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## Transnational Networks and Constitutionalism

**Abstract** The concept of modern constitutionalism is intimately related to notions of state sovereignty. The actual influence of the constitution as a hierarchical tool of nation-state design remains a matter of dubious empirical validity. Today, among the conditions of intergovernmentalism and globalization, state centered constitutionalism is confronting governance by networks: both private domestic networks and networks of national governmental institutions are becoming decision-makers, which cannot be controlled within the concepts of state based constitutionalism. Notwithstanding these developments the above difficulties of constitutional social steering and determination of the public sphere have not resulted in the dethroning of the paradigm of state centered constitutional law in the constitutional law community. Such disregard runs the risk to turn constitutionalism into irrelevant speculation in an age of globalization. In the globalized world the most important decisions and events affecting society escape the control of the sovereign state operating on the principle of territoriality. In this paper I consider two structures of polycentric exercise of public power that are decisive for a new paradigm of constitutionalism. The first type of transnational network structure is primarily a network of private ordering with the participation of administrative bodies of the desaggregating state and private entities associated with the administrative entities (transboundary private networks). A second kind of transnational networks (transgovernmental networks) originates from supranational organizations that operate beyond the nation state. Transgovernmental networks take away traditional governmental functions and overwrite/replace the decisions of the state organs. The taking of state functions includes regulation, adjudication, enforcement, material and other services. The actions of the networks are beyond the control of the constitutionally designated authorities and follow principles, which are unrelated to the otherwise pertinent constitutional principles. The article considers the impact of international networks on the desaggregation of the constitutional state and the possibility of a new legitimation for transnational network-based governance.

**Keywords:** constitutionalism, state sovereignty, transgovernmental network, transnational network

The concept of modern constitutionalism is intimately related to notions of state sovereignty. The constitution is understood as a self-definition of the sovereign state: constitutionalism is the self-restriction of the state. In the concept of the

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state that is based on state sovereignty it is the constitution that shall determine the fundamental arrangements regarding the use of public power and the structure and organization of fundamental state institutions. Beginning with Hans Kelsen, the prevailing hierarchical understanding of the rule of law based state conceived the constitution as the fundamental or decisive element of the legal order. Today the constitution and constitutionalism—as a practice organized around the constitution—is presented in textbooks as the sum total and explicit formation and safeguard of the shared values of society, or at least the sum total of the values or practices that enable living together in the given state.

To what extent these expectations can be met was always a matter of serious doubt. The actual influence of the constitution as a hierarchical tool of state design remains a matter of empirical validity. One can always contest the assumption that the constitution pushes towards constitutionalism the most important organizations of the state.

The lack of sufficient empirical proof to the centrality of the constitution thesis has not endangered the legitimacy and therefore normativity of the constitution. Nevertheless, the growing importance of private organizations beyond the control of the public power created a serious challenge to the traditional perspective of constitutionalism. This challenge is made even more serious by transnational activities. Of course, constitutional law tried to extend its values to the private sphere in the form of state action and third party effect doctrines but most of the private power and transgovernmental phenomena remained under the radar of constitutional law.<sup>1</sup> This is quite stunning given that the dislocation challenges the role of the modern state constitution as “a central mechanism which enabled the recognition, coordination, assimilation and self-legitimation of the legal and political systems”.<sup>2</sup>

Today, among the conditions of intergovernmentalism and globalization, state centered constitutionalism is confronting governance by networks: both private domestic networks and networks of national governmental institutions are becoming decision-makers, which cannot be controlled within the concepts

<sup>1</sup> See Walker, N.: The Idea of Constitutional Pluralism. *Modern Law Review* 65 (2002) 317–359, text accompanying note 89. The challenge to state-centered theories originates in the new institutional perception of the European Union. Integration is a “polity creating process in which authority and policy-making are shared across multiple levels of government—subnational, national and supranational.” See Marks, G. et al.: European Integration from the 1980s: State-Centric v. Multiple-Level Governance. *Journal of Common Market Studies* 34 (1996) 341–378, 342. For a review of the debate see Craig, P.: The Community Political Order. *Indiana Journal of Global Legal Studies* 10 (2003) 79–124.

