THE RELATIONSHIP BETWEEN PUBLIC LAW AND SOCIAL NORMS IN CONSTITUTIONALISM — DOMESTIC, EUROPEAN, AND GLOBAL // A RELAÇÃO ENTRE DIREITO PÚBLICO E NORMAS SOCIAIS NO CONSTITUCIONALISMO — NACIONAL, EUROPEU E GLOBAL

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>> ABSTRACT // RESUMO

The globalisation process is a serious challenge for legal theory including the conception of a constitution beyond the state. The paper tries to develop the idea that globalisation is not only a process that undermines the territorial state form outside. There is an internal side to the globalisation process that disrupts the stable hierarchical structure of state law inasmuch as the dynamic of transformation of post-modern societies in particular undermines the stability of social norms that formed the infrastructure of state-based law as well as the law itself. The increasing dynamic of the self-transformation of these social norms opens a new perspective both on domestic constitutional law and on the law beyond the state. // O processo de globalização é um sério desafio para a teoria jurídica, incluindo a concepção de uma constituição para além do Estado. O presente artigo busca desenvolver a tese de que a globalização não é apenas um processo que enfraquece o Estado territorial externamente. Há uma face interna para o processo de globalização, que rompe a estrutura hierárquica estável da lei estatal da mesma forma que a dinâmica da transformação das sociedades pós-modernas, sobretudo, debilita a estabilidade das normas sociais que formaram a infraestrutura do direito estatal, bem como o direito em si. A dinâmica crescente da auto-transformação dessas normas sociais abre uma nova perspectiva tanto no direito constitucional interno e quanto no direito extra estatal.

>> KEYWORDS // PALAVRAS-CHAVE

Globalisation; State; Constitution; Public Law; Social Norms. // Globalização; Estado; Constituição; Direito Público; Normas Sociais.

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1. TOWARDS THE CONCEPTION OF A "CONFLICT OF NORMS" MODEL FOR THE RELATIONSHIP BETWEEN LEGAL AND SOCIAL NORMS

Last century, in the 1960s, one could observe, both in the literature on civil rights and in the jurisprudence of the German Constitutional Court (FCC), a gradual change from a conception of civil rights as strictly negative liberties towards a more "institutional" view that takes the functional role of freedom of opinion and freedom of the press into consideration.[1] It is quite interesting that the new line of conflict was determined by a perspective on procedural questions and the burden of proof in borderline cases of conflict of freedom of opinion and the protection of personality rights. How about publishing articles that mix facts and opinion? How about reporting on uncertain factual constellations? In German criminal and civil law oft he late 19th and the early 20th century , there had been clear general rules about the burden of proof and the ensuing risk that were shifted to the communicators. The press was not regarded as being entitled to any "privilege" — this was just a formal conflict in which the active part is supposed to be the legitimate bearer of the risk. On the contrary! There is a norm in the Criminal Code that allows a person to communicate "uncertain facts" to an addressee in cases of a legitimate private interest — for example, as a claimant or defendant in a court procedure. The press was not regarded as having a "public role" to play — they made use of private rights just like anybody else.[2]

By now, this has changed completely: the press is regarded as having a role to play in the process of the formation of public opinion. This change finds its repercussion in the fact that, for example, in the case of a report that mixes facts and opinion, there is a presumption that the whole report has the character of an opinion — and, as a consequence, the freedom of the press is expanded in an important way.[3]

Starting from this transformation, I would take the view that one should re-formulate the theory of constitutional rights in a much more radical way, instead of just adapting the doctrine in a pragmatic way as is the case. I would regard this transformation as a signal of a much broader transformation: civil rights are increasingly "historicised" — as Marcel Gauchet has put it. Increasingly, certain factual constellations that are touched upon by the use of civil rights are treated in a differential way — instead of ignoring the factual consequences of a right.[4]

