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European and Global Economic Constitutionalism

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"The point about having a constitution is that it's a clearly understood word describing the basic rules for the operation of an institution, whether it's a golf club, a political party or in this case a European Union."

UK Foreign Secretary Jack Straw on 27 August 2002

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1. Introduction

The nature, purpose and fate of the EU's economic constitution are an old and much disputed theme. In the last decade the dispute has moreover been complemented by an increased focus on the emergence of global (economic) constitutional structures.

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Whether the ensuring of social embeddedness of economic reproduction is a desirable objective of such constitutional structures is moreover one of the core issues of the dispute.

On this background this paper seeks to explore the underlying structural conditions which have enabled the emergence of such constitutional structures on the basis of macro-sociological and historically informed perspective, just as it seeks to clarify what sort of embeddedness different constitutional structures produces.

The point of departure is the hypothesis that constitutional structures, including the constitutional structures at the European and (tentatively) at the global level, should be understood as reflections of the basic structures (*Tiefenstrukturen*) of society insofar as they reflect the basic forms of social differentiation (stratificatory, territorial and functional) which prevails at a certain time in history. Structural transformation is moreover seen as the decisive reason for the evolutionary change in the function and purpose of constitutional structures. Finally, in a rudimentary manner, the capacity of different constitutional structures to establish normative orders will be touched upon.

2. Constitutions as a Reflection of Societal *Tiefenstrukturen*

Constitutional semantics has changed over time, thereby altering the meaning of the constitutional concept.² Such changes reflect transformations in the basic structure (*Tiefenstrukturen*) of society.³ In an ideal type manner pre-modern Europe can be understood as largely characterised by a stratificatory form of social differentiation in the sense that a key characteristic was the institutionalization of hierarchically ordered differences. The primacy of stratificatory differentiation did not exclude the existence of functionally delineated forms of problem solving through the stabilisation of different roles, situations and interests, but such forms mainly emerged as internal forms of stabilisation within the hierarchically organised stratificatory structures such as the

² Reinhart Koselleck: 'Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung', pp. 365-82 in Reinhart Koselleck: *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und Sozialen Sprache* (Frankfurt am Main, Suhrkamp Verlag, 2006).

³ Niklas Luhmann: Gesellschaftliche Struktur und semantische Tradition, pp. 9 – 71 in Niklas Luhmann: *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft*, Band 1 (Suhrkamp Verlag, Frankfurt am Main, 1980). For a critically analysis of the argument concerning a linear relationship between social structure and semantics see Urs Stäheli: Die Nachträglichkeit der Semantik: Zum Verhältnis von Sozialstruktur und Semantik, *Soziale Systeme. Zeitschrift für Soziologische Theorie*, 4, 2, 1998, pp. 315-340.

nobility, the clergy, traders, craftsmen and peasants.⁴ Thus, functionally differentiated forms mainly played a complementary role. This was also the case for the distinction between centre and periphery which served as a form for the internal stabilisation of the higher strata, which enabled them to interact with equals within the larger European space.⁵

Thus, within the discipline of (legal) history it has long been commonly accepted that the constitutional concept in pre-modern times was not referring to state constitutions. In the absence of states the pre-modern constitutional concept instead referred to a multiplicity of forms through which societal structures were stabilised and framed over time through law.⁶ In pre-modern Europe it was thus possible to observe a multitude of constitutions, e.g. in the form of constitutions of trade regimes (e.g. The Hanseatic League), church constitutions, cities and so forth.⁷ Thus, pre-modern constitutions, including those regulating economic interaction, were societal constitutions for the simple reason that states in the modern sense did not exist. On this background the explicit modern attempt to limit the constitutional concept to state constitutions must therefore be understood as the expression of an a-historical reduction.⁸

With the military revolutions from the 16th century onwards⁹ the European state-building processes of early modernity took off, increasingly making functionally delineated and hierarchical organized political, legal and bureaucratic structures a defining feature of society, insofar as the result was a mutually reinforcing triangular relationship between the bureaucratic organization of military capabilities, the structuring of territory and increases in available economic resources, thereby leading to the differentiation (*Ausdifferenzierung*) of functionally delineated spheres of society within areas such as law, politics and economy. Thus, the foundational period of

⁴ For the example of trade see Max Weber: *Zur Geschichte der Handelsgesellschaften im Mittelalter: Schriften 1889 - 1894* (Tübingen, Mohr, 2008).

⁵ Niklas Luhmann: *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, 1997), p...

⁶ Reinhart Koselleck: 'Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung', pp. 365-82 in Reinhart Koselleck: *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und Sozialen Sprache* (Frankfurt am Main, Suhrkamp Verlag, 2006), p...