<sup>2</sup> Chalmers, D.: Post-Nationalism and the Quest for Constitutional Substitutes. *Journal of Law and Society* 27 (2000) 187–217, 179.

of state based constitutionalism. Arguably, transnationally networked private and governmental organizations become more and more decisive in the organization of social life and what used to be called the public sphere. Trans-governmental networks increasingly take over governmental decision-making. In the definition of “transgovernmental networks” I follow Kal Raustiala: “Trans-governmentality refers to the involvement of specialized domestic officials who directly interact with each other, often with minimal supervision by foreign ministries: They are ‘networks’ because this cooperation is based on loosely-structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation. Thus defined, the phrase ‘transgovernmental networks’ captures a strikingly wide array of contemporary cooperation.”<sup>3</sup> Note that although networks do have important power elements and do serve interstate and other (corporate) domination, the networks operate primarily as *epistemic communities*. This will be crucial in their indifference to constitutional considerations.

Even without the recent developments in transgovernmental networking, the centrality of constitutional law and its ability to steer social relations towards constitutional values has been very stressed. To some extent the limits to constitutional steering are built into the very concept of constitutionalism, namely in the various precepts and principles protecting private life. Traditional programs of constitutionalism, like the American one, were restricted to the sphere of governmental action. It is also obvious that irrespective the aspirations of constitutionalism to shape society and impose its own model of fairness and justice, the attempts to create a constitutional society remain somewhat futile because of the limited penetration of law into society.

In all forms of constitutionalism, irrespective of the assumptions constitutional law makes regarding its power to control other parts of the legal system, there is a principal assumption regarding a rather neat separation of the public and private spheres. It is the intent of constitutional law to determine the boundaries of these two spheres. The point is that the two spheres are subject to external normative boundary setting only to a limited extent. On the long run the constitutionally carved out divide has to take into consideration the social construction of these boundaries (see e.g. the case of abortion that was

<sup>3</sup> Raustiala, K.: *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*. *Virginia Journal of International Law* 43 (2002) 1–92, 5. Consider also Risse-Kappen, T.: *Cooperation Among Democracies: The European Influence on U.S. Foreign Policy*. Princeton, 1995. 38. (defining “transgovernmental coalitions” as “transboundary networks among subunits of national governments forming in the absence of central and authoritative national decisions”).

gradually accepted to be a private matter). Moreover, the dynamics of shaping the public and private spheres has changed considerably in a world where globalizing private networks are increasingly capable to shape what remains in the public sphere. In particular, these networks are capable to replace the state law with their own system of norms. In many regards transnational governmental networks are also able to determine what is “private”, enabling the self-regulation that they have sanctioned to remain beyond the reach of constitutional law and constitutionalism.

Notwithstanding these developments the above difficulties of constitutional social steering and determination of the public sphere have not resulted in the dethroning of the paradigm of state centered constitutional law in the constitutional law community. Such disregard runs the risk to turn constitutionalism into irrelevant speculation in an age of globalization. In the globalized world the most important decisions and events affecting society escape the control of the sovereign state operating on the principle of territoriality. Once the state loses control, there seems to be no social actor interested to impose values of constitutionalism into social ordering.

The transnational networks challenge the state’s monopoly over the public sphere that is exercised through its administrative machinery. The state loses control over the sphere that it assigned to be under its supervision. This means that to the extent the state operated according to constitutional values this operations will cease to be decisive. The basic assumptions of constitutionalism embedded into the constitution become of questionable relevance.

Constitutional relations of the state were already under stress given the internationalization of many domestic relations. Moreover, the internationalization resulted in a change in the balance of powers, with increased powers granted to the executive. To a considerable extent the executive escapes the control of the other branches in the generation of international norms applicable to the state. Many areas of regulation that earlier were at least supervised by the legislative and judicial branches, are now presented as activities falling within foreign policy, a matter traditionally reserved to a great extent to the executive. The transnational networking contributes to a polycentric (non-state centered) exercise of public power (including the removal of the exercise of power from the public sphere). By polycentricity I mean that the state cannot decide alone in matters traditionally reserved to sovereign power, at least the decisions are consensual with other states and international organizations, or, the decisions emerge without the participation of traditional holders of state sovereignty.

