Global Constitutionalism (2019), 8:3, 639–661 © *Cambridge University Press, 2019*
doi:10.1017/S2045381719000194

The transnational dimension of constitutional rights: Framing and taming 'private' governance beyond the state*

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Abstract: International law sometimes fails to regulate cross-border affairs due to a lack of consent or pace among the states. As a consequence, transnational governance arrangements, which are established by contract mainly among non-state actors, step in to fill the gap. The arrangement that allocates domains on the Internet offers the most sophisticated example to date. The present article argues that a new approach to the horizontal effect of constitutional rights may both account for the emergence of such arrangements and offer a solution to the problem of their legitimacy. According to this understanding, constitutional rights at the same time enable and restrict transnational regulation. In this way, they guarantee a comprehensive protection of freedom under conditions of globalisation. As long as transnational governance arrangements are not able to generate constitutional rights of their own, however, the national legal orders must complement them. Hence, the legitimacy of law in world society may only be ensured through a dialectical process of internal and external constitutionalisation, resulting from the interaction of its various constituents.

Keywords: transnational governance arrangements; Internet domain allocation; legitimacy; constitutional rights; horizontal effect; internal and external constitutionalisation

I. Introduction

The concept of constitutionalism, as it was established in the modern nation-state, is generally acknowledged as the zenith of legal evolution.[1] Today, this specific conjunction of democracy and the rule of law, including

* A previous version of this article in German appeared in T Vesting, S Korioth and I Augsberg (eds), *Grundrechte als Phänomene kollektiver Ordnung: Zur Wiedergewinnung des Gesellschaftlichen in der Grundrechtstheorie und Grundrechtsdogmatik* (Mohr Siebeck, Tübingen, 2014) 295.

[1] See FI Michelman, 'W(h)ither the Constitution?' (2000) 21 *Cardozo Law Review* 1063; D Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 3.

fundamental rights protection, has spread almost worldwide. Under the impact of the development commonly called 'globalisation',[2] or differentiation of 'world society',[3] in the social sciences, however, the extraordinary capacity of the constitutional state seems to have reached its limits. Indeed, many cross-border affairs cannot be effectively regulated by national law. Some sociologists therefore presumed that law would lose significance in the future.[4] Yet, to date, there is no evidence for a decline of law. On the contrary, the emerging world society reveals an urgent need for conventional means to stabilise expectations and to resolve disputes that is satisfied by a double transformation of law.

On the one hand, international law extends to those subject matters that used to be reserved as the internal affairs of the states, including trade and ecology, but also certain aspects of criminal law and human rights.[5] For this purpose, states have created several international organisations. Some of them even dispose of their own courts. At global level, the World Trade Organization, including its Dispute Settlement Understanding, is one of the best-known examples.[6] At regional level, the European Union, including its Court of Justice, is particularly advanced in its development.[7] Here, the genesis of a new kind of public authority beyond the state, which acts with direct effect on the individual, has also called for the ensuring of fundamental rights protection.[8] To this end, the former Court of Justice of the European Communities has first invoked the European Convention on Human Rights and the common constitutional traditions of the Member States as general principles of law.[9] Meanwhile,

[2] A Giddens, *The Consequences of Modernity* (Stanford University Press, Stanford, CA, 1990) 63–78; S Sassen, *A Sociology of Globalization* (Norton, New York, NY, 2007) 11–44.

[3] N Luhmann, *Theory of Society* vol. 1 (Stanford University Press, Stanford, CA, 2012) 83–99.

[4] See N Luhmann, *A Sociological Theory of Law* (Routledge and Kegan Paul, London, 1985) 255–64.

[5] See JP Trachtman, *The Future of International Law: Global Government* (Cambridge University Press, Cambridge, 2013); E Benvenisti, *The Law of Global Governance* (Brill, Leiden, 2014).

[6] See DZ Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford, 2005); JH Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, Cambridge, 2006).

[7] See JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; K Tuori, *European Constitutionalism* (Cambridge University Press, Cambridge, 2015).

[8] See P Pescatore, 'Les droits de l'homme et l'intégration européenne' (1968) 4 *Cahiers de droit européen* 629; M Zuleeg, 'Fundamental Rights and the Law of the European Communities' (1971) 8 *Common Market Law Review* 446.

[9] ECJ, Judgment of 12 November 1969, Case 29/69, *Stauder v Stadt Ulm*, (1969) *European Court Reports* 419, 425; Judgment of 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, (1970) *European Court Reports* 1125, 1135.

Article 6(1) of the Treaty on European Union refers to a written Charter of Fundamental Rights.[10]

International and European law-making sometimes fail, however, due to a lack of consent or pace among the states. On the other hand, therefore, transnational governance arrangements, which are constituted by contract mainly among non-state actors, step in to fill the gap.[11] The arrangement that allocates domains on the Internet offers the most sophisticated instance of this to date (II.). It will be argued here that a new approach to the horizontal effect of constitutional rights may both account for the emergence of such arrangements and offer a solution to the problem of their legitimacy. According to this understanding, constitutional rights at the same time enable and restrict transnational regulation. In this way, they guarantee a comprehensive protection of freedom under conditions of globalisation (III.). As long as transnational governance arrangements are not able to generate constitutional rights of their own, however, the national legal orders must complement them (IV.). Hence, for the time being, the legitimacy of law in world society may only be ensured through a dialectical process of internal and external constitutionalisation, resulting from the interaction of its various constituents (V.).

II. Transnational law

The new forms of transnational governance emerging beyond both states and international organisations escape from the conventional categories of political and legal thinking. They result in a peculiar type of transnational law.

Description

The arrangement that allocates domains on the Internet may serve as an illustrative example. Although it is a unique phenomenon without precedent or equivalent, some, more general, conclusions on the evolution of law in world society may be drawn inductively from this model. The complex

[10] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, Article 6, C:2007:306:13.