This evolution is ambivalent: in Germany, there is a tendency to transform the state into a protective agency that favours the use of civil rights, instead of regarding it as the potential adversary of freedom. This evolution contributes to the expansion of what one may call judicial or "legal constitutionalism"[5] with the BVerfG at the centre of the constitutional system interpreting constitutional liberties in an expansive way and, at the same time, establishing a practice of "balancing" conflicting rights and interests on a case-by-case basis. "Balancing"[6] is the privileged method advocated by the FCC — if one may call this a method at all. At the same time, the state itself glides into a position in which the difference between a state

competence and the use of a right is more and more undermined: the state increasingly does not impose limits on civil liberties but acts as a representative of the interests — protected by individual rights — of persons who, for some reason or other, cannot play an active role in certain constellations. The new public dimension of rights is increasingly shifted to the state — through the court as the privileged institution for balancing. In one way or another, there is a resurrection of the individual negative freedom whose collective dimension is expropriated by the state.

In my view, both the old and the new constellation need a better theoretical and practical infrastructure. I take the view that, in both constellations, it is the relationship between social norms and legal rights or legal norms that has, in general, been transformed. In the former "society of individuals", we had a stable relationship between a distributed mode of "experience", a common knowledge including the practical repertory of acts, conventions, patterns of co-ordination, etc., and the law — including civil rights. This stable relationship could remain more or less invisible because it changed only slowly and continuously and from case to case — without major interruptions (disruption). This can be demonstrated with reference to freedom of the press, which found its limit in a common social code of "honour" that drew a rather clear line between the private and the public realms - until the beginning of the twentieth century.[7]

2. THE EXAMPLE OF THE MEDIA AS A FIELD OF SELF-ORGANISATION OF SOCIAL NORMS

To simplify a bit, I would assume that, from the 1960s onwards, we have an increasing tension between the law and the social norms. I would call the new societal model the "society of organisations" — this means that social norms increasingly undergo a reflexive organised re-construction: they no longer emerge primarily spontaneously, they are transformed by co-ordinated interactions, but also subject to more intense reactions to social transformations, emotional (protest) and organised — including explicit standard-setting.[8] The traditional stable lines of differentiation, *i.e.*, the separation of the public and the private spheres, crumble. This, in my view, is the explanation for the transformation of the role of the freedom of the press in particular: the rules that dictate what can be said in public and what cannot be said are developed in an experimental mode by the press both in co-operation and in conflict with other groups and the state (judiciary). There is implicit co-operation between the press formulating professional rules and developing patterns of "management" of conflicting interests, on the one hand — and of the courts that react to these practices by supporting them, interrupting certain approaches, influencing their concretisation by handing a problem back for new consideration, etc. In this way, there is a new, more active role of private organisations and groups in the process of generating social norms. One might call this a "negotiated order"[9] that replaces the stable order of the past. In my view, this evolution should not be suppressed by referring alone to

"balancing" by courts. Some balancing might be unavoidable as a default rule, but primarily — especially with a view to legal theory and the role of a rational doctrine[10] — we need a model that contains a conceptual idea of how civil rights evolve in the process of social change in general, and the transformation of social norms in particular.

With regard to the media, one could talk about a productive relationship between the self-organisation of a field of action in society and a regulatory approach of the law, including private law in this field. On the one hand, there is a privately self-organised body of professional norms for the media, which evolves under the pressure to adapt to the transformation of the public, and which proceeds in an experimental way from case to case.[11] At the same time, the role of the courts in adapting the law and its rather vague norms in many fields to the rapidly changing postmodern society is simplified by the pre-structuring of patterns of behaviour and of solving conflicts though professional norms. Clearly, the courts do not follow these norms blindly, but there is a kind of co-operative approach[12] to the generation of a whole network of operations of the media, changing social values, and the consideration of conflicting interests, a network that generates a heterarchical web of practical patterns of conflict resolution.[13] The importance of this co-operation between courts and professions is demonstrated by its almost complete absence in Internet communication and its fragmented character.

I would like to refer to a second example in order to illustrate for the necessity of the co-operation between courts and social groups, which emerges in the process of forming protest groups. The constellation is different, but nonetheless there is also a transformation of the phenomenon of protest that can no longer be rationalised as being a supplementary mode of political communication, beside the media and below the level of the state. Demonstrations can also have a more self-referential character that organises communications primarily among participants as "formless intuitions", and takes on an artistic character. In my view, this evolution has to find its repercussion in the understanding of the legal character of the civil right to demonstration.[14] Unfortunately, I cannot go into details here. But the law has to develop the interpretation of the civil liberty that is at stake here, in co-operation with the changing phenomena of protest and the norms that emerge from its practice.