In this paper I consider two structures of polycentric exercise of public power that are decisive for a new paradigm of constitutionalism. The first type

of transnational network structure is primarily a network of private ordering with the participation of administrative bodies of the desaggregating state and private entities associated with the administrative entities (hereinafter *trans-boundary private networks*). A second type of transnational networks originates from supranational organizations that operate beyond the nation state (like the European Union or the WHO; hereinafter *transgovernmental networks*). The participants of the transgovernmental network are components of the desaggregated state.

The first and primary form of transnational networks is modeled upon networks emerging in production and distribution in the corporate world. Nokia serves as a good example. Here the economic actors (owned by an unidentifiable international network of owners) turned into an international network. Other actors are related to the network in more loosely connected ways (suppliers, etc.). The identifiable ownership elements that are traditionally accessible to national regulators and domestic law more or less disappear or at least are too diffuse for successful control. The labor force to be regulated is to be found under a jurisdiction (or jurisdictions) that is different from the jurisdiction that seems to apply on grounds of ownership or incorporation. Management is not only international but also physically hard to locate. As to capital, especially when it comes to taxation, this is certainly located “elsewhere”, in a hard to reach jurisdiction, or in permanent movement. Private networks are often enormous and exercise control over their member organizations, employees and partners in competition with the state. Given that the private power remains diffuse and hard to reach for the state, it is nearly impossible for constitutional values to penetrate the network that operates under its own ‘constitution’. A private business network like Nokia operates according to its corporate ethics, internal professional standards, codes. These codes, or the communication community that exists on the basis of shared codes, keep the network together (see for example the strictly censorial and privacy disregarding private internet system). Many scholars are inclined to believe that such private ordering that follows market logic makes the efforts of state centered constitutional law irrelevant as the constitutional law is unable to penetrate the private constitutions.

While the above mentioned transboundary ownership networks slip out of the territorially and personally organized constitutional supervision, the transgovernmental networks directly challenge the state. These transgovernmental networks take away traditional governmental functions and overwrite/replace the decisions of the state organs. The taking of state functions includes regulation, adjudication, enforcement, material and other services. The transgovernmental networks are often based on public-private partnership with private actors

having the decisive say in the network.<sup>4</sup> (It should be added that in the process of reshaping the public-private divide hybrid organizations are created and this poses problems to public law partly unrelated to networking.)<sup>5</sup> In other instances the desaggregated national governmental bodies operate under the umbrella of international organizations but private actors may also participate in the network. The distinction is a matter of degree and the composition of the networks changes with increased private participation. A typical process in the making of the transgovernmental network is that first a traditional international organization is created that has decision-making powers under its constitutive treaty only with the consent of the participating states represented by governmental agents of the executive power acting on behalf of the sovereign state. Decisions are taken by state representatives perhaps on the basis of the preparatory work of an international secretariat. Any amendment to the constitutive treaty requires unanimity, in full respect of national sovereignty. Substantive decisions, however, are generally not made by the state representatives: in the specialized organizations it is the national professional bureaucracy that participates in the preparatory work. Here we notice the beginnings of transgovernmental networking. The professional bureaucrats of the state participating at the preparatory and decision-making sessions are contacting their peers in the other countries; their partners are not anymore their domestic superiors, other organs of their state, and even less the constitutional bodies that are supposed to control the professional bureaucracy. Perhaps the comitology system of the European Union is the best example of this trend. Here the national professional bureaucracies are appointing national members to subcommittees ad hoc or permanent mandate. The subcommittees very often create additional sub-sub committees where national members are appointed in their personal, private capacity. The national professional authority has no power to control the private experts who sit in the sub-sub committees (where most of the professional and policy-implementing work takes place). Moreover, international organizations, at least at the level of operative subcommittees increasingly invite private parties with full participatory rights in the deliberation. The International

<sup>4</sup> Aman, A. C. Jr.: Globalization, Democracy, and the Need for a New Administrative Law. *Indiana Journal of Global Legal Studies* 10 (2003) 109–137, 125.

