DISCUSSION

Hybrid Constitutionalism, Fundamental Rights and the State

A Response to Gunther Teubner

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1 Introduction

In his extremely rich and inspiring contribution to this special issue, *Transnational Fundamental Rights: Horizontal Effect?*, Gunther Teubner demonstrates how the emergence of fundamental rights in the transnational sphere can be taken seriously without resorting to the default 'state-and-politics-centricity' of most constitutional and fundamental rights theories.[1] Today, severe human rights problems arise outside the limits of nation-state jurisdiction and beyond the realm of institutionalised politics, i.e. in the 'private' sectors of global society. Whether we're talking about human organ trade, the global health effects of radioactive waste, or the TRIPS agreement restricting poor people's access to lifesaving medicines, the fundamental rights issues at stake cannot properly be conceived of in terms of state-centred constitutional theory. The normative arsenal of classical constitutionalism is historically tailored to the problems of states (imposing shackles on repressive political power by the law); a simple transfer of ideas and mechanisms developed for the nation state to the global level can only have limited success. There is no equivalent of the state to be found at the world level (and this will not change for the foreseeable future), so more fundamental changes to the concept of constitution are required.

It is exactly this challenge that Teubner has set out for himself: how can constitutionalism – which was born in the nation-states of Europe and North-America – survive by transforming itself under the essentially different conditions of a highly fragmented world society? Over the last decennia, Teubner's work has constructed the main building-blocks for such a theory of global societal constitutionalism, which is no longer premised on nation states or on the cosmopolitan

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1   For a systematic critique of state-centred constitutional theory, see Gunther Teubner, "Constitutionalising Polycontexturality," *Social and Legal Studies*, 20 (2011) 2 : 210-229.

hope of a unified global constitution.[2] Taking his cue from sociological theories of societal differentiation, Teubner provides us with an alternative version of constitutionalism, which focuses on the self-constitutionalisation of global, self-referential systems such as the economy, science, health, mass media, transport, the military, and so forth. Through their own operative closure these global functional systems not only create their respective global universes of communication – each system observing the world through its own codes and pursuing its own rationality; increasingly, these global systems have also started regulating themselves by incrementally developing self-constitutional norms. Almost fifteen years ago, in his paper on 'Global Bukinowa'[3] Teubner described the global *lex mercatoria*, the transnational law regulating world-wide economic transactions which developed independently from national states or official international politics, as an example of a more general phenomenon. Although the economy is still the most advanced and successful exemplar of a global law without a state, it is merely one of the various sectors of world society that are to a large extent regulating themselves (including their relations with the external environment), making use of their own sources of law. Good examples are the emerging *lex digitalis*, the global law of the internet, or the *lex constructionis*, the worldwide professional engineering codes for regulating transnational construction projects.[4] In these highly developed cases, system-specific rule-making can over time harden into genuine 'auto-constitutionalisation', Teubner argues, meaning that the auto-referential regimes not only create highly specialised primary norms but also produce their own organisational and procedural norms on the establishment and exercise of decision-making as well as the definition of the limits of their own operations with respect to other social systems and the individuals in their environments.[5]

2   See Gunther Teubner, "'Global Bukowina': Legal pluralism in the world society," in *Global Law Without a State*, ed. Gunther Teubner (Aldershot: Dartmouth Publishing, 1996), 3–28; Gunther Teubner, "Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors?" in *Globalization and Public Governance*, ed. Karl-Heinz Ladeur (Oxford: Oxford University Press, 2003), 71-87; Gunther Teubner, "Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?", in *Transnational Governance and Constitutionalism*, ed. Christain Joerges, Inger-Johanne Sand and Gunther Teubner (Oxford: Hart Publishing, 2004), 3-28; Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Law Journal of International Law* 25 (2004): 999–1045; Gunther Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors," *Modern Law Review* 69 (2006): 327-346; Gunther Teubner, "Fragmented Foundations: Societal Constitutionalism Beyond the Nation State," in *The Twilight of Constitutionalism?* ed. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), 327-341; Gunther Teubner, "Constitutionalising Polycontexturality", note 1; Gunther Teubner, "Societal Constitutionalism without Politics? A Rejoinder" *Social and Legal Studies* 20 (2): 248-252.
3   Teubner, "'Global Bukowina': Legal Pluralism in the World Society", note 2.
4   *Ibid*; Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", note 2: 1034.
5   *Ibid*, 1015-1016.