3. THE APPROACH OF THE MODEL OF "CONFLICT OF LAWS" IN INTERNATIONAL PRIVATE LAW

Social norms within the realm of specific autonomies that are guaranteed by civil rights are not only to be attributed to organisations but also to the spontaneous interactive use of civil rights. This idea would transform the "insular individualism" into an "interactive individualism"[15] version that would include the protection of norms that are practiced within groups and networks, that emerge within the field of action protected by the respective civil right — communicative rights in particular.

For the coordination of social norms and legal norms[16], including civil rights, one could think about a model that follows the patterns that have been developed in International Private Law (IPL): in IPL, there is an increasing willingness, in global law in particular, to accept the necessity of "rule-seeking" in the realm of global law, which is centred round the search for a "common policy" that emerges from the co-operation of different legal systems.[17] This would be different from the traditional decision in IPL on the "conflict of norms" with a view to the determination of the applicability of one specific norm as opposed to another. Nonetheless, both are regarded as being mutually exclusive. We need legal approaches to the evolving phenomena of a deepening tension between vague legal norms which, in the "society of individuals", could refer to common knowledge, experience, stable patterns of co-ordination, a repertory of "normal" actions, and the dynamic process of change of postmodern social norms.

I do not want to go into further details here. Rather, I would like to show that this approach can also be helpful in the understanding of the new phenomena of "global law".[18] The hypothesis that I would like to venture is that the fragmentation and pluralisation of the law is[19], to a large extent, to be attributed to the increasing tension between state law and social norms, both within the state and beyond its limits in the global realm. So, one should not separate the domestic, the European, and the global dimensions of law. The focus on the relationship between social norms and the law can also shed some light on the internal differentiation of the legal system that can be observed in the last decades.[20] What I call the evolution from the "society of individuals" to the "society of organisations" and finally to the "society of networks" can be helpful as frames of reference for the analysis and conceptual distinctions of different types of social norms as the containers of the "common knowledge" upon which the law can draw. And this might be helpful also with reference to both domestic and European constitutionalism.

4. THE EXAMPLE OF EUROPEAN "HORIZONTAL CONSTITUTIONALISM" — THE ROLE OF THE ECHR

One can observe a shift from "hierarchical constitutionalism" to "horizontal constitutionalism" — which is also the phenomenon that Gunther Teubner's conception of a "societal constitutionalism" is focused upon.[21] I will come back on this question later. First, I would like to address the question of pluralism as it has emerged in the jurisprudence of the ECHR. The formula for managing pluralism enshrined in the European Convention on Human Rights is the attribution of a "margin of appreciation" to Member States.[22] This is somewhat misleading under the postmodern conditions of increasing societal pluralism in Member States. According to the approach outlined here, one would re-interpret this formula by shifting the reference from states to societies: it is the "margin of appreciation of societies" that should be taken into consideration in finding a balanced relationship between domestic and European human rights law. This would also

include the possibility of differentiating the degrees of homogeneity and diversity in Europe on a sliding scale. For example, there should be much more respect for the constellations of co-operation between state law and social standards or social norms that try to co-ordinate the interest of the public and the protection of privacy. Why should cultural rights be interpreted in a uniform way, if societies and their social norms related to religion[23], schooling[24], media etc. differ considerably?[25] Under the conditions of a kind of "negotiated" model of co-ordination of the public and private realms[26], the "management" of difference can only be shifted to a web of judgments[27] that establish a distributed order of cases that also allows — to a certain extent — orientation to be found by drawing on a number of similar cases and decisions. Such a web cannot be expected to emerge from a European practice formulated by a supranational court because of the limited number of cases that have to be decided at European level.[28]

This approach would also allow for a more differentiated construction of global law.

5. "CONSTITUTIONAL NORMS OF CIVIL SOCIETY" BEYOND THE SPHERE OF THE NATIONAL CONSTITUTION?