⁷ Verfassung (I), pp. 831 – 862 in Otto Brunner, Werner Conze, Reinhart Koselleck (Hrsg.): *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland, Band 6* (Klett-Cotta, Stuttgart, 1990), p. 837ff.

⁸ A particular important element of pre-modern constitutions was the time aspect. Pre-modern constitutional concepts of 'status' and 'constitutio' had immutability as their central characteristic and this statist feature was what distinguished constitutions from other types of law. In practise constitutions did of course change over time but generally at a slower pace than other types of law.

⁹ For overviews and paradigmatic texts see: Michael Roberts: *The Military Revolution, 1560-1660* (Belfast, Boyd, 1956); Charles Tilly: *Coercion, Capital, and European States, AD 990-1990* (Cambridge, Mass., Blackwell, 1990); Jeremy A. Black: *A Military Revolution? Military Change and European Society, 1550-1800* (London, Basingstoke, 1991).

modernity was characterised by a double movement in the sense that the importance of functional as well as territorial differentiation was dramatically increased at the same time. Functional differentiation can be defined as expressing an equality of difference insofar as different spheres of society reproduces different functions without any of these spheres taking up a superior position vis-à-vis other spheres.¹⁰ In this process territorial differentiation emerged as an internal form of stabilisation within each sphere through the development of territorially based political system and a territorially based legal system, just as the economic system increasingly developed internal forms of stabilisation which relied on the territorial defined frames of the modern states. Forms which later on were described with the term “national economies”. Thus, modern states can from this perspective be understood as configurations consisting of dense webs of structural couplings between territorial delineated subunits of a multiplicity of functionally delineated systems.¹¹

As a result of these processes the meaning of constitutionalism changed insofar as it increasingly became oriented towards the regulation of specific institutions, which again increasingly took the form of organizations in the modern sense of the word. A central function of constitutions was to establish a delineation of the competences of such organizations.¹² In addition, the concept increasingly was reserved for the structures of the emerging states just as the static element increasingly disappeared due to increases in the temporalisation of society, which again triggered an increased focus on procedural elements. Thus, proceduralization embodies another key characteristic of modernity, apart from functional differentiation, namely the ability of social structures to radically increase the level of “dynamic stability” in the sense that proceduralization allows for a fairly constant legal framing of a continuously changing social structures. Thus, whereas pre-modern constitutions described themselves as, in principle, “unchangeable” modernity implied increased awareness of the time element and a formalization of what always had been the case; namely that the difference between constitutional and secondary law merely is a difference in time insofar as the pace of the introduction of changes is slower within constitutional law than within secondary law.

¹⁰ Niklas Luhmann: *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, 1997), pp. ...

¹¹ Poul F. Kjaer: The Societal Function of European Integration in the Context of World Society, pp. 369 – 380 in *Soziale Systeme. Zeitschrift für Soziologische Theorie*, Jg. 13, Heft 1+ 2, 2007, p. 371.

¹² *Verfassung* (I), pp. 831 – 862 in Otto Brunner, Werner Conze, Reinhart Koselleck (Hrsg.): *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland, Band 6* (Klett-Cotta, Stuttgart, 1990), p. 839.

On the basis of the structural differences between the pre-modern and the modern setting, Luhmann, the late-modern theorist of functional differentiation *par excellence*,¹³ argued that constitutions is an explicit modern phenomenon which merely act as structural couplings between law and politics,¹⁴ in the sense that constitutions structures the “functional synthesis” between the legal and the political system. According to Luhmann the function of constitutions is merely to allow for the transfer of meaning components (*Sinnkomponente*), e.g. in the form of legislative texts and legal judgements, between organizations operating within the larger frame of the political and the legal systems.¹⁵ Thus, by Luhmann societal constitutionalism including economic constitutionalism does not play any role. Instead his only focus is on state constitutions. In his late post-structuralist inspired writings, the state is moreover reduced to a purely metaphorical phenomenon in the sense that he defines the state as the structural coupling between law and politics.¹⁶ Thus, he de facto understands the state and the constitution as being identical.

Hegel, a contemporary observer of the breakthrough of modernity, essentially departed from insights similar to those found by Luhmann insofar as he, influenced by the economic studies of David Ricardo and Adam Smith, problematized the emergence of a functional differentiated society and attempted to answer the same question which serve as the guideline of the Luhmannian *oeuvre*, namely how society can remain integrated under the condition of the (relative) primacy of functional differentiation? Sociological speaking the central difference between the two is the status they grant to different forms of differentiation. Whereas modern systems theory, as already indicated, understands modernity as characterised by a subsumption of territorial (as well as stratificatory) forms of differentiation under the overarching concept of functional differentiation, in the sense that such forms only are conceived of as internal forms of stabilisation emerging within functionally differentiated structures, Hegel instead

¹³ Luhmann is however far from the only scholar departing from the primacy of functional differentiation, rather this insight has been the key feature of modern sociology since the beginning of the discipline. See also E. Durkheim: *De la division du travail social* (Paris, Presses universitaires de France, [1893] 1973); G. Simmel: 'Über soziale Differenzierung. Sociologische und psychologische Untersuchungen', pp. 109-296 in G. Simmel: *Aufsätze 1887-1890* (Frankfurt am Main, Suhrkamp Verlag, [1890] 1989); T. Parsons: *The System of Modern Societies* (Englewood Prentice-Hall, 1971).