<sup>5</sup> The divide is crucial as the “private” restricts the applicability of constitutional principles. Turning a sphere ‘private’ used to be a privilege of the public power. Obviously the transgovernmental networking and other phenomena of globalization radically curtail that power. For the consequences of the shift from public to private in terms of constitutional rights see e.g. Oliver, D.: The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act. *Public Law* 476 (2000) 481–486.

Telecommunications Union has panels where global telecommunication companies are present, and also provide expertise to governmental actors who lack sufficient expertise. In the case of the Basel Committee experts are provided by major banks, etc. Human rights intergovernmental organizations admit human rights NGOs to their decision-making bodies (which are often composed of government appointed but independent private experts). Of course, in all these cases the selection of the network participants follows its own, non-transparent and biased logic. Quite often the sub-sub-committees composed of independent experts are acting in their own capacity and not under the authority that is delegated to them by the national authority or the sub-committee for whom they are supposed to work (see in particular the Codex Alimentarius food safety decisions.)

The decisions and actions of these transnational networks raise constitutional issues. The decisions deprive constitutionally designated actors of their power to take sovereign decisions, even if the decision applicable in a given country formally originates from the constitutionally designated organ. The actions of the networks are beyond the control of the constitutionally designated authorities and follow principles, which are unrelated to the otherwise pertinent constitutional principles.

From a constitutional perspective the following constitutional questions emerge in relation to the above developments: Are these decisions legitimate? In particular, do they satisfy expectations of democratic participation, or democratic deliberation? If not so, do they offer alternative legitimation? Does this alternative legitimacy fit into traditional constitutional theory? In case the legitimation is incompatible with constitutional values does it make sense to talk about constitutionalism in a transnational, networks-operated world? After all, it is not evident that traditional constitutional values (rule of law, fairness, participatory decision-making, judicial review, political accountability, etc) are applicable to, or make sense in regard to transnational networks. If the operations of transnational networks present a challenge to constitutionalism, are there new devices to counter these trends? Is it possible to devise constitutional or international law schemes that will counter these trends providing for fairness, accountability, responsiveness in the use of public power increasingly dominated by transnational networks? Is such design feasible in an increasingly globalized world that, for reasons of efficiency, seems to favor increased networking?

Supranational and international organizations work under the assumption of state sovereignty. Even in the European Union the states are the masters of the Treaty. A sovereign state is generally taking into consideration the decisions adopted by the international organizations, but such decisions are in principle preconditioned on the consent of the sovereign state. Such consent as well as

the disregard of the international decision follow constitutionally determined patterns and values. The decisions or co-decisions are taken by constitutionally authorized domestic agents who are under constitutional and democratic control (at least at the black letter level). The development of the last twenty years shows that in the process of globalization *governance* is becoming more and more prominent to the detriment of government.<sup>6</sup> It is one of the characteristics of governance that instead of politically accountable government agencies private actors (including NGOs) exercise public authority, or at least have decisive influence on public determination.

The erosion (“hollowing out”) of the sovereignty conscious state has its domestic foundations that, at least originally, were unrelated to globalization. As Karl-Heinz Ladeur has pointed out, the erosion of the nation state had to do with changes in the production processes and commercial dealings and were related to scientific uncertainty. Decision-making becomes a cooperative process. Norms are not prepackaged knowledge but a matter to be negotiated.<sup>7</sup> Private organizations may live in symbiosis with public entities or public entities are privatized. Whichever be the case private entities become the norm generators. The privately generated norms not only encompass spheres of life that otherwise might be public but are capable to impose their internal norms on those who enter into contact with the norm-generating entity. Further, the private codes become standards for the state regulators who quite often simply underwrite what was developed privately or even delegate authority to private code makers. Government as a transparent form of social control that it subject to political supervision and control in a democracy has little control over governance, including governance that occurs with the participation of public administration. At least this is the assumption of governance theorists, while the constitutional lawyer is little interested in these developments. For the constitutional lawyer the working hypothesis is that whatever is politically relevant for the public good is/shall be conceptually embraced in constitutional