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In his current paper on transnational fundamental rights Teubner outlines the main implications of his global societal constitutionalism for fundamental rights, also looking at the challenges ahead. By starting from the idea of a worldwide societal differentiation he puts old questions regarding fundamental rights in the entirely new light of functional differentiation and global fragmentation. From this vantage point, the position and role of human rights in contemporary world society looks quite different than often imagined. The current significance of human rights is not only concerned with the protection of individuals against the misuses of political power but is part and parcel of a broader problem of protecting global societal differentiation and offsetting the external, negative consequences of globalised function systems for society at large, the environment and individual persons.

Let me make clear right away, when assessing Teubner's work on fundamental rights, that I share his critique on the legalistic concept of basic rights as defensive rights of individuals against state power. From the point of view of systems theory, the historic role of basic rights is not exhausted by protecting individual legal positions, but primarily consists in securing the autonomy of social spheres against the colonising tendencies of other social systems, including (but not solely) the political system. Hence I also applaud his attempt to loosen the old bond between constitutionalism and politics as it has been traditionally secured in the form of the state. Over the last decennia, Teubner's work has been at the forefront in developing an inspiring sociological theory of constitutionalism adequate to the task of describing the enormous complexity and fragmentation of world society. Yet the enthusiasm for trading in old political constitutionalism for the new societal constitutionalism should not lead us to throwing away the baby – i.e. the state – with the bath water (excuse me for the truism). This contribution will therefore discuss Teubner's paper not only by identifying some key features underlying the move from political to societal constitutionalism but also by pointing to some 'statal issues' which remain underexposed in Teubner's views on fundamental rights.[6] I first ask why the idea of a global societal constitutionalism 'beyond the state-and-politics' might be viewed as a significant and controversial, but nonetheless justified innovation. In the second part I discuss what Teubner calls 'the inclusionary effects of fundamental rights', which will require me to engage in some detail with the crucial mediating role of the state in guaranteeing inclusion or access rights on the global level. In my view, Teubner underplays the role of the state in the inclusion problematic, and in a way presupposes well-functioning states in the background.

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6   See also the different responses to Teubner's paper, 'Constitutionalising Polycontexturality', in *Social and Legal Studies*, 2 (2011).

2 Fundamental Rights: From National Political Constitutionalism to Global Societal Constitutionalism

Let me start by quickly outlining the main contours of Teubner's view of global societal constitutionalism, with fundamental rights being one of the most important components of constitutions.

In their modern sense, fundamental rights, as enshrined for instance in the American and French constitutions, emerged with the functional differentiation of society and the autonomisation of different social systems or 'matrixes' such as politics, economy, science, and religion.[7] Initially, the role of basic rights was to protect the precarious results of social differentiation against the colonising tendencies of state power, which was the first to liberate itself from the tutelage of the pre-modern religious-stratified order. Via constitutionally guaranteed rights and freedoms, the political system defined the area of competence of state power, on the one hand, and, on the other, demarcated it from all other, non-political social spheres, thereby preventing a politicisation of the differentiated social order. This historic beginning is still visible in mainstream legal theory, which sees fundamental rights as 'walls against the state', as shields established solely to protect vulnerable individuals from arbitrary imprisonment, intrusions on religious freedom, usurpation of property and other forms of governmental abuse. However, Teubner stresses again and again that a theory of modern fundamental rights should not get caught up in an obsession with (state) power, thereby overlooking the endangering effects of other autonomous media of communication, which, over time, have developed the same expansive dynamics. In fact, the slow but cumulative development of different types of rights accounts for the gradual, evolutionary character of the process of autonomisation of different societal spheres. Early rights such as the right to religious freedom and freedom of conscience are indeed responses to the differentiation of politics and religion (as established after the European religious wars in the treaty of Westphalia (1648)). Yet, the later right to engage in a work activity of one's choosing only emerged later with the full differentiation of the household/family and the economy, and the concomitant dismantlement of the rigid guild systems and corporatist protections. To be sure, the obverse of this right was the rapid commodification of workers in the capitalist labour market.[8] In the same way, the right to education only emerged after mass educational systems were institutionalised and differentiated from the family, state and church, and so forth.[9] The different fundamental rights then work analogously with the early political rights, delineating the