[11] See G Teubner, 'Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?' in K-H Ladeur (ed), *Public Governance in the Age of Globalization* (Ashgate, Aldershot, 2004) 71; L Viellechner, 'The Constitution of Transnational Governance Arrangements: Karl Polanyi's Double Movement in the Transformation of Law' in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart, Oxford, 2011) 435.

entity had not been systematically designed, but emerged rather accidentally and only consolidated in the course of its operation.[12]

In 1998, after a controversial debate between different interest groups ranging from private stakeholders to state governments, the Internet Corporation for Assigned Names and Numbers (ICANN) was founded as the institutional centre of the arrangement.[13] ICANN is a non-profit association pursuant to Californian law, incorporated in Los Angeles.[14] According to its bylaws, it is in charge of ensuring the stable and secure operation of the unique identifier systems of the Internet. Its board of directors includes representatives from all geographical regions of the world, but not from state governments, which have access only to its advisory committees.[15] The organisation thus occurred as an unparalleled compromise: While an international Internet organisation would have required membership of all states in the world, the unilateral regulation of the Internet by a single state, even if it were technically possible, appeared undesirable.[16]

Legally, ICANN acts upon the basis of multiple bilateral contracts.[17] On the one hand, it maintains contractual relations with several public and private institutions that administer the data files in which the top-level domains such as '.com' are inscribed.[18] On the other hand, ICANN was originally subject to a memorandum of understanding with the government of the United States of America, which had supported early research on the Internet for military purposes and therefore long claimed supreme authority over its infrastructure.[19] Nevertheless, the US government had

[12] See AM Froomkin, 'Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution' (2000) 50 *Duke Law Journal* 17; ML Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (Massachusetts Institute of Technology Press, Cambridge, MA, 2002).

[13] Internet Corporation for Assigned Names and Numbers, founded 18 September 1998, <https://www.icann.org>.

[14] Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved 9 August 2016, available at <https://www.icann.org/resources/pages/governance/articles-en>.

[15] Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 18 June 2018, available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

[16] See W Kleinwächter, 'ICANN: Between Technical Mandate and Political Challenges' (2000) 24 *Telecommunications Policy* 553; SP Crawford, 'The ICANN Experiment' (2004) 12 *Cardozo Journal of International and Comparative Law* 409.

[17] See Crawford (n 16) 414: 'a web of contracts'.

[18] Internet Corporation for Assigned Names and Numbers, Registry Agreements, available at <https://www.icann.org/resources/pages/registries/registries-agreements-en>.

[19] Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, 25 November 1998, available at <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en>.

always remained on a latent position in this regard. Most recently, it has withdrawn its commitment altogether.[20] As a result, ICANN may take all decisions of current administration independently. Second-level domains such as 'google.com' are allocated to individuals via numerous registrars, also under contract with ICANN, according to a 'first come, first served' principle.[21]

As each domain may only be registered once for reasons of unambiguous identification, disputes over their allocation soon began to arise.[22] In particular, the domain names that correspond to the names of celebrities and well-known trademarks became highly contested. In the so-called 'cybersquatting'[23] cases, some Internet users registered for a large number of such domains intending to sell them at a profit to the persons and corporations concerned. In order to solve these disputes, ICANN finally established a special dispute settlement mechanism,[24] based upon the Uniform Domain Name Dispute Resolution Policy (UDRP).[25] The accreditation agreements require the registrars to include the UDRP as general terms and conditions in each domain registration contract.[26] According to Paragraph 4(a) UDRP, a complaint will succeed when three conditions are met:

> You are required to submit to a mandatory administrative proceeding in the event that a third party (a 'complainant') asserts to the applicable Provider, in compliance with the Rules of Procedure, that

[20] National Telecommunications and Information Administration Announces Intent to Transition Key Internet Domain Name Functions, 14 March 2014, available at <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

[21] Internet Corporation for Assigned Names and Numbers, Registrar Accreditation Agreement, available at <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

[22] See JJ Look, 'The Virtual Wild, Wild West (WWW): Intellectual Property Issues in Cyberspace' (1999) 22 *University of Arkansas at Little Rock Law Review* 49; J Litman, 'The DNS Wars: Trademarks and the Internet Domain Name System' (2000) 4 *Journal of Small and Emerging Business Law* 149.

[23] JD Mercer, 'Cybersquatting: Blackmail on the Information Superhighway' (2000) 6 *Boston University Journal of Science and Technology Law* 290.

[24] See LA Walker, 'ICANN's Uniform Domain Name Dispute Resolution Policy' (2000) 15 *Berkeley Technology Law Journal* 289; LR Helfer and GB Dinwoodie, 'Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy' (2001) 43 *William and Mary Law Review* 141.

[25] Uniform Domain Name Dispute Resolution Policy, 26 August 1999, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en>.

[26] Internet Corporation for Assigned Names and Numbers, Registrar Accreditation Agreement, available at <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

> (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) you have no rights or legitimate interests in respect of the domain name; and (iii) your domain name has been registered and is being used in bad faith.[27]

ICANN has recognised five different institutions in their capacity as dispute resolution service providers.[28] The group includes not only private organisations, such as the National Arbitration Forum based in Minneapolis,[29] but also the Arbitration and Mediation Centre of the World Intellectual Property Organization, an international organisation.[30] According to Paragraph 15(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (UDRP-Rules), each panel appointed to decide a domain dispute must comply with the provisions of the UDRP, while it may autonomously complement its rules if necessary:

> A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.[31]

Because of its access to the registers, ICANN may even electronically enforce its own law. According to Paragraph 3(c) UDRP, it will cancel, transfer or modify a domain name upon receipt of a panel decision that requires such action.[32] Some commentators regard this sanction as an 'electronic equivalent of the death penalty'.[33] Yet, ICANN cannot prevent subsequent lawsuits before national courts. Paragraph 4(k) UDRP expressly provides for such a remedy:

[27] Uniform Domain Name Dispute Resolution Policy, 26 August 1999, para 4(a), available at <https://www.icann.org/resources/pages/policy-2012-02-25-en>.

[28] Internet Corporation for Assigned Names and Numbers, List of Approved Dispute Resolution Service Providers, available at <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>.

[29] National Arbitration Forum, Domain Name Disputes, <http://www.adrforum.com/domains>.

[30] World Intellectual Property Organization, Arbitration and Mediation Center, Domain Name Dispute Resolution, <https://www.wipo.int/amc/en/domains/index.html>.

[31] Rules for Uniform Domain Name Dispute Resolution Policy, as approved 28 September 2013, para 15(a), available at <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

[32] Uniform Domain Name Dispute Resolution Policy, 26 August 1999, para 3(c), available at <https://www.icann.org/resources/pages/policy-2012-02-25-en>.

[33] DG Post, *Governing Cyberspace, or Where Is James Madison When We Need Him?*, June 1999, available at <www.temple.edu/lawschool/dpost/icann/comment1.html>.

> The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision.[34]

Hence, although a single state could neither comprehensively nor effectively regulate cross-border affairs, such as the infrastructure of the Internet, national courts may occasionally intervene in processes of transnational governance.