¹⁴ Niklas Luhmann: *Verfassung als evolutionäre Errungenschaft*, *Rechtshistorisches Journal*, pp. 176 – 220, 1990, p. 180ff. See also *Verfassung* (II), pp. 863 – 899 in Otto Brunner, Werner Conze, Reinhart Koselleck (Hrsg.): *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Band 6 (Klett-Cotta, Stuttgart, 1990), 866ff.

¹⁵ Niklas Luhmann: *Das Recht der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, 1993), p...

¹⁶ Niklas Luhmann: *Die Politik der Gesellschaft* (Frankfurt am Main, Suhrkamp Verlag, 2000) p. ...

conceives of the three forms of differentiation; functional, stratificatory and territorial as three independent forms of differentiation. In the language of modern systems theory Hegel thus understands the three forms of differentiation as structures which stands in an orthogonal relationship to each other. This is however problematic insofar as Hegel in practise does not refer to territorial and stratificatory differentiation as constants emerging on the basis of an independent logic, but exactly sees them as “side effects” of the breakthrough of modernity due to an increased reliance on functional differentiation. When he refer to stratificatory differentiation he is explicitly not referring to structures which are similar to pre-modern stratificatory structures but instead to the modern form of stratification between social classes (bourgeoisie, petit bourgeoisie, the organized working class and the proletariat). Social classes whose appearance he explicitly acknowledges are the result of the emergence of the kind of modern capitalist economy which represents one of the central expressions of the increased reliance on functional differentiation. Also in relation to territorial forms of differentiation Hegel explicitly sees the emergence of moderns states as a result of the emergence of a modern functional differentiated society.¹⁷ The subsumption of stratificatory and territorial differentiation under the umbrella of functional differentiation promoted by modern systems theory must therefore be considered as representing a theoretical progress.

Nonetheless, the Hegelian model represents an empirical challenge to modern systems theory, since the latter theory uses the primacy of functional differentiation to dismiss the other two forms of differentiation as mere “details”. In the 19th and throughout the first half of the 20th century, when the early modern European territorial states was transformed into nation-states, modern forms of stratificatory differentiation however emerged within almost all functional delineated areas from economy and politics to education and sports, just as these evolved within nationally delineated frames.

As a reflection of the emergence of new forms of stratification, complex corporatist regimes, operating on the basis of the distinctions between employers and employees and capital and labour, emerged. The fundamental function of the corporatist regimes was the stabilisation of the relationship between the social classes of the industrial society. Not surprisingly the economic system and the labour market were therefore at the centre of the corporatist regimes. Although, the “variety of capitalism” as it emerged within the framework of nationally delineated states led to substantial differences in the

¹⁷ Georg W. F. Hegel: *Grundlinien der Philosophie des Rechts. Oder Naturrecht und Staatswissenschaft im Grundrisse* (Frankfurt am Main, Suhrkamp Verlag, [1821] 1976), p...

organisational forms, a common feature of the European corporatist regimes was however that they reached beyond the economic system in the sense that the triangular relationship between the state, employers and employees served as the centre of coordination for the emerging and far larger welfare-state conglomerates. Thus, corporatism bound together a multitude of organisations, which all relied on stratificatory differentiation as their central exclusion/inclusion mechanism. which operated within almost all functional systems; e.g. in the form of political parties within the political system, newspapers within the mass media system, schools within the education system, hospitals within the health system, to sports clubs within the system of sport. Thus, the emergence of corporatist structures provided a countermovement to the increased functional differentiation of the overall structures of society, thereby providing an essential contribution to the embeddedness of economic operations within the larger societal realm and thus to integration of society.

In constitutional terms the state constitutions, which Luhmann focuses upon, thus got supplemented by novel forms of societal constitutionalism. Corporatist regimes became legally framed through labour constitutions,¹⁸ which institutionalised the representation of “vested interests”, defined exclusion and inclusion mechanisms, the specification of procedures for conflict resolution and arbitration and so forth. As these constitutions reflected the larger reach of the corporatist conglomerates they were not just labour constitutions but rather economic and social constitutions in a broader sense, insofar as the regulation of the labour market merely served as a platform which, directly or indirectly, enabled a legal framing of almost all areas of life from work and education to health and leisure activities, in a manner which – at the organizational level - ensured concordance between different forms of rationality within the framework of the emerging welfare state conglomerates.