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7   See Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, (Berlin: Duncker & Humblot, 1965). See also Gert Verschraegen, "Human Rights and Modern Society: A Sociological Analysis from the Point of View of Systems Theory," *Journal of Law and Society*, 29 (2002) 2: 258-281.
8   See Karl Polanyi, *The Great Transformation*, (Boston: Beacon Press, 1957).
9   See Neil Smelser, "The Contest between Family and Schooling in Nineteenth-Century Britain," in *Differentiation Theory and Social Change*, ed. Jeffrey C. Alexander and Paul Colomy, (New York: Columbia University Press, 1990), 165-186.

autonomous operational sphere of a function system as well as protecting individuals and other societal systems against the expansive dynamics of communicative media (not only power, but also money, religion, and so forth). The fundamental right of ownership, for instance, ensures the autonomy of the economic system against intrusions of various other systems, such as politics, religion or the family; at the same time it makes economic operations dependent upon the decision to buy or not to buy.

Whereas historically the political subsystem had the biggest propensity for simplifying the differentiated social order according to its own political goals (just think of political totalitarianism in the 20th century), today the subsystems of the economy, religion, science or technology carry potentially as many risks.[10] The theory of fundamental rights as a protective device to guarantee functional differentiation applies perfectly, for instance, to recent manifestations of religiously motivated and politically ambitious movements, which envisage the totalisation of society and hence create 'boundary conflicts' between science and religion (e.g. the religiously motivated refusal of scientific theories), medicine and religion (e.g. the religiously motivated refusal of blood transfusions), education and religion (e.g. tensions about the curricula of Muslim or Christian schools) or politics and religion (e.g. the emergence of religiously fundamentalist political parties).[11] Accordingly, fundamental rights are required to set up variable demarcations insulating the expansive dynamics of the religious system vis-à-vis other social systems.

Although the sociological problematic of fundamental rights has been anchored in functional differentiation for some centuries now, its full implications have only recently become visible with the globalisation of the last decennia. According to Teubner, the classical, political model of fundamental rights, which is oriented towards politics and the state, has long concealed the fact of constitutional pluralism, with each autonomous sphere developing their own system-specific rights.[12] For a long time, states tried to contain the divergent autonomous function systems under the roof of one political constitution, attempting to counter the adverse effects of functional differentiation. By establishing social rights, for instance, modern welfare states tried to contain the logic of the economic system and counter it by national corporatist systems. More generally, in each national context systems such as politics, law, education and science are structurally coupled to each other in many different ways, which creates a context where different systems develop strong limitations to each other's autonomy. The territorial construction of the nation-state also allowed functional systems to develop in a restricted national context and to diffuse slowly on a global level. The path to modern global and universal science, for instance, has lead via an intermediate

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10   Teubner, "Transnational Fundamental Rights", in this volume, 208.
11   See Karl-Heinz Ladeur, "The Myth of the Neutral State and the Individualization of Religion: The Relationship Between State and Religion in the Face of Fundamentalism", *Cardozo Law Review*, 30 (2009): 2445-2471.
12   See Teubner, "Constitutionalising Polycontexturality", note 1: 212.

phase of strong *nationalisation* of science; the institutional infrastructures of the modern system of science, such as universities, disciplines, etc. were first realised in a national setting (e.g. Germany), and were later taken over in other countries and finally diffused on a global level.[13]

With the emergence of globalisation different function systems quite rapidly started liberating themselves from the tutelage of the territorial state. Contemporary systems theory reflects this evolution by arguing that modern, functionally differentiated society cannot possibly be seen as an organic, territorial entity.[14] Functionally specialised systems have a universal and global reach, and cannot be contained in a territorial form. Territorial forms of internal differentiation, in the form of nation-state subsystems, emerged as stabilising elements in early modernity, but from the point of view of global function systems they have increasingly become obstacles to further evolution. Consequently, it is only in globalised society that the full force of societal constitutionalism has become visible. Globalisation, or so Teubner asserts, has destroyed 'the latency of the problem societal constitutionalism'. He adds that:

> '[i]n light of the much weaker draw of transnational politics, compared to that of the nation-state, the acute constitutional problems of other global social sectors appear now in a much harsher light. On what legitimating basis do transnational regimes regulate whole spheres of social activities, right down to the detail of daily life? What are the limits of global capital markets in their impact on the real economy and other social sectors? Can fundamental rights and human rights claim validity in the state-free spheres of the global economy, particularly as against transnational organisations?'[15]

At the global, transnational level, the problem of societal constitutionalism and fundamental rights as a protective, limiting institution becomes fully visible because it has become much more difficult to count on the primacy of politics and political constitutionalism. There is no equivalent for the state at the global level, and despite attempts to replace the state with different actors from the global political community, Teubner argues, we will have to account for the fact that the constitutionalisation of global autonomous matrixes can only take place through 'auto-constitutionalisation'. Self-limitations of the various global matrixes can only work if they are developed within and not outside the logic specific to a subsystem. Teubner sees a beginning of such global constitutionalisation at work in the different private global regimes, where concrete standards of fundamental rights are being developed incrementally. Through various, interconnected channels such as arbitral tribunals of official regulatory institutions (ICANN, WIPO, WTO, etc.), contracts between private actors, or through public pressure of

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13   Rudolf Stichweh, "Science in the System of World Society," *Social Science Information*, 35 (1996): 327-340.
14   Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt: Suhrkamp, 1997).
15   Teubner, "Constitutionalising Polycontexturality", note 1: 212.

NGO's and media, fundamental rights are being positivised in transnational regimes, beyond and above existing international politics and law.

These fundamental rights are Janus-faced, analogously to the fundamental rights in the context of the nation-state. On the one hand they have to enable the autonomisation of each function system, enabling free and equal access for everybody. On the other hand, they have to set boundaries to the totalising tendencies of autonomised communicative media. Given the limited space of this contribution, I will limit myself here to a discussion of the 'inclusive function' of fundamental rights.

3   Human Rights as Inclusion Rights

Fundamental freedoms and human rights are primarily protective rights: they protect the individual sphere of freedom against excessive claims from society, not only against political power but against any social system with totalising tendencies. It would however be one-sided to reduce human rights to protective, negative rights, as they also enable the individual to participate in society. Different rights such as the freedom of opinion and expression, the right to freedom of peaceful assembly and association and the right to political participation, aim to guarantee the 'inclusion' of the individual in the different communicative subsystems of society. Over the last centuries, this inclusion was co-regulated by the national political constitution of the nation-state (witness the welfare state promising to guarantee equal opportunities of inclusion for all of its citizens in different function systems like education, health care, and so forth). Yet with the emergence of truly transnational arenas and problems, function systems should be able to develop fundamental rules regarding system-specific access conditions without recourse to the national level. In the absence of a global state, Teubner argues, it's up to the autonomous matrices themselves to formulate system-specific conditions in such a way that free and equal inclusion is permitted, and that private third parties within the autonomous matrixes (like internet providers, health insurers, universities, etc.) 'can no longer dispose of access (...) by the overall population'.[16]

There is obviously little to be said against such a system-specific determination of the rules of access. In principle, inclusion in a function system is only related to functional and role specific inequalities. Only differences in the health situation of the patients can count in deciding who gets a kidney transplant; only inequalities in test scores, school grades, and so on should be considered meaningful in deciding who is admitted to selective colleges and schools. Yet what we might lose sight of if we trade in the 'old' political question about inclusion for its 'new' polycontextural version is that the old institution of political membership in the state (citizenship) still plays a crucial role in mediating the balance between inclusion and exclusion in global society. As a general rule, unfortunate individuals who do

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16   See Teubner, "Transnational Fundamental Rights", note 10, 205.

not live under a government capable of taxing and upholding the rule of law have few legal rights. It hardly needs mentioning that the majority of human rights violations occur in weak or failed states, largely incapable of delivering effective remedies for the protection of citizens. For instance, more than a billion people worldwide are seriously malnourished because their governments cannot provide an enabling environment for their citizens to feed themselves, proactively engage in activities intended to strengthen their access to resources to ensure their food security (e.g. engage in land reform, agricultural education), or function as a provider of last resort in emergency cases. In fact, many weak states never succeeded in establishing an effective monopoly over violence on their territory and are basically unregulated;[17] the economy is declining or stagnant; crime is rampant; and armed groups often operate within the state's boundaries but outside the control of the government (e.g. Pakistan, Somalia, Congo, Niger, and so forth). The legal enforcement of rights is also inefficient in such regions, as this presupposes a certain degree of political stability for the proper development of an independent and credible judiciary, a population that has access to and can afford to pay for legal services, as well as a government that complies with court orders, and so forth.