<sup>6</sup> For an early recognition in the international context see some essays in James N. Rosenau, J. N.–Czempiel, E.-O. (eds.): *Governance without Government: Order and Change in World Politics*. Cambridge, 1992. See further Rhodes, R. A. W.: The New Governance: Governing without Government. *Political Studies* 44 (1996) 662–667. for a review of different meanings of governance. One of the definitions that are in use reads: “Governance is about managing networks” at 658. In this article governance is primarily management *by* networks. Rhodes also points to the hollowing out of the state as the source of (domestic networks) governance. The hollowing out of the state results in reduced control over implementation.

<sup>7</sup> Cf. Ladeur, K. H.: Towards a Legal Theory of Supranationality–The Viability of the Network Concept. *European Law Journal*. 3 (1997) 33–54. at 34.



law. The background assumption is that in a modern democracy only a constitutionally viable policy is capable of long term political existence.

Governance exists in many forms. Increasingly governance is the result of (regulatory) networks. A closely related form of governance is the neo-corporatist one. Neo-corporatist governance is highly problematic for democratic constitutionalism. Neo-corporatist governance structures, like tripartite labor governance dealing with wage setting is often legally formalized. Governments may have important role in setting up such schemes and it is government regulation that determines the formal role for the participating parties.

The new development that makes governance networks so problematic for constitutional government is that by joining transnational networks domestic actors escape even the theoretical possibility of government control. Governance networks increasingly shape themselves and operate in the vacuum of the international setting where the sovereign nation state has limited access.

It is in this regard that the most visible leak to constitutional arrangements is noticeable. Independent national regulatory agencies, and to a lesser extent other non-political government branches like courts, have created their own networks with different degrees of competence. The forum that originally might have served simply as a venue for the exchange of ideas ('co-operation tourism') rapidly develops into a point of reference and authority. The network operates as international pressure group supporting its members against other branches of domestic power. At a next stage these networks will provide expertise to international organizations in charge of providing harmonized regulatory schemes, international law, or other cooperation. Finally, the network of independent agencies becomes a self-relying, recognized body that imposes its will on the participating states, and at the same time exempts the national regulator from state control in the sense that policies, professional standards, including conditions of work, and even dismissals are dependent upon the network and not on the political branches that are supposed to exercise a level of control that is compatible with the independence of the agency. In other words, the independent agencies through their network membership develop a new transnational network identity and change their point of reference from a national one to an international professional one.

The independent telecommunications regulatory agencies of the member states of the European Union offer a telling example of the process. In a number of EU member states there were no independent regulators. Traditionally telecommunications was an area of governmental regulation carried out partly in a ministerial department and partly by the Post Service that was a government service. It was only under the pressure of the EU directives that some member states abandoned this model. Interestingly the concerned ministerial departments

and postal services were resistant to this change that was the result of the decision of the political branch, i.e. the executive that did not share the institutional interests of its telecommunications bureaucracy and was ready to accept business pressure and general deregulatory ideology. However, shortly after the reorganization took place the independent regulatory agencies have created their informal network and started to coordinate their policies in order to come up with a unified professional position. This was more than welcome from Brussels as it offered a regulatory relief to the Commission generalists. The Commission readily accepted that the still informal network of the telecommunications regulators will take the initiative (in collaboration with industry that had its equivalent networks) in European telecommunications policy setting. As a result, the formation of telecommunications policy shifted from the national political executive to the national regulators, but not in their national agency capacity, but in their capacity of network members. Hence the policy was created as a network policy. The national regulatory agency became able to formulate its policies against its own national government relying on the network and claiming that the national government has no authority to intervene in the policy that was developed as an all-European policy. The European telecommunications policy is primarily developed by the network, and the Commission's role is primarily to transpose that policy into directives. In 2002 the new telecommunications directives further increased the national power of the national regulatory agency: the initiative came from the network members and served their interests *vis a vis* the national governments. The directives granted additional powers to the network within the Union *vis a vis* the political institutions of the Union. One may wonder how and why the national governments accepted such reduction of their constitutional power. They were advised to do so by their independent expert agencies, which had the strong self-interest in the emerging solution against the weak interest of other domestic players—all that in accordance with the logic of collective action. The new directives recognize the formal policy-making powers of the regulatory network.

