structure to govern the polity;
- (vi) rights and obligations of citizenship, understood in a broad sense;
- (vii) specification of the terms of representation of the citizens in the polity.¹⁵

¹² G. Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’, in G. Teubner (ed), *Global Law without a State* (Aldershot: Dartmouth, 1997), 3–28.

¹³ For the *lex mercatoria*, see A. Stone Sweet, ‘The New Lex Mercatoria and Transnational Governance’ (2006) 13 *Journal of European Public Policy* 627–46. On the *lex digitalis*, H. H. Perritt, ‘Dispute Resolution in Cyberspace: Demand for New Forms of ADR’ (2000) 15 *Ohio State Journal on Dispute Resolution* 675–703, at 691 et seq.

¹⁴ Berman, above n 11, at 369 et seq.

¹⁵ N. Walker, ‘The EU and the WTO: Constitutionalism in a New Key’, in G. de Burca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart, 2001), 31–57, at 33.

‘Polity’ in this context should not be understood in the narrow sense of institutionalised politics. The term also refers to non-political institutions of civil society, of the economy, of science, education, health, art, or sports—of all those social sites where constitutionalising takes place.¹⁶ Thus, self-contained regimes fortify themselves as auto-constitutional regimes. The defining feature of self-contained regimes is not simply that they create highly specialised primary rules, ie substantive rules in special fields of law, but that they also produce their own procedural norms on law-making, law recognition, and legal sanctions: so-called secondary rules.¹⁷ However, such reflexive norm building does not yet amount to constitutional norm building in the strict sense. Secondary rules become constitutional rules only when they develop closer parallels to the norms of political constitutions. Political constitutions do not simply contain higher legal norms. Instead, they establish a structural coupling between the reflexive mechanisms of law and those of politics.¹⁸ Accordingly, the defining feature of auto-constitutional regimes is the existence of a linkage between legal reflexive processes and reflexive processes of other social spheres. Reflexive in this context means the application of specific processes to themselves, the norming of norms, the application of political principles to the political process itself, epistemology as the theorising of theories, etc.

Auto-constitutional regimes are defined by their duplication of reflexivity. Secondary rule making in law is combined with defining fundamental rationality principles in an autonomous social sphere. Societal constitutions establish a structural coupling between secondary rule making in law and reflexive mechanisms in the other social sector. A non-statal, non-political, civil society-led constitutionalisation thus occurs to the degree that reflexive social processes, which determine social rationalities through their self-application, are juridified in such a way that they are linked with reflexive legal processes. Understood in this way, it makes sense to speak of the existence of constitutional elements—in the strict sense of the term—within economic regimes, within the academic system, and within digital regimes of the Internet. Here, in such diverse contexts, we find typical elements of a constitution: provisions on the establishment and exercise of decision making (organisational and procedural rules) on the one hand and definitions of individual freedoms and societal autonomies (fundamental rights) on the other.¹⁹

¹⁶ This is accentuated by Sciulli, above n 2; H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, Mass.: MIT Press, 2005).

¹⁷ B. Simma, ‘Self-Contained Regimes’ (1985) 16 *Netherlands Yearbook of International Law* 111–36; M. Koskeniemi, *Outline of the Chairman of the ILC Study Group on Fragmentation of International Law: The Function and Scope of the Lex Specialis Rule and the Question of ‘Self-contained Regimes’* (2003), <http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf>.

¹⁸ N. Luhmann, ‘Verfassung als evolutionäre Errungenschaft’ (1990) 9 *Rechtshistorisches Journal* 176–220.

¹⁹ A. Fischer-Lescano, ‘Globalverfassung: Verfassung der Weltgesellschaft’ (2002) 88 *Archiv für Rechts- und Sozialphilosophie* 349–78.

Importantly, societal constitution making intensifies conflicts between legal regimes, even conflicts between their fundamental rights concepts, since it fortifies the independence of the legal regime from other distinct legal regimes through reflexive mechanisms.

Collisions of regime constitutions

What does this mean for the idea of a unified world constitution? The ultimate assumption to give up is the hope for a unified global constitution, harboured, inter alia, by political philosophers like Jürgen Habermas: *Lasciate ogni speranza*. Any aspiration to the constitutional unity of global law is surely a chimera. The reason is that global society is a 'society without an apex or a centre'.²⁰ Following the decentering of politics, there is no authority in sight that is in a position to undertake the constitutionalisation of societal fragments.