Overall, it is striking that the quality of rights, safety and services and the scope of freedoms and opportunities enjoyed by those in affluent polities are far greater, *ceteris paribus*, than the opportunities of those born in poorer or less stable countries. Even in a centreless world society, where heterarchic, globally operating systems, networks and organisations have created multilayered and overlapping forms of membership and inclusion, the old legal distinction between citizens and strangers remains of major importance.

4   The Role of the State in Global Inclusion and Exclusion

In my view, this requires that we engage with the crucial, mediating role of the state in the dynamics of inclusion and exclusion in world society, and assign it a more important place than Teubner's theory allows for. Although states are today profoundly altered by the effects of global autonomous function systems (polycentric globalisation), they remain among the critical building blocks of world society. World maps still mark all territory inhabited by people as belonging to mutually exclusive territories; in other words, the segmentary differentiation of world politics into states is still without a clear alternative.[18] National membership – mostly expressed in the over-elaborated notion of 'citizenship' – does much more than define the formal boundaries of political membership. It also closely corresponds to strikingly different prospects for the security, well-being and agency of individuals. Yet, although citizenship distributes rights and opportunities in a vastly unequal manner, 'gaining access to citizenship's goods is clearly

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17   See Robert H. Jackson, *Quasi-states: Sovereignty, International Relations and the Third World*, (Cambridge: Cambridge University Press, 1990).
18   Niklas Luhmann, *Die Politik der Gesellschaft*, (Frankfurt: Suhrkamp, 2000), 222 -223.

not open to everyone who voluntarily consents to membership or is in dire need of its associated benefits'.[19] While the international law system acknowledges a human right to emigration, there is no right to immigration or the correlative duty to award citizenship to foreigners demanding for it.[20] In fact, the vast majority of the global population has no way to acquire national membership, except by circumstances of birth (parentage in the case of *jus sanguinis*, or territorial location at time of birth in the case of *jus soli*). In other words, political membership is assigned simply by ascription or birthright. This 'birthright lottery' is probably the most crucial dynamic in drawing the lines between the included and excluded – the emerging metacode of the 21st century, according to the late Luhmann – and largely explains the strikingly different prospects of individuals to have access to basic subsistence services such as clean water and shelter, basic education or a decent level of health care.[21]

From the point of view of systems theory this means that the criteria that are used for the definition of state membership, as well as the effects of the resulting (non-)membership, are highly peculiar in comparison with the way individuals are included in other functional subsystems and their constitutive organisations.[22] As a result, any theory of fundamental rights in modern society must account more systematically for the crucial and specific role of state membership or citizenship.

Firstly, it is quite unusual for a modern organisation to have mainly ascribed members. According to *jus sanguinis*, for instance, membership is automatically ascribed to someone because his parents already were members. Circumstances of birth have been firmly rejected in most domains of society as the core determinant of entitlement to full and equal membership (except in the domain of the family), yet it still plays a crucial role in the assignment of political membership. This automatic, ineluctable aspect of political inclusion makes it very different from individual participation in, for instance, a commercial organisation, the internet, a hospital or a sports club. With the exception of members of western liberal democracies – in particular European member states – and a minority of mobile professionals in less developed states, most individuals in world society are 'captives' of their nation states. National citizenship, which is in daily practice a crucial condition for the enforcement of individual rights, entails a territorial relationship between the individual, rights and the state. Only Danish nationals are entitled to the rights and privileges that the Danish state affords. Citizenship operates here as an instrument of closure vis-à-vis the outside: being a citizen, at