Whether the socio-economic constitutions should be understood as societal constitutions or rather served as annexes to the state and the state constitutions largely depends on the concept of state which one departs from. Hegel developed a three-dimensional concept of the state which reflected his departure from the three forms of social differentiation; functional, territorial and stratificatory. Firstly, he understands the state as composed by the legal and the political system in the “narrow sense”; that is of functionally delineated structures such as the government, the state bureaucracy and the courts.

¹⁸ E.g. see Hugo Sinzheimer: *Arbeitsrecht und Rechtssoziologie*, vol. 1 (Frankfurt am Main, Europäische Verlagsanstalt, 1976).

Secondly, he understood the state as an entity composing society as a whole. Thus in this understanding of the state the corporatist socio-economic constitutions was acting as the constitution of the “larger state”. Thirdly; the state is a container which constitutes itself through the delineation of one state towards other states, thereby proving a frame within which the “variety of capitalism” emerged.

Whereas Hegel’s concept of the state might be considered to reflect the empirical reality of 19th and early century modernity in Europe, it is from a theoretical perspective a concept with obvious shortcomings because it remains unclear what the relation between the three forms of state is and how the unity of the three are being constituted. By Luhmann one is faced with the opposite problem insofar as his theory, from a conceptual perspective might be deemed conceptually coherent but empirical implausible. His definition of the state is, as already indicated, more or less identical to Hegel’s first definition. In order to defend this definition Luhmann however ends up with an overly formalistic definition of the political in the sense that he, on the basis of the distinction between power and influence, reduces the political to a phenomenon which merely is being unfolded within areas which are subject to formalised negative sanctions in the legal sense.¹⁹ Empirically this distinction is however far from clear. Instead the emergence of corporatism, where formalised negative sanctions tend to play a role in relation to some activities but not necessarily to all activities, illustrates that it is necessary to develop a gradualised concept of the political which is freed from Luhmannian reductionism.²⁰ A concept capable of highlighting that the political, and with it the legal structuring of the political through constitutional structures, are, in different forms and subject to different levels of hierarchisation, to be found in all areas of society, without necessarily constituting a totality in a Hegelian sense.

On the other hand, modern system theory rightly points out that the “Hegelian state” only materialised within a small section of the world for a – in historical terms – very short period of time. The “Rhine-model”²¹ was a largely Western European phenomenon which merely played a role between the 1870s and the 1970s thereby underlying the system theoretical insight that the focus on stratification in times of

¹⁹ Christian Borch: ‘Systemic Power. Luhmann, Foucault and Analytics of Power’, *Acta Sociologica*, pp. 155-67, 48, 2, 2005.

²⁰ See also Poul F. Kjaer: ‘The Under-complexity of Democracy’, in Galf-Peter Calliess/Andreas Fischer-Lescano/Dan Wielsch/Peer Zumbansen (Hrsg.): *Entgrenzungen und Vernetzungen im Recht. Festschrift für Gunther Teubner* (Gruyter-Verlag, Berlin, forthcoming 2009).

²¹ For the concept of the “Rhine-model” see especially; Michel Albert: *Capitalism Against Capitalism* (New York: Walss and Whurr, 1993)

modernity to a large extent can be understood as a specific form of “transitional semantics”. An insight which moreover is supported by the observation that the period where corporatism was realised to its fullest was the same period where the corporatist idea was taken to the extreme within the framework of totalitarian regimes.²² Thus, although far from being unavoidable or automatic, it is important to bear in mind that corporatism also contains a “dark side” in the sense that it, under specific structural conditions, also facilitated the construction of the road to serfdom.

3. The Emergence and metamorphoses of the European Economic Constitution

The intellectual origins of the European economic constitution can be traced back to the Weimar republic. The intellectual ideas however only gained central prominence after the foundation of the post-war German Federal Republic (GFR), where economic constitutionalism was seen as providing a possible guarantee against a repetition of the economic and social disaster of the 1930s and the even larger political disaster which followed. In the GFR context the economic constitution however took the shape of a socio-economic constitution in the corporatist sense, insofar as it served as the legal foundation for the attempt to establish a “social-market economy”. Thus the GDR structures went far beyond merely framing economic interaction in the narrow sense.²³ Rather the objective was to expand the validity of basic subjective rights beyond the sphere of the state in the sense that also the economic order was subsumed under the subjective rights regime on the basis of the insight that power not only is exercised by states and public actors but also by private actors.²⁴ From this perspective the West German state and society model, as developed in the first decades after the war, to a large extent embodies the perfect implementation of the Hegelian model of the state.²⁵

²² Nicolas Hayos: Regionale “organisierte Gesellschaften” und ihre Schwierigkeiten mit der Realität der funktionalen Differenzierung, pp. 160 – 172, *Soziale Systeme. Zeitschrift für Soziologische Theorie*, Jg. 13, Heft 1+ 2, 2007, p. 164ff.