After the collapse of legal hierarchies, the only realistic option is to develop heterarchical forms of law whose sole function is to create loose relations between the constitutional fragments. Collisions between the diverse regime constitutions might be coped with by a selective process of networking that normatively strengthens already existing factual networks between the regime constitutions: the linkage of regime constitutions with autonomous social sectors and, more importantly in this context, the linkage of regime constitutions with one another. Recent developments of network theory may hence become relevant for international constitutional law. This theory has identified the paradoxical logic of action in networks, the *unitas multiplex* of heterarchical configurations. As 'highly improbable contexts of reproduction of heterogeneous elements',²¹ networks are counter-institutions of autonomous systems. Combining different logics of actions, they mediate between autonomous function systems, formal organisations, and, particularly relevant for our purposes, between autonomous regimes. Three guiding principles for the decentralised networking of legal regimes may be identified in the abstract:

- (i) Simple normative compatibility instead of hierarchical unity of law.
- (ii) Constitution making in transnational regimes and nation states through mutual irritation, observation, and reflexivity of these autonomous legal orders.
- (iii) Decentralised modes of coping with conflicts of regime constitutions as a legal method.²²

²⁰ N. Luhmann, *Political Theory in the Welfare State* (Berlin: De Gruyter, 1990).

²¹ D. Baecker, *Organisation und Gesellschaft* (Witten-Herdecke: Universität, 2002), at 14.

²² For the European context, see C. Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3 *European Law Journal* 378–406.

III. CONSTITUTIONAL RIGHTS IN TRANSNATIONAL PRIVATE REGIMES

Fundamental rights as limitations of the politics of the nation state

What are the consequences of societal constitutionalism for fundamental rights?²³ Apart from procedural rules on decision making, fundamental rights are the most important components of constitutions. In their specific modern sense, fundamental rights emerge with the autonomisation of a multiplicity of separate communicative worlds: of different ‘matrices’. Historically first, and visible everywhere since Machiavelli, the matrix of politics becomes autonomous. It becomes detached from the strong moral-religious-economic ties of the old European society, and extends political power without any immanent restraints. With its operative closure and its structural autonomy the political system develops expansive, indeed downright imperialist tendencies. Centralised power for legitimate collective decisions has an inherent tendency to expand into society beyond any limit.²⁴ It liberates highly destructive force.

The political matrix’s expansion marches in two divergent directions. First, it crosses the boundaries to other social sectors. Their response is to invoke their communicative autonomy against politics’ intervention. This is the hour of birth of fundamental rights: fundamental rights demarcate from politics areas of autonomy attributed either to social institutions or to persons as social constructs.²⁵ In both cases, fundamental rights set boundaries to the totalising tendencies of the political matrix within society. Second, in its endeavours to control the human mind and body, politics expands with particular verve across the boundaries of society. Their protests are translated socially into political struggles of the oppressed against their oppressors, and finally end up, through historical compromises, in political guarantees of the self-limitation of politics vis-à-vis individuals. Unlike the aforementioned institutional and personal fundamental rights, these political guarantees are human rights in the strict sense.

Multiplication of expansive social systems

This model of fundamental rights, which is oriented towards politics and the state, works only as long as the state can be equated with society, or at least, be regarded as society’s organisational form, and politics as its hierarchical coordination. However, insofar as other highly specialised communicative media—money, knowledge, law, medicine, technology—gain autonomy, this model loses its plausibility. At this point, the horizontal effects of fundamental and human rights become relevant.

²³ For a more detailed analysis, see: G. Teubner, ‘The Anonymous Matrix: Human Rights Violations by “Private” Transnational Actors’ (2006) 69 *Modern Law Review* 327–46.

²⁴ N. Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Berlin: Duncker & Humblot, 1965), 24.

²⁵ On the transformation of individual to institutional fundamental rights, see K.-H. Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik* (Tübingen: Mohr & Siebeck, 2004), at 77.

Fragmentation of society multiplies the boundary zones between autonomised communicative matrices and human beings. The new 'territories' each have boundaries of their own on their human environment. Here, new dangers arise for the integrity of body and mind and for the autonomy of institutional communicative spheres.