Interpretation

Transnational governance arrangements such as the one that allocates domains on the Internet hold a peculiar legal status. They escape from the thought patterns fixated on the nation-state. In particular, they transcend the conventional dichotomies that have long dominated this tradition.

Firstly, transnational governance arrangements undermine the distinction between international and national law.[35] On the one hand, they cannot be qualified as international law, since they are neither created by inter-state treaties nor do they regulate inter-state relations. ICANN is a corporation according to Californian private law, and the rules issuing from the arrangement primarily address individual Internet users. Nevertheless, the World Intellectual Property Organization, as an international organisation, serves as a dispute resolution service provider under the UDRP. On the other hand, these arrangements cannot be classified as national law, since they neither emanate from national legislation nor do they exclusively address national affairs. Although ICANN was subject to a contract with the US government and defers to national courts in domain disputes, it autonomously regulates the allocation of Internet domains across the globe.

[34] Uniform Domain Name Dispute Resolution Policy, 26 August 1999, para 4(k), available at <https://www.icann.org/resources/pages/policy-2012-02-25-en>.

[35] Cf. P Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 *Columbia Journal of Transnational Law* 485; HH Koh, 'Why Transnational Law Matters' (2006) 24 *Penn State International Law Review* 745.

Secondly, transnational governance arrangements subvert the distinction between public and private law.[36] On the one hand, regarding their source, they result from the co-operation of various actors, both state and non-state. ICANN had long acted in agreement with the US government, which, at global level, recedes to a representative of particular interests for its part. At the same time, the advisory committees of ICANN comprise stakeholders from numerous other states and interest groups. On the other hand, regarding their subject matter, these arrangements touch not only upon the relationships of individual Internet users, but also upon concerns of society at large. Thus, the regulation of the Internet in general, and the allocation of domains in particular, are regarded as services of general interest because of their significance for enabling global information and communication.[37] The European Commission therefore concluded that ICANN takes 'decisions of a kind that governments would, in other contexts, expect to take themselves in the framework of international organisations'.[38]

Finally, regarding their medium, transnational governance arrangements break the distinction between statute and contract.[39] On the one hand, they are unable to enact rules that are generally binding. For this reason, ICANN, which was itself created by contract, allocates domains to individual Internet users via several registrars through bilateral agreements. On the other hand, all registration agreements indirectly impose a collective orientation by incorporating the dispute resolution mechanism of the UDRP as general terms and conditions. From this symbiosis, or 'network',[40] of contracts thus emerges a new form of collective order.

[36] Cf. G Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9 *Social and Legal Studies* 399; P Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 *Journal of Law and Society* 50.

[37] See AA Al-Darrab, 'The Need for International Internet Governance Oversight' in WJ Drake (ed), *Reforming Internet Governance: Perspectives from the Working Group on Internet Governance* (United Nations Information and Communication Technologies Task Force, New York, NY, 2005) 177.

[38] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, The Organisation and Management of the Internet: International and European Policy Issues 1998–2000, 11 April 2000, COM:2000:202:13.

[39] See G Teubner, 'Coincidentia Oppositorum: Hybrid Networks beyond Contract and Organisation' in M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Cooperation* (Hart, Oxford, 2009) 3; M Amstutz, 'The Constitution of Contractual Networks' ibid 309.

[40] G Teubner, *Networks as Connected Contracts* (Hart, Oxford, 2011).

Transnational governance arrangements gain a relative autonomy by exclusively following their own 'secondary rules'[41] as defined by HLA Hart.[42] These secondary rules include not only rules of recognition, which allow for identifying the primary rules of obligation to be applied, but also rules of adjudication, which empower dispute resolution service providers to ascertain whether a primary rule of obligation has been violated on a particular occasion. Thus, Paragraph 15(a) UDRP-Rules prescribes all dispute resolution service providers recognised by ICANN to resolve disputes over domain names in accordance with the UDRP and all other rules and principles of law that they deem applicable.[43] In this way, the arrangement may operate self-referentially, similarly to the European Union, whose Court of Justice exclusively decides according to 'the law stemming from the treaty', which is hence considered as 'its own legal system'.[44]

III. Transnational constitutional rights

Pursuant to a new approach proposed here, constitutional rights serve both as a foundation and as a limitation of transnational governance arrangements. In this way, they also offer a solution to the problem of their legitimacy.

Legitimacy

Since transnational governance arrangements such as the one that allocates domains on the Internet are based on contracts and, therefore, are unable to enact rules that are generally binding, they do not raise a problem of legitimacy in the traditional sense of the term. On the contrary, contract by definition requires the approval of the parties so that it is regarded as 'the quintessential form of government with the consent of the governed'.[45]

[41] KC Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends' (1994) 25 *Netherlands Yearbook of International Law* 3; T Schultz, 'Secondary Rules of Recognition and Relative Legality in Transnational Regimes' (2011) 56 *American Journal of Jurisprudence* 59.

[42] HLA Hart, *The Concept of Law* (Clarendon Press, Oxford, 1961) 91.

[43] Rules for Uniform Domain Name Dispute Resolution Policy, as approved 28 September 2013, para 15(a), available at <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

[44] ECJ, Judgment of 15 July 1964, Case 6/64, *Costa v ENEL*, (1964) *European Court Reports* 585, 593–4.

[45] MJ Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, Cambridge, MA, 1993) 8. See also R Banakar, 'Reflexive Legitimacy in International Arbitration' in V Gessner and A Cem Budak (eds), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* (Ashgate, Aldershot, 1998) 347.

Within the national legal orders, such arrangements would be regarded as expressions of private autonomy and protected by constitutional rights, in particular freedom of contract and freedom of association. At the same time, however, national private law usually contains certain provisions of mandatory private law that implement private autonomy and thus fulfil a constitutional function in the horizontal relations between individuals.[46] These provisions ensure that the parties have entered freely into a contract and protect the liberties of third parties from interference.[47]

Infringements on the freedom of contract and interference with the liberties of outsiders may also appear in the transnational context. On the one hand, unequal bargaining powers may considerably reduce party autonomy. Thus, the arrangement that allocates domains on the Internet holds a monopoly position in providing a service of general interest that is indispensable for the realisation of freedom of information and speech under conditions of digital communication. It may therefore unilaterally impose the contractual terms for the registration of domains. On the other hand, such arrangements may significantly affect the liberties of third parties. Thus, the allocation of certain domain names may violate rights in names and trademarks.