It may contribute to defining the concept represented here to consider briefly the approach adopted by Gunther Teubner. He takes the view (summarised here with a certain element of simplification) that society's subsystems, through their expansion beyond the boundaries of the national state, create the societal basis for a "world law"[29] which, finds its repercussion, for example in transnational commercial law, "corporate governance" regimes in private and public law and (hybrid) standards. This type of governance brings about an autonomous "civil society" *self-constitutionalisation* extending beyond the sphere of the national law, yet not as far as a (political) "world constitution" in the true sense of the word[30] — Teubner regards these self-organised ordering as leading to merely "constitutional *fragments*". This constitutionalisations (and not merely juridification) is also evident in the increase in reflexive processes which is also observed here, by which spontaneously generated norms or norms which are controlled through "secondary norms", are measured against basic requirements of practice. The emphasis here is on new kinds of links between the intrinsic rationality of commercial organisations and the self-organised observation thereof by third parties through the connection with non-economic rationalities, which are becoming institutionalised by means of (for example) monitoring processes involving NGOs. This is explicitly regarded as a variant of "societal *constitutionalisation*[31]" in the narrow sense, and is understood as a functional equivalent of, and also therefore an alternative to, the conventional national constitution.

Traditional constitutionalism is located in the political subsystem that can no longer be regarded as being the leading subsystem as opposed to the economic and other subsystems. It cannot monopolise the function of constitution building in postmodern societies. National constitutional law

cannot lay claim to any hierarchy vis-à-vis the societal processes of self-organisation; on the contrary, both political and societal constitutionalisation processes exist in a heterarchical relationship which is embodied in the link between the qualitatively different networks of constitutional norms (generated by both the political and other subsystems of society). This is based on the assumption "...that in the process of globalisation the affirmation of constitutional norms is shifted from the political system on to different sectors of society, which generate constitutional norms of civil society in parallel with political constitutional norms".[32]

6. THE TRANSNATIONAL NETWORKS OF THE LAW

However plausible it may appear to assume that the origin of law cannot be traced back to any privileged source of national will, because the internal self-organisation of the law in particular would thereby remain overshadowed by an entire architecture consisting of different rules and meta-rules (the blending together of norm and application, reflexion procedures, methodical principles, linking of law and social norms), it is nevertheless also problematic to illustrate the pluralisation of (in particular) global law primarily in the reproduction of "normative communities"[33] (Paul Schiff Berman) and as a result to neglect the new challenge of the formation of order under conditions of complexity that does not only lead to a multiplicity of "legislators" but also to a heterogeneity of norms and their relationship to the fragmented character of "common knowledge", once the close link between a distributed process of generation and use of experience and the universal law has fallen apart.[34]

The conventional legal architecture, which is geared to unity, is not dissolved, but becomes more mobile. For Gunther Teubner, however, observation of the dynamic is restricted to the relations *between* the individual "fragments of the constitution".[35] The fact that these are not themselves closed, but are defined by a dynamic process of overlapping norms and practices of varying provenance, is ignored. The process of the transnationalisation of the law implies and permits a greater level of heterogeneity, it permits experimentation, it relaxes the rules of connection between social and legal norms, it differentiates between methods for different contexts, it requires rules to deal with conflict of laws, it allows the relationship between rule and application to be reversed, and is satisfied with only partial juridification through the defining of procedures without any preconception as to the result. "Transnational law" does not establish a new homogeneous global level of norm building. It includes the necessity to coordinate norms that are generated on different levels and within competing constituencies.[36] It even needs norms that retranslate global norms into domestic ones, and at the same time it needs legal norms that organise the participation of national actors, public and private, at the global level. It can also operate with norms whose legal character can — either wholly or on a temporary basis — remain open to change, or which only become legally relevant at points of contact with the national law, for example if a violation against

social rules justifies the legal charge of negligence in regard to a breach of contract. However, it is surely important not to overplay the associated transformation and to differentiate normativity. The "constitutionalism of society" is therefore conceptually much more rigid than can be said of concepts which in many respects regard a clear distinction between "internal" and "external" in global law as impossible. In this respect the concept of a "constitutional fragmentation" appears to be too limited in its perspective: it risks missing the heterogeneity of the different norms and their origins. This is why I would rather use the concept of "network" of norms – a concept that includes the distinction of "nodes" that organise a certain intensity of exchange and coordination among different norms and "structural holes" that are characterized by "loose coupling" or unresolved conflicts. Thus — leaving other considerations aside — even for transnational "company law" the "contamination" by externally generated models of Codes of Conduct, political pressure, international law obligations, and transnational effects of national and regional regulation is almost impossible to distinguish from the closing down of an "internal constitution".