²³ For the concept of a „broad” socio-economic constitution see especially; Hans Carl Nipperday: *Soziale Marktwirtschaft und Grundgesetz* (Heymann, Köln, 1961).

²⁴ Hans H. Rupp: *Grundgesetz und „Wirtschaftsverfassung“* (J. C. B. Mohr (Paul Siebeck), Tübingen, 1974), p. 14f. For the young Luhmann’s concept of societal power see: Niklas Luhmann: *Macht* (Ferdinand Enke Verlag, Stuttgart (1975), 1988), p. 81ff.

²⁵ See especially Schlomo Avineri: *Hegel’s Theory of the Modern State* (Cambridge University Press, 1972).

Current advocates of the up-holding of the “German model” can in this sense also be understood as “Old-Hegelianists”.²⁶

The German economic constitution was subject to intense debate, insofar as it was far from obvious from the out-set that the constitution should be a socio-economic rather than a purely economic constitution. The debate however somewhat dissolved itself with the emergence of the European economic constitution, insofar as the liberalist advocates of a “slim” constitution, merely regulating economic interaction in the narrow sense, lost the German battlefield but instead tended to consider themselves victorious at the European level.

In relation to the European economic constitution Hans Peter Ipsen identifies four defining principles: 1) The rule of law; 2) Supranationality; 3) the principle of established procedures of decision-making and; 4) The principle of democracy.²⁷ In substance the European economic constitution moreover refer to the well-known principles of freedom of establishment and free movement of capital, products, services and labour. Hence, at a first glance, the European economic constitution is not a neutral order but an explicit liberal order, in the sense that it only serves as a market constitution in the narrow sense.²⁸

From a sociological perspective the emergence of the phenomenon of European integration with the European economic constitution as the central form of its legal framing can be understood as reflecting a decrease in the internal reliance on territorial and stratificatory differentiation within the functional differentiated structures of the economic system. Of course the EU also operates within a territorial frame. But due to the sheer size of the EU, the continued enlargement process and the strategy of binding neighbouring countries (E.g. Norway and Switzerland) as close as possible to the Union, territorial differentiation plays a far less important role in the EU context when compared with the nation state contexts. The same is the case with stratificatory differentiation which, as we will return to, is almost absent in relation to the way EU policies are framed.

²⁶ From perspective the Max Planck Institute for the Study of Society in Cologne can be understood as the global epi-centre of old-Hegelianism.

²⁷ Hans Peter Ipsen: *Europäisches Gemeinschaftsrecht in Einzelstudien* (Nomos, Baden-Baden, 1984), p. 35ff. He does however acknowledge that the principle of democracy is only indirectly present insofar as it only is realized within the Member States and not within community itself. See p. 48f.

²⁸ See e.g. Jürgen Basedow: *Von der deutschen zur europäischen Wirtschaftsverfassung* (J. C. B. Mohr (Paul Siebeck, Tübingen, 1992), p. 26ff.

The turn to integration proved “evolutionary superior” because integration reduces the number of structural couplings which economic operations are entangled in since the different legal and political demands towards the economic system produced by each member state is being substituted with the demand to adhere to a single framework.²⁹ In this sense integration produces “economies of scale” in relation to the cognitive resources which the economic system needs to deploy in order to sufficiently adjust to its environment. Thus, integration reduces the “friction” emerging from the environment and thereby facilitates the economic systems strive for re-producing itself.³⁰ Similar advantages can, although to a lesser extent, be observed in relation to other areas such as science, (higher) education, professionalised sports and mass media. For this reason the political and the legal system are faced with a pressure from the wider society, and particular from the economic system, to pursue further integration. A kind of pressure, which moreover is being supplemented by structural changes which are internal to the political and legal systems, as expressed in the relative decline of the importance of European states in the global political system, due to the transformation of the world from a “European space” and into a truly global space as described by Carl Schmitt.³¹ This decline provides the political subsystems in the member state form with an incentive to pool resources in order to remain relevant on the global scene. Thus from this perspective the emergence of the integration process must be understood as intrinsically linked to increases in the level of globalisation.³²

The nationally embedded welfare conglomerates have however not (yet) been faced with a similar globalization pressure. It is on this background that Fritz Scharpf developed his idea concerning the emergence of equilibrium in the relation between increasingly Europeanized economic policy and national welfare policy.³³ The equilibrium concept is however a purely analytical tool. In reality one never arrives at

²⁹ Poul F. Kjaer: The Societal Function of European Integration in the Context of World Society, pp. 369 – 380 in *Soziale Systeme. Zeitschrift für Soziologische Theorie*, Jg. 13, Heft 1+ 2, 2007, p. 371.