The emergence of transgovernmental regulatory networks that desaggregate the state are the continuation of a trend related to the emergence of neutral institutions. I am not claiming that transgovernmental networking is primarily among neutral institutions. In fact we notice transgovernmental networking amongst all regulatory agencies. However, state desaggregation means that the regulatory agencies and public administration in general is becoming less and less dependent on the political branches, moreover this is legitimized. Regulators increasingly construe themselves (are designed as) neutral institutions in the

last thirty years.<sup>8</sup> Neutral institutions always had their constitutional problems, as the whole idea to have neutral institutions reflects mistrust in democratic politics and is also poses a challenge to traditional concepts of checks and balances as understood in a tripartite division of powers.

The modern state (as a network of organizations) pretends to be non-partisan or neutral in an increasing number of instances. Institutional arrangements are developed to make that claim credible.

The modern state is identified not only with representative institutions but also with administrative structures operated as public bureaucracies.<sup>9</sup> Public bureaucracies offer a degree of neutrality in the sense of not necessarily being politically partisan. However, the depoliticization of public administration remains incomplete. The social desire for a non-partisan state machinery can not be entirely satisfied through the establishment of a civil service. Rather, in order to further isolate some parts of the civil service from partisan politics, *neutral regulatory institutions* emerged early in the 20<sup>th</sup> century. (See the creation of federal and state agencies to regulate railroads and public utilities in the United States.) In complex societies, many traditional governmental functions were transferred to independent organizations, which were legitimated in terms of their professional expertise.<sup>10</sup> In principle, these neutral institutions are to a

<sup>8</sup> See the increasing number of independent regulators in utilities, media, banking, health etc. that are designed to operate in isolation from daily partisan politics.

<sup>9</sup> Impartial institutions (like courts, and constitutional courts in particular) also contribute to the neutralization of the state. Contrary to institutions like independent agencies, courts stand *above* identifiable contests. They are impartial in the sense that they don't follow independent professional policy goals other than that related to self-preservation. See Sajó A.: The Concepts of Neutrality and the State. In: Dworkin, R. et al. (eds.): *From Liberal Values to Democratic Transition*. New York–Budapest, 2003. 107–144.

U. S. independent agencies, such as the Federal Trade Commission, were originally designed to be exempt from *executive* control. See *Humphrey's Executor v. U.S.* 295 U.S. 602 (1935). This understanding differs markedly from the one voiced by the Council of Europe (below), which denies *legislative* oversight. Note further that the characterization of agencies as “executive” or “independent” is the result of ad hoc political decisions. Strauss, P. L.: The Place of Agencies in Government: Separation of Powers and the Fourth Branch. *Columbia Law Review* 84 (1984) 573–669.

<sup>10</sup> Broadcasting regulation by independent regulatory agencies exemplifies a relatively recent world-wide attempt to neutralize oversight of the communicative sphere. Here, various institutional solutions guarantee the independence of the regulated media and the neutral handling of broadcasting-related matters. This is done “officially” in order to avoid politicization or because the public interest cannot be served well in a partisan manner. The contemporary solutions range from quasi self-regulation by those concerned to regulation

great extent autonomous and independent of political bodies or democratic politics. The analysis of the actual institutions indicates how limited such independence and autonomy actually was. Nevertheless, they often have enough autonomy to remain independent from the political branches if they really wish to do so. Autonomous bodies may be biased but, in principle, are beyond partisan politics and, therefore, their rule-making and decisions are deemed to be neutral in the sense of non-political. This trend is rooted in the growth of *independent expert bodies*. Neutralization relies on a specific form of authority derived from the professionalism and expertise enabled by neutral institutional settings.