19   Ayelet Shachar, *The Birthright Lottery. Citizenship and Global Inequality*, (Cambridge, MA: Harvard University Press, 2009), 12.
20   Emma Haddad, *The Refugee in International Society. Between Sovereigns*, (Cambridge: Cambridge University Press, 2008).
21   Shachar, *Birthright Lottery*, note 19.
22   Rudi Laermans, "Framing the Sovereignty of the 'Democratic State' Sociologically: Reflections on the Political System, Contemporary Populism and Democracy," in *Globalization and the State: Sociological Perspectives on the State of the State*, ed. Willem Schinkel, (London: Palgrave Macmillan, 2009), 83-105.

least of developed democratic countries, entails a wide range of civic, political and social rights, yet the space of national citizenship is not easy to enter for outsiders, at least on a permanent basis and with full access to rights. While European countries have considerably relaxed entrance and exit options within the European Union,[23] the bulk of the world population has few options when it comes to the right to enter and remain. Those who are unfortunate to be born in Pakistan, Mali or Somalia are usually captives of their states (or more accurately: non-states) and have very few rights to exercise. In weak or failed states the ruling elite uses the constitution in a merely symbolic way – as Marcelo Neves puts it – so only a minority of 'over-integrated individuals has access to the products and benefits of social systems, without being simultaneously dependent on their constraints and rules', while the majority of the population is 'under-integrated' and largely excluded from access to political power, the labour market, judicial protection, education, medical care, and so forth.[24]

In short, despite predictions about national citizenship losing ground to a more universal and flexible model of political membership, the protection of individuals still relies heavily on domestic (and increasingly regional) regimes, which have not abolished the distinction between the citizen and the alien, especially when it comes to the definition of membership boundaries themselves and the regulation of cross-border mobility.[25] Furthermore, we are witnessing an unmistakable evolution towards an ever tighter and harsher regulation of territorial boundaries throughout the world. This is also evident in the otherwise optimistic story of European citizenship, where the opening of internal borders within Europe has been consistent with a closing of the external borders to non-EU nationals.

Secondly – and as indicated heretofore – political inclusion also differs from other forms of inclusion as it is the principal ticket for inclusion into the other societal spheres.[26] Because rights and opportunities are ordinarily distributed and enforced by the state, it plays a crucial mediating role in the inclusion and exclusion of individuals at the global level. Obviously, this is less visible when looking at welfare states, which aim to guarantee for all their citizens equal chances of inclusion in all important function systems ('social rights'), mainly by insulating or differentiating labour market inclusion from other forms of inclusion (thus ensuring that one's standing in the labour market remains relatively independent from inclusion in other social systems such as education or health care).[27] However, most individuals born in weak, unstable or dysfunctional states are to a

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23   See Maurizio Ferrera, *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection*, (Oxford: Oxford University Press, 2005).
24   See Marcelo Neves, "From the Autopoiesis to the Allopoiesis of Law", *Journal of Law and Society*, 28 (2001) 2: 242-264, at 260.
25   Shachar, *Birthright Lottery*, note 19: 62-63.
26   Laermans, *Framing the sovereignty of the democratic state*, note 22: 91.
27   See also Gert Verschraegen, "Re-embedding Capitalism? Reflections on the Role of Welfare in the Construction of European Societies," in *Social Cohesion in Europe and the Americas. Cohesión social en Europa y las Américas. Power, Time and Space. Poder, tiempo y espacio*, ed. Harlan Koff (Bruxelles: Peter Lang, 2009), 145-168.

large extent barred from having access to various societal subsystems (education, health care, politics, labour market, and so forth) precisely because of their political membership. This can endanger their bodies and minds by depriving them of basic subsistence services such as clean water and shelter, basic education or a decent level of health care. Let me note that states which are incapable of exercising effective control within the borders of their own polity are not an exception. Although failing and failed states – in which the legitimate monopoly over the means of violence is completely lacking – comprise only a small percentage of the world political system, most of the developing and transition states contain 'areas of limited statehood', including those parts of a country in which governments lack the ability to implement and enforce rules and decisions, at least temporarily. Mexico, for instance, enjoys mostly consolidated statehood; but the central authorities are too weak to enforce human rights and the rule of law in large parts of the territory.[28]