³⁰ This element is moreover being supported by the internal change in the form of economic reproduction due to the relative decline of industrial production and the emergence of a service and knowledge economy. See also Karl-Heinz Ladeur: *Der Staat gegen die Gesellschaft. Zur Verteidigung der Rationalität der "Privatrechtsgesellschaft"* (Mohr Siebeck, Tübingen 2007).

³¹ Carl Schmitt: *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot, Berlin, 1950).

³² This is, of course, a somewhat simplified account of the structural reasons for the emergence of the integration phenomenon. For a more detailed account see; Poul F. Kjaer: Between Governing and Governance: On the Emergence, Function and Form of Europe’s Postnational Constellation. Ph.D. Thesis, EUI Florence, 2008. Available at: <http://cadmus.iue.it/dspace/handle/1814/9067>.

³³ E.g. F.W. Scharpf, “The European Social Model: Coping with the Challenges of Diversity”, *Journal of Common Market Studies* 40 (2002), 645–670.

the point of equilibrium. The concept cannot therefore be used as a descriptive tool when trying to describe e.g. the evolution of the integration process. Moreover, Polanyi tells us that such a de-coupling is simply impossible because the economic system is always embedded in a wider social context and that it would not be able to operate if that was not the case.³⁴ Thus, from the Polanyi perspective economic constitutions are always socio-economic constitutions. That the launch of the internal market did not lead to de-regulation but automatically triggered a move towards re-regulation at the European level illustrates this point very well. As pointed out by Carporaso and Tarrow with direct reference to Polanyi it is moreover possible to observe an astonishing development within a whole range of EU policy areas which cannot be understood as an expression of economic regulation in the narrow sense. E.g. the EU, including the ECJ, has actively sought to develop policies aimed at ensuring social embeddedness, in relation to environmental policy, gender equality, consumer safety and so forth.³⁵ Thus, there is no empirical foundation for the claim that the EU is producing disembeddedness. Rather the integration process proves that the liberalist mythology shared by a certain section of the German *ordo-liberal* school, Giandomenico Majone and Margaret Thatcher is impossible to sustain.

Nonetheless, there is a widespread perception in broad sections of the European public as well as within academia that European integration does lead to dis-embeddedness. This view is however only plausible if one merely observes the world from the lifeworld of a labour unionist, insofar as the integration process indeed has contributed to the relative decline in the relevance of corporatism. This development is however a reflection of the same transformation of the deeper structures (*Tiefenstrukturen*) of society, which looms behind the emergence of the integration phenomenon itself. As described by Ulrich Beck, the transition towards a “second modernity” implies a (gradual) change away from classical welfare policies and towards policies of risk regulation.³⁶ Going a step deeper than Beck, this development can also be understood as a reflection of increased societal complexity which in turn has triggered an increase in the reliance on functional differentiation. Trade-offs, asymmetries and externalities is

³⁴ Karl Polanyi: *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, Beacon Press, [1944] 2001), p. ..

³⁵ James Carporaso and Sidney Tarrow: Polanyi in Brussels. European Institutions and the Embedding of Markets in Society, *RECON Working Paper*, 01, 2008.

³⁶ Ulrich Beck: *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (Frankfurt am Main, Suhrkamp Verlag, 1986), p.

the result insofar as economic reproduction clashes with other societal spheres such as health and environment thereby creating new forms of societal problems. These problems cannot, however, be understood as problems of a stratificatory nature. Rather they are reflecting a radicalisation of modernity insofar as they can be understood as side-effects of an increased reliance on functional differentiation, in the sense that they represent problems and conflicts which are being reproduced along functionally delineated rather than stratificatory lines. Thus, the corporatist structures are faced with a relative decrease in significance (*Bedeutungsverlust*) because the host of problems they address increasingly are being reduced to one set of problems among many, thereby illustrating the system theoretical insight that stratificatory differentiation largely should be understood as a (protracted) form of transitional semantics. The consequence is that the corporatist structures have increasingly lost their function as the central locus for problem solving and societal coordination as embodied in their earlier status as the most important link between the political system and the wider society. From this perspective the way the EU frame economic interaction by no means indicates a reduction in social embeddedness but merely reflect a difference in the form of embeddedness insofar as the EU responds to a different set of problems than was the case for the corporatist nation-states in their founding period. Problems which cannot be grasped by organizational structures which rely on stratificatory differentiation as their central organizational principle.³⁷

What do the structural transformations and the reality of the already existing embeddedness mean for the future of the European economic constitution? Although the German Constitutional Court famously argued otherwise³⁸ the entering into force of the Maastricht Treaty (MT) in 1993 is generally considered to indicate the end of the European Community as a mere economic entity.³⁹ The introduction of the MT meant that the economic constitution, which until then had served as the central legal framing of the Community, no longer was the (sole) pillar on which the integration project

³⁷ For an empirical example in relation to chemicals regulation see Poul F. Kjaer: Rationality within REACH? On Functional Differentiation as the Structural Foundation of Legitimacy in European Chemicals Regulation (EUI Working Paper, Law, no. 18, 2007). Available at <http://cadmus.iue.it/dspace/handle/1814/6948>.