Thus, fundamental rights cannot be limited to the relation between state and individual. Specific endangerment of individual and institutional integrity by a communicative matrix arises not just from politics, but in principle from all social sectors that have expansive tendencies.²⁶ For the matrix of the economy, Marx clarified this particularly through such concepts as alienation, autonomy of capital, commodification of the world, exploitation of man by man. Today we see—most clearly in the writings of Foucault, Agamben, Legendre²⁷—similar threats to individual and institutional integrity from the matrices of the natural sciences, psychology, the social sciences, technology, medicine, the press, radio, and television. The cruel experiments carried out on people by Dr Mengele in the concentration camps should not only be seen as an expression of a sadistic personality or as an enslavement of science through the totalitarian Nazi-policy. Recent research on the involvement of prestigious science institutions reveal that the experiments are also to be regarded as the product of the expansionistic tendencies of the natural sciences to seize every opportunity to accumulate knowledge unless they are restrained by external controls.²⁸

By now, it should have become clear why it makes no sense to talk about the 'horizontal effect' of those fundamental rights which are enshrined in the political constitution. There is no transfer from the state guarantees of individual freedoms into 'horizontal' relations between private actors. Something else is needed instead. What is necessary is to develop new types of guarantees that limit the destructive potential of communication outside the sphere of institutionalised politics.

The anonymous matrix

If violations of fundamental rights stem from the totalising tendencies of partial rationalities, there is no longer any point in seeing the horizontal effect of fundamental rights as if the rights of private actors have to be weighed up against each other. 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 were that individuals threaten other individuals.

²⁶ U. K. Preuss, 'The Guarantee of Rights: Horizontal Rights', in M. Troper (ed), *Traité International de Droit Constitutionnel, Tome III: Suprématie de la Constitution* (2009: forthcoming).

²⁷ M. Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1991); G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Calif.: Stanford University Press, 1998), at 15 et seq; P. Legendre, *Leçons VIII: Le crime du caporal Lortie. Traité sur le père* (Paris: Fayard, 1989).

²⁸ See H.-W. Schmuhl, *Grenzüberschreitungen: Das Kaiser-Wilhelm-Institut für Anthropologie, menschliche Erblehre und Eugenik 1927 bis 1945* (Göttingen: Wallstein, 2005).

Violation of the integrity of individuals by other individuals raises a completely different set of issues that arose long before the radical fragmentation of society in our day. It must systematically be separated from the fundamental rights question as such. In the European tradition, the conflict between individuals has been dealt with by attributing 'subjective rights' to persons. The theory of subjective rights in the Kantian tradition demarcates ideally the citizens' spheres of arbitrary freedom from each other in such a way that the law can take a generalisable form. This idea has been most clearly developed in classical law of tort, in which violations of subjective rights are central. But 'fundamental rights' as here proposed differ from 'subjective rights' in private law. They are not concerned with mutual endangerment of private individuals, ie intersubjective relations, but address concerns about the dangers to individual and institutional integrity that are created by anonymous communicative matrices.

Criminal law concepts of macro-criminality and criminal responsibility of formal organisations come closer to the issue.²⁹ They affect violations of norms that emanate not from human beings, but from impersonal social processes. But these concepts are still too narrow, because they are confined to the dangers stemming from 'collective actors' (states, political parties, business firms, groups of companies, associations) and miss the dangers stemming from the 'anonymous matrix', that is, from autonomised communicative processes (institutions, functional systems, networks) that are not personified as collectives. To treat the horizontal effect of fundamental rights in terms of subjective rights between individual persons would just end up being addressed in the law of tort with its focus on interpersonal relations. As a consequence, we would be forced to apply the concrete state-oriented fundamental rights wholesale to the most varied interpersonal relations, with disastrous consequences for elective freedoms in private life. 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.³⁰

Both the 'old' political and the 'new' polycontextural human-rights questions should be understood with respect to people being threatened not by their fellows, but by anonymous communicative processes. These processes must in the first place be identified. Michel Foucault has seen them most clearly, radically depersonalising the phenomenon of power and identifying today's micro-power relations in society's capillaries in the discourses/practices of 'disciplines'.³¹

We can now summarise the outcome of our abstract considerations. The human-rights question in the strict sense must today be seen as endangerment of individual

²⁹ See, eg H. Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt* (Frankfurt am Main: Suhrkamp, 1989).