Reformulated in this way, the issue may be addressed by a new approach to the 'horizontal effect'[48] of constitutional rights. According to this understanding, animated by systems theory of law,[49] constitutional rights are to be regarded as a social 'institution'[50] that upholds the differentiation of society and thereby indirectly generates collective order. Constitutional rights hence serve to enable and support the autonomous organisation of different social spheres, such as economics, religion, technology, arts and sciences, while, at the same time, preventing a single rationality from dominating society. Initially, the argument was advanced only with regard to the relationship between the political and the other social spheres within

[46] See D Grimm, 'Basic Rights in the Formative Era of Modern Society' in D Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, Oxford, 2016) 65.

[47] See F Bydlinski, *Privatautonomie und objektive Grundlagen des verpflichtenden Rechtsgeschäftes* (Springer, Vienna, 1967).

[48] For the doctrine of 'horizontal effect' of constitutional rights within the state, see S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387; J van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter, Berlin, 2014).

[49] See generally N Luhmann, *Law as a Social System* (Oxford University Press, Oxford, 2014); G Teubner, *Law as an Autopoietic System* (Blackwell, Oxford, 1993).

[50] N Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Duncker and Humblot, Berlin, 1965).

the state,[51] but its scope may be generalised, especially in the transnational context, which lacks a central political legislator.[52]

Such a conception reverses the supposedly 'classical'[53] function of constitutional rights as negative, or defensive, rights of the individual against the state in a double sense. On the one hand, it extends the circle of rights holders, including not only individuals, but also other social systems and institutions, in particular processes of societal self-regulation. Nevertheless, it does not abandon the protection of the individual and the system of remedies based on subjective rights. On the other hand, this conception broadens the group of those obliged to respect constitutional rights, binding not only the state, but also other social systems and institutions that could develop totalitarian tendencies.

Philosophical and historical enquiries confirm that such a conception of constitutional rights only restores their original function. From a philosophical point of view, the understanding of constitutional rights as the defensive rights of the individual against the state reduces Immanuel Kant's notion of right, which had a decisive influence on modern constitutionalism. It does not reconcile the freedom of one with the other, in general, according to a universal law of freedom, but only that of the citizen with that of the state.[54] From a historical point of view, referring back to the French Revolution, constitutional rights had initially served as guiding principles for transforming the social order in accordance with the principles of freedom and equality. Only afterwards did they fall back to their function as rights of defence against the state.[55]

Foundation and limitation

In this view, constitutional rights serve both as a foundation and as a limitation of constitutional governance arrangements such as the one that allocates domains on the Internet.

On the one hand, they enable and protect these arrangements not only because they make use of their private liberties, but also because they

[51] Ibid 187.

[52] See G Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69 *Modern Law Review* 327; K-H Ladeur and L Viellechner, 'Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privatrechtsregimes' (2008) 46 *Archiv des Völkerrechts* 42.

[53] B Schlink, 'Freiheit durch Eingriffsabwehr: Rekonstruktion der klassischen Grundrechtsfunktion' (1984) 11 *Europäische Grundrechte-Zeitschrift* 457; DP Currie, 'Positive and Negative Constitutional Rights' (1986) 53 *University of Chicago Law Review* 864.

[54] See E-W Böckenförde, 'Fundamental Rights as Constitutional Principles: On the Current State of Interpreting Fundamental Rights' in E-W Böckenförde, *Constitutional and Political Theory: Selected Writings* vol. 1 (Oxford University Press, Oxford, 2017) 235, 258.

[55] See Grimm (n 46) 76.

contribute to creating an order that benefits the entire society and is not available elsewhere.[56] As a matter of fact, there is no consensus on creating an international organisation that could assume the task of allocating domains on the Internet. At the same time, the regulation of the Internet by a single state, such as the United States of America, would not be acceptable from a normative point of view, even if it were technically feasible. From an epistemological perspective, finally, societal self-regulation of the Internet may appear even superior to regulation by either national legislation or international treaty-making. In complex subject matters, political regulators sometimes lack the knowledge required in order to take fully informed decisions.[57] Especially in the field of technology, which is subject to rapid evolution, they may encounter insurmountable cognitive limits. By contrast, transnational governance arrangements, which are deeply embedded within the respective social spheres, may instantly absorb the implicit knowledge dispersed there. For example, ICANN evolved from an initiative around the computer scientists and technicians who invented the Internet domain system.[58] As this development demonstrates, societal interaction in transnational governance arrangements may not only, and even not primarily, serve selfish ends, but enable movements of research and processes of innovation, the findings of which others may profit from as well. In its regulatory activity, the arrangement that allocates domains on the Internet is therefore protected by the constitutional rights to freedom of information and speech.[59]

On the other hand, however, horizontal constitutional rights as proposed here also constrain transnational governance arrangements, notably to avoid their self-destruction and excessive expansion. To this purpose, they not only comprise a negative, that is defensive, but also a positive component.

[56] Cf. K-H Ladeur, 'Discursive Ethics as Constitutional Theory: Neglecting the Creative Role of Economic Liberties?' (2000) 13 *Ratio Juris* 95; T Vesting, 'The Autonomy of Law and the Formation of Network Standards' (2004) 5 *German Law Journal* 639.

[57] See generally FA von Hayek, 'Die Anmaßung von Wissen' (1975) 26 *Ordo* 12.

[58] See Mueller (n 12) 73–208.

[59] Cf. A Skordas, 'Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, Cambridge, 2007) 207; DR Johnson and DG Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367, 1393: 'If there is one central principle on which all local authorities within the Net should agree, it must be that territorially local claims to a right to restrict online transactions (in ways unrelated to vital and localized interests of a territorial government) should be resisted. This is the Net equivalent of the First Amendment, a principle already recognized in the form of the international human rights doctrine protecting the right to communicate.'

In a negative sense, they provide protection for both shareholders and outsiders against transnational governance arrangements.[60] For example, in the so-called 'cybergriping'[61] cases, in which domain names reproduce the names of persons or brands supplemented by pejorative suffixes, such as 'sucks', in order to express criticism, ICANN must respect not only personality and intellectual property rights, but also the right to freedom of speech.