In sum, the ability of the state to enforce collectively binding institutions, ultimately through coercive means (or the threat of coercion), still constitutes a crucial precondition for including persons within different global function systems and for guaranteeing access to social institutions such as the labour market, the health system and the internet. There is consequently no contradiction between strong states and global functional differentiation. On the contrary: states which look after the rights and interests of their citizens will have to connect to worldwide evolutions;[29] they can only protect citizens by enabling them to plug into the global communicative matrixes, that is, by increasing their dependence on global markets, science, schooling, medicine and so forth, rather than by 're-nationalising' these issues. John Meyer has described how clues and models for appropriate state behaviour are signaled and diffused by so-called 'world models', which are developed by international organisations, more powerful states, as well as global epistemic communities.[30]

In this sense Teubner is right in concluding that re-nationalisation and re-politicisation will not work to counteract the current crisis of constitutionalism.[31] Yet the absence of stable states in significant regions of the world raises the question whether constitutional norms within particular global social spheres such as the internet, the economy or the field of health care can provide enough counterweight when state constitutional norms are lacking. On this issue, Niklas Luhmann writes:

> 'One can doubt whether the inherited definitions of the state can still be applied in this situation. Nevertheless all territories are forced to take over

28   Tanja A. Börzel and Thomas Risse, "Governance Without a State: Can it Work?", in *Regulation and Governance*, 4 (2010): 113-134, at 119.
29   Luhmann, Politik der Gesellschaft, note 18: 224.
30   John Meyer, et al. "World Society and the Nation-State", *American Journal of Sociology*, 103 (2010) 1: 144-81.
31   Teubner, "Constitutionalising Polycontexturality", note 1.

the segmentary differentiation of the political system. There are no regions that participate in politics (and there are no regions that can prevent such participation), without taking the form of a "sovereign" state. That this state of affairs is not a guarantee for stability any more, becomes more and more the central problem of the new international order (as one calls it optimistically). A state has to be more than a simple "address" in international communication. Political effectiveness and internal jurisdiction are necessary conditions. One can hence not exclude that the global political system will be necessitated to serve as a guarantor of statehood, without however interfering in domestic politics. However, suited forms of intervention still have to be developed.'[32]

5   Functional Differentiation and the Need for a Hybrid Constitutionalism

I believe Teubner's constitutionalism provides important clues as to how new constitutional architectures, which have developed outside the traditional state framework and beyond the sphere of international politics/law, can help in guaranteeing inclusion and (hopefully) stabilising regions. Yet it seems unlikely that purely informal constitutionality – as for instance the effects of transnational civil litigation, undertaken by private actors and NGO's seeking to hold multinational corporations to account in cases of human rights violations – will be significant enough to secure access rights (to medication, education, the internet, etc.) and prevent further dangers to the integrity of institutions and persons in regions in which statehood is absent or limited. Will initiatives of private self-regulation persist if the credible threat of legal intervention by the state ceases to exist? Will multinational companies, for instance, engage in constitutional law-making if there are no national governments or international institutions powerful enough to cast a credible 'shadow of hierarchy'?[33]

In an earlier response to questions about the role of politics in societal constitutionalism, Teubner made clear that 'social systems have the best constitutional chances where they can develop their own constitutions in the shadow of institutionalised politics (…) Societal constitutionalism always depends on law; law for its part, depends on the physical monopoly that politics has over power.'[34] This seems to imply that societal constitutionalism presupposes functioning states – or whatever effective political form is available to monopolise force and guarantee internal jurisdiction (external actors, such as international organisations or foreign governments, can provide a useful alternative). It also implies that in the peripheral parts of world society – where human rights problems are most salient – global societal constitutionalism has to be complemented by more traditional 'state-building' efforts, involving, for instance, international peacekeeping forces to ensure that truces stick, multilateral assistance to build national institu-

32   Luhmann, *Politik der Gesellschaft*, note 18: 225-226.
33   See Börzel and Risse, "Governance Without a State", note 28: 118
34   Teubner, "Societal Constitutionalism Without Politics? A Rejoinder", note 2: 249.

tions, like police forces, courts and basic welfare services and direct governance assistance or even transitional administration.[35] In my view, this does not mean that the political constitution of the state enjoys primacy over other social constitutions, and that it should regulate the fundamental structures of these social sub-spheres;[36] it only points to the structural precondition of having effective political forms in place. It also points to the fact that the functional systems of law and politics are still characterised by higher levels of territorial structural couplings than functional systems such as the economy, science, religion, mass media or art, which operate globally and are only loosely coupled to territory.