³⁰ D. Medicus, 'Der Grundsatz der Verhältnismäßigkeit im Privatrecht' (1992) 192 *Archiv für die civilistische Praxis* 35–70; W. Zöllner, 'Regelungsspielräume im Schuldvertragsrecht: Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu den sogenannten Ungleichgewichtslagen' (1996) 196 *Archiv für die civilistische Praxis* 1–36.

³¹ Foucault, above n 27, at 135 et seq.

and institutional integrity by a multiplicity of anonymous and today globalised communicative processes. The fragmentation of world society into autonomous subsystems creates new boundaries between subsystem and human being and between the various subsystems. The expansive tendencies of the subsystems aim in both directions.³² It now becomes clear how a new 'equation' has to replace the old 'equation' of the horizontal effect. The old one was based on a relation between two private actors—private perpetrator and private victim of the infringement. On one side of the new equation is no longer a private actor as the fundamental-rights violator, but the anonymous matrix of an autonomised communicative medium. On the other side is no longer simply the compact individual. Instead, the protection of the individual splits up into three main dimensions:

- (i) Institutional rights protecting the autonomy of social discourses—the autonomy of art, of science, of religion—against their subjugation by the totalising tendencies of the communicative matrix.
- (ii) Personal rights protecting the autonomy of communications, attributed not to institutions, but to the social artefacts called 'persons'.
- (iii) Human rights as negative bounds on societal communication, where the integrity of individuals' body and mind is endangered by a communicative matrix.

Justiciability?

How can the law describe these boundary conflicts when, after all, it has only the language of 'rights' of 'persons' available?³³ Can it, in this impoverished rights talk, in any way reconstruct the difference between interpersonal conflict and the conflict between the communicative matrix and the integrity of individuals? Here we reach the limits of legal doctrine, and the limits of court proceedings. In litigation, there must always be a plaintiff suing a defendant for infringing his rights. In this framework of mandatory binarisation as person-versus-person conflict, can fundamental rights ever be asserted against the structural violence of anonymous social processes?

The only way this can happen is to use individual suits against private actors to thematise conflicts in which human rights of individuals are asserted against structural violence of the matrix. In more traditional terms, the institutional conflict 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 recognise as their bearers not only persons, but also institutions.³⁴

³² In more detail, see A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt: Suhrkamp, 2006), ch 1.

³³ M. A. Glendon, 'Rights Talk: The Impoverishment of Political Discourse', in D. E. Eberly (ed), *The Essential Civil Society Reader* (Oxford: Rowman Littlefield, 2000), 305–16.

³⁴ For the impersonal concept of fundamental rights, see H. Ridder, *Die soziale Ordnung des Grundgesetzes* (Opladen: Westdeutscher Verlag, 1975); K.-H. Ladeur, 'Helmut Ridder's Konzeption der Meinungs- und Pressefreiheit in der Demokratie' (1999) 32 *Kritische Justiz* 281–300.

Whoever enforces individual freedom of expression simultaneously protects the integrity of the political process.

Is this distinction justiciable? Can person-versus-person conflict be separated from communication-versus-individual conflict? Translated into the language of law, this becomes a problem of attribution. Whodunnit? Under what conditions can the concrete violation of integrity be attributed not to persons, but to collective actors, or to anonymous communication processes? If this attribution could be achieved, the genuine problematic of human rights would have been formulated even in the impoverished rights talk of the law.

In an extreme simplification, the 'horizontal' human-rights problematic can perhaps be described in more familiar legal categories as follows: the problem of human rights in private law arises only where the endangerment of body–mind integrity comes from social 'institutions' (and not just from individual actors). In principle, institutions include private formal organisations and private regulatory systems. The most important examples here would be business firms, private associations, hospitals, schools, and universities, as formal organisations on the one hand; and general terms of trade, private standardisation, and similar rule-setting mechanisms as private regulatory systems on the other. We must of course be clear that the term 'institution' represents only imperfectly the chains of communicative acts that endanger the integrity of mind and body, and does not completely grasp the expansive phenomenon that is really intended. This is the reason why we use the metaphor of the anonymous 'matrix' instead. But for lawyers, who are orientated towards rules and persons, 'institution' has the advantage of being defined as a bundle of norms and at the same time being able to be personified. The concept of the institution could accordingly re-specify fundamental rights in social sectors. The outcome would then be a formula of 'third-party effect' which could seem plausible also to a black-letter lawyer. It would regard horizontal effect no longer as balancing between the fundamental rights of individual bearers, but instead as the protection of human rights and rights of discourses vis-à-vis expansive social institutions.