In a positive sense, horizontal constitutional rights as proposed here allow for equal participation and consideration in transnational governance arrangements when they hold a monopoly in providing a service that is indispensable for realising freedom.[62] Since there is no central legislator in the transnational context, the positive component is particularly important. It would be inadequate, however, to speak of 'democratisation'[63] in this regard. More precisely, the issue is to render transnational governance arrangements 'responsive'[64] towards their societal environment. In this way, they are required to take into account the conflicting interests of the institutions and persons affected by their activities.[65] For example, as ICANN holds a monopoly in allocating domains on the Internet and communication on the Internet is impossible without a domain, the rights to freedom of information and speech, as well as the right to equality, ensure that applications for second-level domains that have not yet been registered are not arbitrarily rejected. Moreover, when ICANN intends to create new top-level domains, such as '.xxx' for pornographic sites, it must equally consider the conflicting rights to freedom of speech, freedom of profession and concerns of youth protection.[66]

[60] See G Teubner and V Karavas, 'http://www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on "Private Parties" within Autonomous Internet Law' (2005) 12 *Constellations* 262.

[61] RS Sorgen, 'Trademark Confronts Free Speech on the Information Superhighway: "Cybergripers" Face a Constitutional Collision' (2001) 22 *Loyola of Los Angeles Entertainment Law Review* 115; A Goldstein, 'ICANNSucks.biz (And Why You Can't Say That): How Fair Use of Trademarks in Domain Names Is Being Restrained' (2002) 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1151.

[62] See Viellechner (n 11) 453–4; G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, Oxford, 2012) 136–9.

[63] But see O Gerstenberg, 'Private Law, Constitutionalism and the Limits of the Judicial Role' in C Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, Oxford, 2001) 687.

[64] L Viellechner, 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law' (2015) 6 *Transnational Legal Theory* 312.

[65] See also G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.

[66] See P Chan, 'Safer (Cyber)Sex with .xxx: The Case for First Amendment Zoning of the Internet' (2006) 39 *Loyola of Los Angeles Law Review* 1299.

Such a conception of constitutional rights may provoke a double objection. A critique from an internal point of view may reveal a self-contradiction. Apparently, this conception aims at both differentiation and integration of society simultaneously. At times, it calls for protection of social systems and institutions in order to maintain a variegated order. At other times, it allows for intervention so as to improve participation in social systems and institutions.[67] A critique from an external point of view may further detect a category error. Allegedly, this conception tries to solve problems of collective self-determination by employing means of individual self-determination. In this way, it seems to overstretch the capacities of constitutional rights.[68]

In the transnational context, which lacks a central political legislator, however, these objections lose significance. When both states and international organisations fail, society must necessarily regulate itself. Collective order may then only result accidentally from societal interaction.[69] Intentional design is only possible by means of contract.[70] Under these conditions, the internal relationship between democracy and constitutional rights needs to be reformulated. It must be adapted to the changing circumstances in order to ensure a constant protection of freedom.

IV. Transnational legal process

An adequate protection of constitutional rights in the transnational context has not yet been achieved. For the time being, it may only succeed through a dialectical process that oscillates between the internal constitutionalisation of transnational governance arrangements and the external constitutionalisation provided by the national legal orders.

Internal constitutionalisation

Systems theory of law claims that transnational governance arrangements are able to establish their own constitutions.[71] As its proponents explain,

[67] See O Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik* (Mohr Siebeck, Tübingen, 1999) 70.

[68] See O Lepsius, 'Braucht das Verfassungsrecht eine Theorie des Staates? Eine deutsche Perspektive: Von der Staatstheorie zur Theorie der Herrschaftsformen' (2004) 31 *Europäische Grundrechte-Zeitschrift* 370, 380.

[69] See K-H Ladeur, 'The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making' (2007) 14 *Indiana Journal of Global Legal Studies* 329.

[70] See P Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14 *Indiana Journal of Global Legal Studies* 191.

[71] See G Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart, Oxford, 2004) 3.

these societal constitutions do not result from any visible act of constituent power. Rather, they emerge incrementally and pass through several stages of evolution, similar to the common law. Purportedly, each process of juridification presupposes latent constitutional norms that are created at the very time of their application and hence remain inseparable from the ordinary norms.[72] Constitutional norms of this kind include not only rules of recognition, such as Paragraph 15(a) UDRP-Rules, but also fundamental rights.

Indeed, some panels appointed to decide domain disputes invoke the right to freedom of speech, although the UDRP does not explicitly provide for such a right. They notably proceed in this way when they deal with issues of 'cybergriping'. In an early case, a dispute resolution panel appointed by the Arbitration and Mediation Center of the World Intellectual Property Organization proclaimed in a principled manner:

> Although free speech is not listed as one of the Policy's examples of a right or legitimate interest in a domain name, the list is not exclusive, and the Panel concludes that the exercise of free speech for criticism and commentary also demonstrates a right or legitimate interest in the domain name under Paragraph 4(c)(iii). The Internet is above all a framework for global communication, and the right to free speech should be one of the foundations of Internet law.[73]

Several other panels share this view. Yet, they employ different methods in order to reach their aim. Some of them refer to the right to freedom of speech guaranteed by the First Amendment to the Constitution of the United States of America.[74] Others determine the applicable law according to the rules of private international law of the competent national jurisidiction.[75] Still others refuse to apply national law in these transnational disputes as a matter of principle. Instead, they rely on the Universal Declaration of Human Rights of the United Nations,[76] international treaties, such as the International Covenant on Civil and

[72] Ibid 18; for a more detailed account, see Teubner (n 62) 73–123.

[73] WIPO AMC, Decision of 6 July 2000, Case D2000-0190, *Bridgestone Firestone, Inc. et al. v Jack Myers*.

[74] WIPO AMC, Decision of 5 August 2000, Case D2000-0536, *TMP Worldwide Inc. v Jennifer L. Potter*; Decision of 10 July 2009, Case D2009-0693, *Sutherland Institute v Continuative LLC*.

[75] WIPO AMC, Decision of 22 April 2004, Case D2004-0014, *Howard Jarvis Taxpayers Association v Paul McCauley*; Decision of 2 July 2008, Case D2008-0647, *Sermo, Inc. v CatalystMD, LLC*.

[76] WIPO AMC, Decision of 14 November 2007, Case D2007-1379, *Chelsea and Westminster Hospital NHS Foundation Trust v Frank Redmond*; Decision of 10 November 2014, Case D2014-1590, *Fiskars Corporation v Whois Privacy Service/James Taverner*.