Under which conditions, then, do social systems have the best chances to develop their own constitutions? As Teubner himself stresses, what is generally required – and not only in peripheral world regions – is a '*hybrid constitutionalism*', combining public and private law-making and involving 'the exercise of state power, the enforcement of legal rules' as well as 'the strong influence of social countervailing power from other spheres – media, public discussion, spontaneous protest, intellectuals, social movements, NGOs, trade unions' which 'must apply such massive external pressure to the expansionist function systems that their self-limitations become truly effective'.[37] A case in point is the so-called 'certification revolution'. In order to regulate producers or suppliers in countries with limited or no social regulations in the field of human rights, labour or the environment, an array of global private standardisation initiatives has developed rapidly which aim at imposing voluntary obligations on producers concerning, for instance, child labour or environmental protection.[38] When producers meet these standards they receive a certificate or a label that is used in external communication intended for consumers or other companies. The human rights or environmental standards can be set and/or enforced by companies, sector organisations or an independent organisation. Some interesting observations can be made in light of the foregoing discussion. First, there is a sort of 'constitutionalisation' emerging in this field in the sense that 'there is an increasing need for the independent certification of the "certifiers" by a multilateral organisation or by a private organisation'.[39] This proto-constitutionalisation takes place within the private sector itself, which has developed initiatives to distinguish effective certification systems from other certification systems. At the same time there is increasing recognition from public authorities and multilateral organisations, which are starting to use private certification initiatives by including them, for instance, as mandatory requirements in legislation (e.g. Bolivia's new forest law requires private forest owners or conces-

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35   See Stephen Krasner, "Sharing Sovereignty. New Institutions for Collapsed and Failing States", *International Security* 29 (2004), 2: 85-120.
36   Teubner, "Societal Constitutionalism Without Politics? A Rejoinder", note 2, 248.
37   Teubner, "Constitutionalising Polycontexturality", note 1: 225.
38   See Tim Bartley, "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions, *American Journal of Sociology*, 113 (2007) 2: 297-351; Axel Marx, "Global Governance and the Certification Revolution," in *Handbook of the Politics of Regulation*, ed. David Levi-Faur (Cheltenham: Edward Elgar, 2011).
39   *Ibid*.

sion holders to obtain certificates). Secondly, we can also observe that certification has very little success in countries with limited statehood (where the needs are probably the highest) because there are significant costs involved in fulfilling the standards required for obtaining certificates; for producers (especially the smaller ones) in countries with little infrastructure and legal enforcement, these costs are too risky to bear.[40] This again underlines that societal constitutionalism operates most effectively 'in the shadow of institutionalised politics'. If states are not capable of adopting and enforcing collectively binding decisions, constitutional self-regulation will be difficult. It might be true that consumers, media and international NGOs which care about human rights and environmental standards in areas of limited statehood will use regulation and market mechanisms to induce firms to comply with the norms. But the problem remains the following: who enforces fundamental rights law in the absence of an effective state?

If areas of limited statehood are not to be doomed, however, we have to keep looking for alternatives or functional equivalents to the 'shadow of institutionalised politics'.[41] Externally generated shadows of hierarchies by international organisations as well as market pressures, media publicity, NGO pressure, community norms or informally agreed standards of fundamental rights can under certain circumstances substitute for a lacking shadow of hierarchy in areas of limited statehood. Although these functional equivalents will seldom be as effective as government in areas of consolidated statehood, they are at times the only available regulation that exists. Moreover, as Teubner seems to suggest, when combined in hybrid forms these functional equivalents can compensate for some of their individual weaknesses, such as ensuring compliance.

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40 See Axel Marx and Dieter Cuypers, "Forest Certification as a Global Environmental Governance Tool. What is the Macro-impact of the Forest Stewardship Council", *Regulation and Governance*, 4 (2010): 408-434.

41 See Börzel and Risse, "Governance Without a State", note 28.