Individual and institutional dimensions

Let us return to human rights violation by the transnational corporation. We can now see directions in which human rights might develop. It should be clear how inadequate it is in court proceedings to weigh up an individual's fundamental rights against the transnational corporation's individual rights. The matter is not one of 'corporate social responsibility', with a single corporate actor infringing the fundamental rights. A human right can become a reality only if the 'horizontal' effect of fundamental rights is reformulated from interpersonal conflicts to conflicts between a social system and its environment.

In the dimension of institutional rights, the conflict needs to be set in its social context, which requires us to observe that the conflict is due to a clash of incompatible logics of action. The critical conflict arises in the contradiction between norms of different social rationalities. The point is not, then, to impose controls on particular firms, but to develop abstract and general rules on incompatibilities between different social sectors, and to prepare the conflicting transnational regimes to respond to

destructive conflicts between incompatible logics of action by building concerns of the other into the norms of their own rationality. Since there is no paramount court for the conflict, it can only be solved from the viewpoint of one of the conflicting regimes. But the competing logic of action, ie the normative principles of the one sector, has to be brought into the other's own context as a limitation.

Where the law ends

This sketch of legal ways to react to the conflict shows how inappropriate the optimism is that the human-rights problem can be solved using the resources of law. Can one discourse do justice to the other? This is a problem the dilemmas of which have been analysed by François Lyotard.³⁵ But it is at least a problem within society, one that Niklas Luhmann sought to respond to with the concept of justice as socially adequate complexity.³⁶ The situation is even more dramatic with human rights in the strict sense, located at the boundary between communication and the individual human being. All the groping attempts to juridify human rights cannot hide the fact that, in a strict sense, this is an impossible project. 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 a positive concept of justice in the relation between society 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 the law, we have to accept that the problem of the integrity of body and mind 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 mind and body on the other can at best be surmised at by law. And the only signpost left is the legal prohibition, through which a self-limitation of communication seems possible. This programme of justice is ultimately doomed to fail, and cannot console itself with Jacques Derrida's words that it is 'to come, *à venir*'.³⁷ It has to face up to its being in principle impossible. The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counter-principle

³⁵ J.-F. Lyotard, *The Differend: Phrases in Dispute* (Manchester: Manchester University Press, 1987).

³⁶ N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart: Kohlhammer, 1974); N. Luhmann, 'Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft', in N. Luhmann (ed), *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt am Main: Suhrkamp, 1981), 374–418; N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), at 214 et seq.

³⁷ J. Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 *Cardozo Law Review* 919–1046, at 969.

to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of 'humanly just' communication might be.³⁸

Nor do the emancipatory programmes of modernity à la Habermas help any further. No information comes from criteria of democratic involvement of individuals in social processes, since only persons take part, not bodies or minds. From this viewpoint one can only be amazed at the naivety of participatory romanticism. Democratic procedures are no test of a society's human rights justice. Equally uninformative are universalisation theories that proceed transcendently via a priori characteristics or via a posteriori universalisation of expressed needs. What do such philosophical abstractions have to do with actual human individuals? The same applies to economic theories of individual preferences aggregated through market mechanisms.

Only the self-observation of mind–body—introspection, suffering, pain—can judge whether communication infringes human rights. If these self-observations, however distorted, gain entry to communication, then there is some chance of humanly just self-limitation of communication. The decisive thing is the 'moment': the simultaneity of consciousness and communication, the cry that expresses pain. Hence we observe the closeness of justice to spontaneous indignation, unrest, protest, and its remoteness from philosophical, political, and legal discourses.

³⁸ For an elaboration, see G. Teubner, 'Self-subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 *Modern Law Review* 1–23.