Political Rights[77] or the European Convention on Human Rights,[78] as well as general principles of law.[79] Finally, some panels apply national and international law sources simultaneously.[80]

More recently, many panels simply follow the large number of precedents rendered on the same issue.[81] A noteworthy decision not only identifies a specific right of the UDRP that allows using a trademark as a domain name in order to express criticism, but also extracts the precise content of this right from previous decisions:

> [T]his Panel suggests that a registrant of a domain name is likely to have a right or legitimate interest in a domain name which is identical or confusingly similar to a mark of another party in accordance with paragraph 4(c)(iii) of the Policy if the following conditions are met: (a) the domain name has been registered and is being used genuinely for the purpose of criticising the owner of the mark; (b) the registrant believes the criticism to be well-founded; (c) the registrant has no intent for commercial gain; (d) it is immediately apparent to Internet users visiting the website at the domain name that it is not a website of the owner of the mark; (e) the respondent has not registered all or most of the obvious domain names suitable for the owner of the mark; (f) where the domain name is one of the obvious domain names suitable for the owner of the mark, a prominent and appropriate link is provided to the latter's website (if any); (g) where there is a likelihood that email intended for the complainant will be sent using the domain name in issue, senders are immediately alerted in an appropriate way that their emails have been misaddressed.[82]

Nevertheless, the dispute resolution practice is still unclear regarding both the foundation and the content of the right to freedom of speech under

[77] WIPO AMC, Decision of 23 November 2009, Case D2009-1295, *Coast Hotels Ltd. v Bill Lewis and Unite Here*.

[78] WIPO AMC, Decision of 10 January 2002, Case D2001-1318, *British Nuclear Fuels plc v Greenpeace International*; Decision of 23 October 2006, Case D2006-1066, *Moss and Coleman Solicitors v Rick Kordowski*.

[79] WIPO AMC, Decision of 18 January 2008, Case D2007-1461, *1066 Housing Association Ltd. v Mr. D. Morgan*; Decision of 8 March 2016, Case D2016-0110, *Visit Faroe IslandsP/F v Pilot Whale, Save the Whales*.

[80] WIPO AMC, Decision of 23 September 2014, Case D2014-1331, *Petroleo Brasileiro SA – Petrobas v Ivo Lucio Santana Marcelino Da Silva*.

[81] Among the first decisions employing this reasoning were WIPO AMC, Decision of 13 February 2008, Case D2007-1887, *Thorsten Rathmann v Administrator Lunarpages and Customer of Lunarpages*; Decision of 17 April 2008, Case D2008-0274, *Escada AG v Phil Mitchell*.

[82] WIPO AMC, Decision of 25 February 2008, Case D2007-1947, *Fundación Calvin Ayre Foundation v Erik Deutsch*.

the UDRP. Regarding the foundation, some panels expressly speak of a fundamental right proper to the UDRP.[83] Others merely recognise a counter-right or a legitimate interest according to Paragraph 4(a)(ii) UDRP.[84] Yet others categorically deny their competence to take a decision of constitutional significance:

> Panelists are private citizens who are given a very limited brief by commercial contract between private parties, and accountable only to the private provider that has engaged them. Even if the consequences be limited to a single domain name, it is wholly inappropriate for a panelist to make a judgment with Constitutional import.[85]

Regarding the content of the right to freedom of speech under the UDRP, there is disagreement in two respects. On the one hand, opinions differ on the preliminary question of whether the use of a trademark with a pejorative suffix such as 'sucks' can cause a risk of confusion in the sense of Paragraph 4(a)(i) UDRP that would require justification.[86] On the other hand, decisions contradict each other on the question of whether the use of a trademark without a pejorative suffix is protected by the right to freedom of speech when the website thus designated contains criticism.[87]

The internal constitutionalisation of transnational governance arrangements such as the one that allocates domains on the Internet hence remains uncertain. Dispute resolution service providers may not only take divergent decisions, but also refuse to provide fundamental rights protection at all, especially since there is no obligation to follow precedents under

[83] WIPO AMC, Decision of 6 November 2000, Case D2000-1171, *Migros Genossenschaftsbund v Centro Consulenze Kim Paloschi*; Decision of 14 April 2004, Case D2004-0032, *Hollenbeck Youth Center, Inc. v Stephen Rowland*.

[84] WIPO AMC, Decision of 5 September 2002, Case D2002-0596, *Akerman, Senterfitt and Eidson, P.A. v American Distribution Systems, Inc. d/b/a DefaultData.com*; Decision of 22 October 2008, Case D2008-1234, *Union Square Partnership, Inc. et al. v* unionsquarepartnership.com *Private Registrant et al.*

[85] WIPO AMC, Decision of 11 December 2006, Case D2006-1230, *InMed Diagnostic Services, LLC et al. v James Harrison*.

[86] On the one hand WIPO AMC, Decision of 19 September 2000, Case D2000-0662, *Wal-Mart Stores, Inc. v Richard MacLeod d/b/a For Sale*; Decision of 11 August 2016, Case D2016-0951, *Royal Institution of Chartered Surveyors v Martin Rushton*; on the other hand WIPO AMC, Decision of 26 January 2001, Case D2000-1015, *Lockheed Martin Corporation v Dan Parisi*; Decision of 18 June 2001, Case D2001-0212, *The Royal Bank of Scotland Group plc v natwestfraud.com and Umang Malhotra*.

[87] On the one hand WIPO AMC, Decision of 18 December 2000, Case D2000-1314, *Skattedirektoratet v Eivind Nag*; Decision of 9 July 2014, Case D2014-0780, *Mr. Willem Vedovi, Galerie Vedovi S.A. v Domains By Proxy, LLC/Jane Kelly*; on the other hand WIPO AMC, Decision of 6 July 2000, Case D2000-0190, *Bridgestone Firestone, Inc. et al. v Jack Myers*; Decision of 25 February 2008, Case D2007-1947, *Fundación Calvin Ayre Foundation v Erik Deutsch*.

the UDRP. There is only hope that external pressure might induce a self-restraint of transnational governance arrangements.

External constitutionalisation

As long as transnational governance arrangements do not guarantee adequate protection of constitutional rights, they must therefore be complemented by the national legal orders. In the arrangement that allocates domains on the Internet this is possible as Paragraph 4(k) UDRP explicitly allows for actions to be brought before national courts. Such kind of containment might be called 'external constitutionalisation'[88] and follow a model that is already established for the relationship between national legal orders and international organisations as well as several international organisations including the same member states among each other. According to this model, the various legal orders may, by means of mutual judicial assistance, compensate the gaps in the protection of constitutional rights that exist elsewhere.[89]

Thus, the Federal Constitutional Court of Germany has declared in its famous 'Solange' decision that it will only relinquish its competence to decide on the applicability of European Union law in Germany as long as the European Union guarantees a protection of fundamental rights 'which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law'.[90] Similarly, the European Court of Human Rights holds that state action taken in compliance with obligations resulting from the membership in an international organisation 'is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'.[91] In the same vein, the Court of Justice of the European Union scrutinises the regulations of the European Union that implement resolutions of the United Nations Security Council sanctioning

[88] For the distinction of external and internal point of view in legal theory, see Hart (n 42) 86–8.