³⁸ BVerfGE 89, 155 vom 12. Oktober 1993.

³⁹ Economic constitutions are of course also political constitutions although they tend to be described as a-political. They only represent a different form of politics, thereby highlighting the need to develop a more differentiated concept of the political.

rested.⁴⁰ This development can be understood in two ways: Either the MT transformed the Community into an (embryonic) polity, with the consequence that the principles structuring economic interaction became subsumed under the political rationality guiding the operations of the Unions emerging political system. Or the MT can be understood as an evolutionary transmutation which meant that the existing economic constitution merely was supplemented by a number of other (embryonic) functional delineated constitutions, in the form of a European environmental constitution, a European consumer constitution, a European science constitution and so forth.⁴¹ From this perspective the MT merely implied a metamorphosis which transformed the Community from a functional regime into a complex Byzantine matrix consisting of a plurality of partially overlapping functional regimes, engaging with each other in a multitude of ways, on the basis of their respective constitutional frameworks. Frameworks that might or might not refer to the same legal texts and rely on the same legal structures in their separate attempts to stabilize and justify their respective operations. Thus, the fate of the economic constitution goes to the core of what the EU “is”: A (conglomerate of) functionalist regime(s) or a polity? No clear-cut answer can be given to this question at the present. Rather the EU continues to oscillate between the two forms on a more or less permanent basis.⁴² Whether one of them will eventually prevail over the other thus remains to be seen. But irrespectively of which road the EU will go down of is unlikely to happen on the basis of a “decision” but rather in an evolutionary fashion reflecting deeper structural changes. If the globalization wave, in spite of the current crisis, continues, the EU is likely to find itself faced with a need of continued enlargement and a steady increase in its entanglement with other regional as well as global governance structures thereby rendering the transformation of the EU into a kind of „true” polity impossible. Globalization has, however, been with us for

⁴⁰ Christian Joerges: ‘The Market without the State? The ‘Economic Constitution’ of the European Community and the Rebirth of Regulatory Politics’, *European Integration online Papers (EIoP)*, 1, 19, 1997; Christian Joerges: ‘States Without a Market? Comments on the German Constitutional Court’s Maastricht-Judgement and a Plea for Interdisciplinary Discourses’, *European Integration online Papers (EIoP)*, 1, 20, 1997.

⁴¹ A clear example of such an embryonic constitution is the, partly unrealized, concept of a European Research Area, which foresees the laying down of core principles, similar to those found within the economic constitution concerning free movement, non-discrimination etc. within the area of science and research. For the case of R & D policy see – Poul F. Kjaer: ‘Formalisation or De-formalisation through Governance?’ in Rainer Nickel (Ed.): *Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification* (Oslo, ARENA Report Series, 2009 forthcoming).

⁴² For an analysis of the European hybridity see Poul F. Kjaer: *Between Governing and Governance: On the Emergence, Function and Form of Europe’s Postnational Constellation*. Ph.D. Thesis, EUI Florence, 2008. Available at: <http://cadmus.iue.it/dspace/handle/1814/9067> .

five hundred years and has always developed in a two step ahead and one step back manner.⁴³ Thus, it is indeed possible that society is currently about to enter a period of “re-stabilization” coursed by a (temporary) contraction in the degree of globalization. A contraction which potentially will make a prolonged period of stabilisation of the European construction, within a well-defined territorial frame a viable possibility, thereby providing a structural basis for the emergence of a European polity. A polity which subsequently would have the potential to structure the embeddedness of the economy on the basis of the political priorities set out by the polity. But irrespectively of which path the EU will go down of the changed nature of economic reproduction, and thus the character of societal problems we are confronted with, means that such embeddedness is unlikely to focus on stratificatory differentiation to the same degree as the European nation-states did in their peak period.

4. The Global Economic Constitutional Conglomerate

The year after the MT became the foundation of the European integration project agreement was reached on the treaty establishing the World Trade Organization (WTO), which entered into force in 1995. The WTO regime has since undergone a legalization process which has triggered the question whether we are seeing a move towards the establishment of an (almost) global economic constitution within the realm of the WTO?⁴⁴ The WTO is however only one of several globally operating regimes structuring economic communication flows. Rather than a singular global economic constitution it is possible to observe the existence of a conglomerate of overlapping, partly reinforcing and partly contradictory regimes which has been subject to different degrees of constitutionalisation. Apart from the WTO this conglomerate consists of public international organizations such as the International Monetary Fund (IMF) and the World Bank, private public organizations such as the International Organization for Standardization and quasi-economic entities, such as the Internet Corporation for Assigned Names and Numbers (ICANN), as well as highly fluid regimes such as the Lex Mercatoria.