The "self-constitutionalisation hypothesis" does not pay enough attention to the fact that the state does not disappear — not at all. It takes on the character of a "disaggregated state" (A. M. Slaughter) that allows for more flexible action at the heterogeneous global level. The "law of the networks", as already mentioned, is acentric, it constitutes a multiplicity of nodes upon which relationships are arranged, but it also forms a potential relationing of *all* nodes that can be related to each other in the "networks of the law". The effect of the processing of law and its relationship to other social norms and practices in this network is *ex ante* difficult to calculate, but the legal "validity symbol" which is geared to hierarchical reproduction is transformed, in a heterarchical "order far from equilibrium"[37], into a plurality of linking models which, by means of cases, deal with legal and in particular discursive interrelations (and thus ever new constraints and possibilities for connection), which at the same time exclude others or place them under an increased obligation to justify themselves.

In this regard postmodern law permits greater reflexivity, *i.e.* in light of the multiplicity of possible candidates for the "legal value" of operations, the question (which requires a strategic answer) as to whether a norm should be treated as law arises more frequently.

7. "SELF-CONSTITUTIONALISATION" OF REGIMES BY "SECONDARY NORMS"?

On the basis of the example of what Gunther Teubner[38] refers to as "Unternehmensrecht" (codes of corporate governance), it seems extremely doubtful that any set of regulations ought to be treated as law, either internally by self-observation on the part of the players or externally by attribution. Above all, however, this cannot be laid down by a "corporate constitution" (to be treated on a par with the "political" constitution) in "world society" with effect for the national constitutional law (which is

localised at the same level). H. L. A. Hart's "secondary norms"[39] cannot, on the basis of the self-observation of the emergence of "primary norms" in "sectors of society" outside the political system, dispose of the boundaries between law and non-law by way of "self-constitutionalisation". This would be a circular argument: even social (non legal) norms can be firmly established and secured by means of a "constitution". Whether *law* arises as a result is however quite a different question, which can only be answered by recourse to functional equivalences of the "law of networks" to hierarchical law. In accordance with similar constructs of "legal pluralism". Gunther Teubner's theory of transnational law — as we have said — amounts to constructing a plurality of deterritorialised "transnational regimes"[40] on the basis of the model of the state, and creating the non circumvenable (although also variable) concept of "a kind of" unity of the law through "conflict-of-laws rules".

The assumption that there is a differentiation of an autonomous world law, and that these law systems boundaries on an *issue*-specific basis, and claim "global validity"[41] is scarcely plausible even for civil law, since the systems cannot be completely emancipated from territorially established law — even for the enforcement of arbitral judgements. Even harder to follow, however, is the thesis that the evolution of the new world law can be understood as a renewal of the difference between a legal system and its social environment systems. How is it possible to construe this? Could this be interpreted as stating that "world law" is not some product of new internal differentiations within the legal system, but rather that the "big bang" of the self-generation of the law through a system/environment distinction is being repeated within the legal system through the formation of a kind of "second order law", which is developing its own forms and internal differentiations? Only thus is it possible to explain the assumption (which is otherwise difficult to follow) that the "self-constitutionalisation" within world law is supposed to have the same status as state-based constitutional law. A similar argument is presented by Andreas Fischer-Lescano[42], who sees "normative expectation" as being grounded not only in "political law-making", but also "in the sphere of human rights, specifically in the system of the mass media", which are becoming a forum for "colère publique" (this goes back to Durkheim). The monopoly to which "statist international law" lays claim must be opened up to include new sources of law that emerge from the law making capacity of civil society.