[89] See also N Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals' (2008) 30 *Loyola of Los Angeles International and Comparative Law Review* 275; A Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument' in OK Fauchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Hart, Oxford, 2012) 185.

[90] BVerfG, Decision of 22 October 1986, Case 2 BvR 197/83, *Solange II*, 73 *Entscheidungen des Bundesverfassungsgerichts* 339, 387.

[91] ECHR, Judgment of 30 June 2005, Case 45036/98, *Bosphorus v Ireland*, para 155.

persons suspected of terrorism as long as the review procedure offered by the United Nations 'does not offer the guarantees of judicial protection'.[92]

The construction of a transnational dimension of constitutional rights is possible in all national legal orders across the Western tradition. It is particularly easy in Germany where the objective component of constitutional rights may serve as a gateway. The Federal Constitutional Court of Germany has already deduced several new dimensions from it, including an indirect horizontal effect in civil law,[93] a protective function of the state,[94] positive rights,[95] procedural guarantees[96] and organisational principles.[97] When other new dangers arise for fundamental rights in the transnational context, it becomes once more necessary to adapt the law to the changing circumstances. The constitutional principle of 'open statehood'[98] enshrined in the Basic Law for the Federal Republic of Germany then calls for ensuring protection of constitutional rights also with regard to transnational governance arrangements. In this respect, the objective component of constitutional rights may yet again prove to be a dynamic principle that adapts the law to social change and safeguards freedom in the face of alternating conditions.[99]

To date, the German courts have only ruled on domain disputes relating to the country code top-level domain '.de', for which the Deutsches Network Information Center eG (DENIC),[100] a private organisation authorised

[92] ECJ, Judgment of 3 September 2008, Joined Cases C-402/05 P et al., *Kadi and Al Barakaat v Council and Commission*, (2008) *European Court Reports* I-6351, para 322.

[93] BVerfG, Judgment of 15 January 1958, Case 1 BvR 400/51, *Lüth*, 7 *Entscheidungen des Bundesverfassungsgerichts* 198, 205–7.

[94] BVerfG, Judgment of 25 February 1975, Joined Cases 1 BvF 1/74 et al., *Schwangerschaftsabbruch I*, 39 *Entscheidungen des Bundesverfassungsgerichts* 1, 41–4.

[95] BVerfG, Judgment of 18 July 1972, Joined Cases 1 BvL 32/70 et al., *Numerus Clausus* I, 33 *Entscheidungen des Bundesverfassungsgerichts* 303, 330–5; Judgment of 9 February 2010, Joined Cases 1 BvL 1/09 et al., *Hartz IV*, 125 *Entscheidungen des Bundesverfassungsgerichts* 172, 222.

[96] BVerfG, Decision of 20 December 1979, Case 1 BvR 385/77, *Mülheim-Kärlich*, 53 *Entscheidungen des Bundesverfassungsgerichts* 30, 57–61.

[97] BVerfG, Judgment of 16 June 1981, Case 1 BvL 89/87, *Rundfunkentscheidung III*, 57 *Entscheidungen des Bundesverfassungsgerichts* 295, 320.

[98] BVerfG, Judgment of 26 March 1957, Case 2 BvG 1/55, *Reichskonkordat*, 6 *Entscheidungen des Bundesverfassungsgerichts* 309, 362; K Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit: Ein Diskussionsbeitrag zu einer Frage der Staatstheorie sowie des geltenden deutschen Staatsrechts* (Mohr Siebeck, Tübingen, 1964) 42.

[99] Cf. D Grimm, 'Return to the Traditional Understanding of Fundamental Rights?' in D Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, Oxford, 2016) 183.

[100] Deutsches Network Information Center eG, founded 1 December 1996, <https://www.denic.de>.

by ICANN and based in Frankfurt, Germany, distributes second-level domains. Here, they do not hesitate to invoke the right to freedom of speech guaranteed by Article 5(1) of the German Basic Law in 'cybergriping' cases. For example, the Higher Regional Court of Hamburg held, in a dispute concerning the domain 'awd-aussteiger.de', on which former clients criticised the business practices of a financial service provider:

> The defendant does not intend to promote unfair competition, but to criticise the plaintiff. This is as such not an unlawful undertaking. Rather the defendant may invoke the fundamental right to freedom of speech according to Article 5 of the Basic Law.[101]

The external constitutionalisation of transnational governance arrangements may equally be achieved through the means of civil law. Thus, the Regional Court of Bremen dismissed an action of the public transport company Bremer Straßenbahn AG (BSAG) against the use of the domain 'bsagmeckerseite.de' because it did not find any likelihood of confusion pursuant to Paragraph 15(2) of the German Trade Mark Act or a violation of interests pursuant to Paragraph 12 of the German Civil Code.[102]

Civil law institutions also lend themselves for the external constitutionalisation of transnational governance arrangements in national legal orders that do not know of any horizontal effect of constitutional rights.[103] In the Anglo-American jurisdictions, common law might likewise assume this task. Thanks to its flexibility, it is especially well suited for such an undertaking.[104] Apart from this, even the national legal orders that rely on a rigorous state-action doctrine might follow the German model when it comes to confining transnational governance arrangements. As one commentator points out for the Constitution of the United States of America:

> We must decide on our own what makes better sense of our constitutional tradition. Is it more faithful to our tradition to allow these structures of control, the functional equivalent of law, to develop outside the scope of constitutional review? Or to extend constitutional review to the structures of private regulation, to preserve those fundamental values

[101] OLG Hamburg, Judgment of 18 December 2003, Case 3 U 117/03, *awd-aussteiger.de*, (2004) 7 *Multimedia und Recht* 415, 418 (my translation).

[102] LG Bremen, Judgment of 30 January 2003, Case 12 O 383/02, *bsagmeckerseite.de*, (2003) 7 *Zeitschrift für Urheber- und Medienrecht – Rechtsprechungsdienst* 360.

[103] See R Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society' (2005) 46 *Harvard International Law Journal* 471; H Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347.