⁴³ Rudolf Stichweh: *Die Weltgesellschaft. Soziologische Analysen* (Frankfurt am Main, Suhrkamp Verlag, 2000).

⁴⁴ For a critical perspective see Robert Howse and Kalypso Nicolaidis: Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step to Far, pp. 227 – 252 in R.B. Potter, P. Suave and A. Subramian (eds.): *Efficiency, Equity, Legitimacy and Governance: The Multilateral Trading System at the Millenium* (Washington, Brookings Institution, 2001).

All of these structures are, to a different extent, subject to a legal framing with entails constitutional elements. The differences to the EU is however quite substantial. Whereas the EU, although to a lesser extent than the nation-states, relies on territorial differentiation these regimes are (almost) global regimes for whom territorial differentiation plays no role. Secondly, although the EU is an independent and autonomous legal order which cannot be understood as merely representing the sum of the member states, it is still deeply entangled with the "social reality" of the Member States. Thus, the EU is benefiting from the (in spite of enlargement) relative homogeneity of the European space in relation to social structures and the type of societal problems which the Union find itself confronted with. In contrast, global regimes are confronted with an environment which is dramatically more varied, in the sense that they, at least in principle, refer to stakeholders residing in Switzerland as well as Swaziland. Thus, the ambition of ensuring social embeddedness of global economic processes through legally structured governance regimes is being hampered by the sheer difficulty of developing coherent strategies and legal principles capable of taking account of the fundamentally different nature of societal problems in developed and less-developed areas of the world. These differences largely reflect the different forms of societal differentiation on which the developed and the less-developed parts of the world-society relies on in the sense that the move towards the primacy of functional differentiation has not prevailed as the dominating form of differentiation in the less-developed world. In other words: Global governance structures are faced with the problem of defining coherent policies towards areas of the world where the relative weight and relation between functional, territorial and stratificatory differentiation are radically different. Thus, irrespective of the type and quality of the constitutional framing such frames are likely to have substantially reduced ability to ensure social embeddedness. Moreover, governance structures which are not capable of "delivering" embeddedness tend not to be very successful, thereby providing a possible reason for the far more dynamic evolution of the EU when compared to most global governance structures (most notably the UN institutions).⁴⁵

5. Outlook: The Normative Reach of Constitutions

⁴⁵ To a certain extent a similar argument can be deployed in relation to the stalemate of the WTO in relation to the Doha Round. See e.g. Jens Ladefoged Mortensen: The Institutional Requirements of the WTO in the Era of Globalisation: Imperfections in the Global Economic Polity, *European Law Journal*, Vol. 6, No. 2, pp. 176-204.

The above differences between the EU and the global context illustrates that there is substantial differences in the capacity of European and global governance structures to establish normative orders. Hence, even though they all can be understood as being subject to a constitutional framing the reach and sophistication of the frames varies. Neil Walker identifies 5 forms of constitutional frames with each of them possess differences in their reach. 1. A self-contained legal framing; 2. A System of specialised political rule; 3. A constituent power steaming from the sovereignty of the people; 4). A structure capable of achieving a degree of social integration; 5). A self-reflexive structure capable of structuring a singular discourse on the desired nature of the polity.⁴⁶ Historically speaking these forms have emerged evolutionary and, in the nation-state contexts, builds “on top” of each other, with the latter always including the former forms as well. The distinction between the Luhmannian and the Hegelian approaches is moreover being captured by the distinctions insofar as Luhmann concept of constitutionalism falls within the second category and the Hegelian approach seems to be well-presented by the forth category.

At the trans-national level, as also pointed out by Walker, the five forms are however present at the same time insofar as it is possible to observe a radical metamorphosis of constitutionalism. The EU oscillates between category 1 and 2 whereas most global governance structures are in category one or about to enter category one. But even then some highly specialised structures, such the internet constitution,⁴⁷ also contain strong integrative and self-reflexive elements, thereby indicating the need to undertake a radical re-conceptualization of the constitutional idea in relation to trans-national structures.

⁴⁶ Neil Walker: Taking Constitutionalism Beyond the State, pp. 519 – 543, *Political Studies*, 56, 2008, p. 533ff.

⁴⁷ Vagias Karavas: *Digitale Grundrechte. Elemente einer Verfassung des Informationsflusses im Internet* (Nomos, Baden-Baden, 2007).