8. THE "SELF-CONSTITUTIONALISATION THESIS" AND THE PROBLEM OF THE PARTICIPATION OF THE STATE IN THE FORMATION OF GLOBAL NORMS

In any event it seems more productive, in the context of describing the emerging "global law" that extends beyond the sphere of the state but not as far as that of conventional international law, to accentuate first of all the conditions under which "territorial" law is linked with the transformation of social rules and knowledge systems, i.e. the conditions which

allow the unity of "global law" to appear only as "order far from equilibrium".[43] Their self-transformation in the conditions of the postmodern era is to be described as a process of rearrangement within a "differentiation process", which initially occurs within territorialised law and is then continued in the process of globalisation.

The postmodern "national" law of the "society of networks" is not fundamentally so very different from the fragmented global law that exists beyond the sphere of the state. Starting from this assumption, it seems easier to envisage that on the one hand, in a global law order which is entirely characterised by heterarchy and asynchrony, new legal forms are being generated which are geared to operating with incompleteness[44] and which are in particular procedural-reflexive and to some extent also strategically dimensioned, while at the same time the experimental transnational cooperation with national law (which is also changing), which is aimed at the stimulus of self-regulation, cannot be separated from global law (particularly in the sphere of global administrative law or the constitutionalisation of new procedural constraints aimed at making sovereignty more "permeable").

The theory of "world law" as envisaged by Fischer-Lescano and Teubner, which is of necessity only reproduced here in simplified form, appears excessively complex (even disregarding theoretical objections to the structure) without any balancing effect being provided through additional gains in knowledge. By contrast, the concept of an evolution of the law as outlined here, which attributes to the legal system a higher capacity for self-modelling with the aid of "sub-models", extending beyond the opening and coupling mechanisms as previously discussed, is capable of a more precise conception of the transformation processes of the law not only in the territorialised but also in its dterritorialised and fragmented order.[45] Not only can it observe a fragmentation of individual "legal systems" in the factual dimension, but also, in particular, it can illustrate the fragmentation of the law in the time dimension as a process — and thus the asynchrony of the effects of the individual "sub-models". Thus the answers to the challenge posed to the law by Internet communication are to be found not only (and perhaps not even primarily) in the observation of globalisation. On the contrary it is also necessary for there to be a conversion from social norm formation, which is centred on the mass media, to the heterarchical processes of the emergence of social norms and the coordination of these norms with the formation of law. This does not however lead to the disappearance of older layers of norms, but gives rise to new conflicts and therefore further need for coordination. In my opinion the "world law" reading for which I have offered a critique here tends to neglect a particular feature of the law which consists in its not being „patternless" and in its establishing a defined impersonal "management of rules" and a network of connection constraints and possibilities for controlling uncertainty that extends even beyond the boundaries of territorially established law. The postulated closing down of "self-constitutionalised" transnational systems blocks access to the heterarchical procedural rationality of overlapping *networks of the law* (and of other norms) that consists of different "nodes" and patterns of relationships.

>> ENDNOTES

[1] (Reports oft he Federal Constitutional Court) BVerfGE 61, 1, 8; 85, 1, 15; 90, 1, 15; cf. for the "institutional" dimension of civil rights to communication *Helmut Ridder*, Die soziale Ordnung des Grundgestzes, Wiesbaden: Westdeutscher Verlag 1975, p. 85 et seq., *Karl-Heinz Ladeur*, Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie, Kritische Justiz 32 (1999), p. 281.

[2] (Reports of the Reichsgericht, criminal law) RGSt 8, 19; 15, 17; 59, 172; 64, 10; *Reinhard* Ricker & Johamnnes Weberling, Handbuch des Presserechts, Munich: Beck 2012, § 53 No. 41 et seq.

[3] BVerfGE 54, 288; 61, 1: functional distinction between value judgment and the communication of a "fact" according tot he relecvance of public opinion.

[4] *Karl-Heinz Ladeur*, Die transsubjektive Dimension der Grundrechte, in: Stephan Korioth/ Thomas Vestng/Ino Augsberg (eds.), Grundrechte als Phönomene der kollektiven Ordnung, Tübingen: Mohr 2014, p. 17.