[104] See HH Perritt Jr, 'Towards a Hybrid Regulatory Scheme for the Internet' (2001) 16 *University of Chicago Legal Forum* 215, 280.

> within our tradition? These are hard questions, though it is useful to note that they are not as hard to ask in other constitutional regimes. The German tradition, for example, would have less trouble with the idea that private structures of power must ultimately be checked against fundamental constitutional values.[105]

Some American courts have already taken this path. For example, a Court of Appeal held, in a dispute over a domain name that added a critical suffix to the designation of a shopping centre:

> We find that Mishkoff's use of Taubman's mark in the domain name 'taubmansucks.com' is purely an exhibition of Free Speech ... . And although economic damage might be an intended effect of Mishkoff's expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business.[106]

It does not seem appropriate, however, to apply national constitutional rights exclusively in cases that imply a cross-border aspect. Especially with regard to disputes over Internet domains, such a choice of law would be random and undemocratic as far as foreigners are concerned. The transnational dimension of constitutional rights should therefore be considered as a conflict-of-laws rule dealing with the relationship between national legal orders and transnational governance arrangements.[107] This rule does not refer to any single foreign legal order, either. Instead, it

[105] L Lessig, *Code and Other Laws of Cyberspace* (Basic Books, New York, NY, 1999) 217–18. See also P Schiff Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 *University of Colorado Law Review* 1263.

[106] CA (6th Cir), Judgment of 7 February 2003, Case 01-2648, *Taubman v Webfeats and Mishkoff*, 319 F3d 770, 778.

[107] For the idea to transfer the concepts of conflict of laws to transnational governance, see R Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 *Columbia Journal of Transnational Law* 209; P Schiff Berman, 'Conflict of Laws, Globalization, and Cosmopolitan Pluralism' (2005) 51 *Wayne Law Review* 1105; J Bomhoff, 'The Reach of Rights: "The Foreign" and "the Private" in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements' (2008) 71 *Law and Contemporary Problems* 39; C Joerges, 'A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation' in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart, Oxford, 2011) 465; Teubner (n 62) 150–73; K Knop, R Michaels and A Riles, 'International Law in Domestic Courts: A Conflict of Laws Approach' (2009) 103 *American Society of International Law Proceedings* 269; H Muir Watt, 'Conflicts of Laws Unbounded: The Case for a Legal-Pluralist Revival' (2016) 7 *Transnational Legal Theory* 313; CA Whytock, 'Conflict of Laws, Global Governance, and Transnational Legal Order' (2016) 1 *UC Irvine Journal of International, Transnational, and Comparative Law* 117.

requires the applicable law in these cases to be determined according to a method called the 'substantive approach'[108] in conflict-of-laws scholarship. A new substantive norm that comprises elements of all the legal orders concerned should, hence, be formed.[109]

Such an approach may raise serious concerns for its part. From a methodological point of view, it is extremely challenging. Not only does it place a special responsibility on judges, but it also requires comparative knowledge and skills that would need to be acquired through some new form of 'transnational legal education'.[110] Moreover, regarding democracy and separation of powers, the approach appears as highly problematic. It doubles the 'counter-majoritarian difficulty'[111] since judges are allowed to make rules by a possibly even arbitrary resort to foreign law. The assessment turns out more favourably, though, if it is acknowledged that the issue here is not to invalidate statutes enacted by a democratically elected legislator, but self-given rules of transnational governance arrangements. In this respect, the judges ensure that the legitimate concerns of all those affected by the rules, but not heard elsewhere, are duly taken into account.[112]

V. Conclusion

The adequate standard of constitutional rights protection in the transnational context may then eventually arise from a dialectical process of mutual observation, recognition and contestation between national legal orders and transnational governance arrangements. While any competent court or arbitrator seised may take an authoritative decision, none of them may

[108] AT von Mehren, 'Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology' (1974) 88 *Harvard Law Review* 347.

[109] See also E Langen, *Transnational Commercial Law* (Sijthoff, Leiden, 1973) 33; GB Dinwoodie, 'A New Copyright Order: Why National Courts Should Create Global Norms' (2000) 149 *University of Pennsylvania Law Review* 469; P Schiff Berman, 'Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interest in a Global Era' (2005) 153 *University of Pennsylvania Law Review* 1819; G Teubner and P Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society' in MA Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge, 2012) 23.

[110] S Lebel-Grenier, 'What Is a Transnational Legal Education?' (2006) 56 *Journal of Legal Education* 190; C Arjona *et al.*, 'What Law for Transnational Legal Education? A Cooperative View of an Introductory Course to Transnational Law and Governance' (2015) 6 *Transnational Legal Theory* 253.

[111] AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, Indianapolis, IN, 1962) 16.

[112] See Gerstenberg (n 63) 698–701; P Schiff Berman, 'The Globalization of Jurisdiction' (2002) 151 *University of Pennsylvania Law Review* 311, 520–1.

claim to have the last word. In this dialectical process of constitutionalising transnational governance arrangements, the national courts incur a 'double function',[113] or role splitting, that is already known from the implementation of public international law. On the one hand, they act as national agents. On the other, they support a transnational rule of law.[114] Arguably, the mere possibility of recourse to national courts may incite transnational governance arrangements to respect the appropriate legal standards.[115]

The judicial reconciliation of the various legal orders would be greatly enhanced if it were supported by a procedural commitment to deal with precedents that might be called 'default deference'.[116] Such a mode of decision-making lies in-between stare decisis and persuasive authority. It allows for deviation from precedents, but only when there are convincing reasons. The mutual recognition and contestation of the various legal orders through the dialogue of judges and arbitrators may thus even bear some democratic potential. As it allows for articulating opposition, it can, at least to some extent, compensate for the lack of parliamentary legislation in the transnational context.[117]

[113] G Scelle, *Précis de droit des gens: principes et systématique* vol. 1 (Sirey, Paris, 1932) 43.

[114] See A-M Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; P Schiff Berman, 'Judges as Cosmopolitan Transnational Actors' (2004) 12 *Tulsa Journal of Comparative and International Law* 109; S Cassese, *I tribunali di Babele: I giudici alla ricerca di un nuovo ordine globale* (Donzelli, Rome, 2009).

[115] See Perritt (n 104) 266.

[116] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1039.

[117] Cf. K-H Ladeur, 'Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation-State?' in K-H Ladeur (ed), *Public Governance in the Age of Globalization* (Ashgate, Aldershot, 2004) 89; N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010) 264–76.