[5] *Richard Bellamy*, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, Cambridge: Cambridge University Press 2007, p. 1 et seq.

[6] *Robert Alexy*, Theorie der Grundrechte, Frankfurt a. M.: Suhrkamp 1986, p. 71 et seq; 410 et seq.; *Alexander Heinold*, Die Prinzipientheorie bei Ronald Dworkin und Robert Alexy, Berlin: Duncker & Humblot 2011; Matthias Klatt (ed.), Prinzipientheorie und Theorie der Abwägung, Tübingen: Mohr 2013; for a critic cf. *Philipp Reimer*, "...und machet zu Jüngern alle Völker"?, Der Staat 52 (2013), p. 27.

[7] *Karl-Heinz Ladeur*, Das Medienrecht und die Ökonomie der Aufmerksamkeit, Köln: von Halem 2007.

[8] Cf. the contribuitions in: Christian Joerges, Karl-Heinz Ladeur & Ellen Vos (eds.), Integrating Scientific Expertis into Regulatory Decision Making, Baden-Baden: Nomos 1997; *Lawrence Busch*, Standards: Recipes for Reality, Cambridge, MA: MIT Press 2013.

[9] *Jody Freeman & Laura I. Langbein*, Regulatory Negotiation and the Legitimacy Benefit, New York University Environmental Law Journal 9 (2000), p. 60.

[10] For a Critique cf. *Niklas Luhmann*, Das Recht der Gesellschaft, Franlfurt a. M.: Suhrkamp 1993, p. 33.

[11] This why Ridder talked about "impersonal rights" that guarantee processes (media communication etc.) *Ridder*, loc. cit., p. 85

[12] For the changing role of the relationship between public and private cf. *Gralf-Peter Calliess & Peer Zumbansen*, Rough Consensus and Running Code, Oxford: Hart 2012; Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, Minnesota Law Review 89 (2004), S. 382.

[13] *Joanne Scott & Susan P. Sturm*, Courts as Catalysts: Rethinking the Judicial Role in New Governance, in Columbia Journal of European Law (13) 2007, p. 565.

[14] *Karl-Heinz Ladeur*, Wandel der Demonstrationsfreiheit — neue Formen der Aktionskunst, to appear in: Der Staat 54 (2015).

[15] *Yaron Ezrahi*, The Descent of Icarus: Science and the Transformation of Contemporary Democracy, Cambridge, MA: Harvard University Press 1990, p. 186.

[16] Cf. generally *Thomas Vesting*, Rechtstheorie, Munich: C. H. Beck 2007, No. 188.

[17] *Ralf Michaels & Joost Pauwelyn*, Conflict of Norms or Conflict of Laws? Diferent Techniques in the Fragmentation of Public International Law, 22 Duke Journal of Comparative & International Law 2012, p. 349; *Christian Joerges*, Kollisionsrecht als verfassungsrechtliche Form, in: Nicole Deitelhoff/Jens Steffek (eds.), Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter, Frankfurt a. M./New York 2009: Campus, p. 309.

[18] *Benedict Kingsbury, Nico Krisch & Richard B. Stewart*, The Emergence of Global Administrative Law, Law and Contemporary Problems 68 (2005), p. 15; *Carol Harlow*, Global Administrative Law: The Quest for Principles and Values, European Journal of International Law 17 (2006), p. 187; *Jean-Bernard Auby*, La globalisation — Le droit et l'Etat, 2nd ed., Paris: LGDJ 2010; vgl. auch *Armin von Bogdandy, Philipp Dann & Matthias Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities, German Law Journal 9 (2008), p. 1375; = www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_13751400_Articles_von%20Bogdandy_Dann_Goldmann.pdf.

[19] *Nico Krisch*, Beyond Constitutionalism: The Pluralist Structure of Postnational Law, Oxford: Oxford University Press 2010, p. 226, 283.

[20] Cf. for the Phenomenology of of different types of "norm collision" *Marcelo Neves*, Transconstitutionalism, Oxford: Hart 2012.

[21] *Gunther Teubner*, Constitutional Fragments: Societal Constitutionalism and Globalization, Oxford: Oxford University Presss 2012; for a critique cf. *Karl-Heinz Ladeur*, Die Evolution des Rechts und die Möglichkeit eines globalen Rechts jenseits des Staates, Ancilla iuris, 11.10.2012 — http://www.anci.ch/karl-heinz_ladeur

[22] *Dean Spielmann*, Current Legal Problems Lecture: Whither the Margin of Appreciation? http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf — Dean Spielmann is the president of the CEDH.

[23] ECHR , Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2008, 1217 — the Norwegian "State Church" system was regarded as incompatible with the Convention.

[24] ECHR, NVwZ 2011, 737 ("Lautsi" — crucifix in a Italian School) — this judgment gives more leeway to Member Staates with respect to cultural traditions; cf. with reference to an earlier decision *Ino Augsberg & Kai Engelbrecht*, Staatlicher Gebrauch religiöser Symbole im Lichte der uropäischen Menschenrechtskonvention, JZ 2010, 450.

[25] Cf. for example the differing judgments of the ECHR, Neue Juristische Wochenschrift (NJW) 2004, 2647, and the German FCC, BVerfG, NJW 2012, 756; NJW 2011, 740; BVerfGE 120, 180; Zeitschrift für Urheber- und Medienrecht-Rechtsprechungsdienst (ZUM-RD 2007), 1; NJW 2005, 1857; NJW 2003, 3262, on the conflict between personal rights including privacy on the one hand and the role oft he freedom of the press on the other hand.

[26] *Lobel*, loc. cit; *Calliess & Zumbansen*, loc. cit.

[27] *Scott & Sturm*, loc. cit.

[28] The ECHR has even problems in establishing a certain consistency in fields of its practice that raise the above-mentioned questions, cf. for example two later judgments that differ considerably from the judgment in the case of "Caroline von Monaco/Hannover I"; ECHR, NJW 2012, 1053 (Springer Publishing); ECHR, NJW 2012, 1058 ("Caroline II").

[29] *Teubner*, loc. cit., p. 45; *Andreas Fischer-Lescano*, Globalverfassung. Die Geltungsbegründung der Menschenrechte, Weilerswist: Velbrück 2005, p. 247 et seq.

[30] Cf. now the overview of different trends of "constitucionalization" *Lars Viellechner*, Verfassung als Chiffre: Zur Konvergenz von konstitutionalistischen und pluralistischen Perspektiven auf die Globalisierung des Rechts, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 75 (2015), p. 231.

[31] *David Sciulli*, Theory of Societal Constitutionalism. Foundations of a Non-Marxist Critical Theory, Cambridge: Cambridge University Press 2010, *Teubner*, loc. cit.

[32] *Teubner*, loc. cit.

[33] *Paul Schiff Berman*, Global Legal Pluralism: A Jurisprudence Beyond Borders, Cambridge: Cambridge University Press 2012, p. 164.

[34] *Ann-Marie Slaugter*, A New World Order, Princeton: Princeton University Press 2004, p. 12.

[35] *Teubner*, loc. cit.

[36] *Teubner*, loc. cit.; also *Krisch*, loc. cit.

[37] Cf. *Henri Atlan*, Entre le cristal et la fumée, Paris: Seuil 1979.

[38] *Teubner*, loc. cit., p. 77.

[39] *H. L. A. Hart*, The Law as the Union of Primary and Secondary Rules, Oxford: Oxford University Press 1961, p. 76.

[40] *Teubner*, loc. cit., p. 74.

[41] *Teubner*, loc. cit., p. 74.

[42] *Fischer-Lescano*, loc. cit., p. 67 et seq.

[43] *Atlan*, loc. cit.

[44] *Charles F. Sabel & William H. Simon*, Contextualizing Regimes. Institutionalization as a Response to the Limits of Interpretation and Policy Engineering, Michigan Law Review 110 (2012), p. 1265; *Matthew C. Jennejohn*, Innovation, Collaboration, and Contract Design, Columbia Law and Economics Working Paper No. 319, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014420

[45] *Jutta Brunnée & Stephen J. Toope*, International Law and Constructivism, in Columbia Journal of Transnational Law 39 (2000), p. 19.