The transfer of decision-making to neutral public institutions remains problematic. Policy-making institutions that are insulated from the democratic process are not necessarily fully neutralized in the sense of being exempt from political influence, but, at least, they are insulated *vis-a-vis* the democratic process. Of course, such insulation may also allow elected officials, government bureaucracies and interest groups to exercise even *more* political influence than in a transparent democratic setting. Neutralization has very often been a way to protect particular groups by excluding contrary political influences. The design of insulated public institutions is, after all, left overwhelmingly to legislation that often follows a logic completely alien to institutional neutrality. The withdrawal of the state from certain public domains is often determined by major performance failures accompanied by successful resistance to government by the regulated. Quite often politicians seek to avoid responsibility, and independent agencies allow politicians to avoid responsibility. Note that most of the independent state agencies which were created to enhance credibility serve special interest groups and only indirectly the general public: it is the trust of these special interests that is at stake. (Central banks directly serve the financial community; the media regulatory agency is catering to broadcasters, etc.). The constitutional problem with transgovernmental networks of neutral institutions is that these problematic features become even more acute.

Even where professionalism prevails, neutrality may suffer from insularity. If insularity means non-interference it may result in a lack of social responsiveness. If the performance of the neutral institution follows the dictates of the internal self-interest of the organization, it will undermine trust in the institution, notwithstanding the formal fairness of its procedures. Moreover, these institutions tend to keep their decision-making process non-transparent.

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by non-governmental bodies as decision-makers, and to insulated independent governmental bodies.

What are the implications of these trends to the prevailing constitutional arrangement? The national executive power must reckon with the operations of transgovernmental networks, including the possibility of additional, non-government induced privatization and also with further desaggregation of the state in the sense that national governmental entities, and independent agencies and other elements of the 'neutral power' turn *against* the executive and become unreachable for the other branches. It follows that decisions that affect the general public are not generated in the public sphere as it is assumed in constitutional law. Given that governance follows from transgovernmental policies, it is highly questionable to what extent the legality of such measures can be controlled by organs of supervision. Beyond the problem resulting from the desaggregation of the state, private systems cause additional problems for constitutionalism. The social sphere of the constitutionally controlled is shrinking. It is not any more up to constitutional law to determine what pertains to the public domain, and, consequently what is subject to constitutional values. The problem is aggravated by practical difficulties: the shrinking state simply has no resources to patrol the vast territories of the private. The pluralism of the legal system undermines law itself.

National Parliaments loose legislative and supervisory powers. The executive gets new opportunities to bypass legislation by allowing transgovernmental networks to come up with legislative solutions. Legislation becomes less transparent. On the other hand the executive that creates opportunities to present its own politically unacceptable dreams as international dictates of expert compromise, looses control over its own professional bureaucracies. Finally, at least in Europe, the national administration of justice is loosing ground to international courts.<sup>11</sup> These international courts operate in a network with the national courts (undermining to some extent the traditional hierarchical structure of the domestic system) creating a form of transnational cooperative constitutionalism.

Obviously, network governance is not the end of politics in the sense that neutral institutions still enable domination that remains the goal and result of political games. One should keep in mind the advantages of transgovernmental networks before condemning the inevitable. After all, irrespective of deontological considerations that echo liberal constitutionalism, independent agencies,

<sup>11</sup> This is quite problematic for the sovereignty concerned, but not necessarily for the constitutionalism concerned, as the international courts, which are relieved of local political considerations and loyalties of the national courts, seem to contribute to constitutionalism, and national administration of justice to the extent it has to cooperate with the international instances seems to be liberated of parochial interests.

both at national and Union levels were created not only because of the advantages the regulatory network systems offered to interest groups politics. These professional, beyond-the-reach of-ordinary-politics networks are also devices of *quasi-constitutional pre-commitment*.<sup>12</sup> Such pre-commitments are crucial for the stability and sustainability of any constitutional system, particularly in democracies, where democracy, as Juan Linz has often stated, is about the non-perpetuation of the regime. Without such arm's length operating agencies the democratic welfare redistribution would have become unsustainable. Democratic politics is *too responsive* to short term constituency interests pushing the responsive welfare state to unsustainable largesse. It was for such reasons that regulation through independent agencies (and in a way the whole concept of neutral powers) emerged.<sup>13</sup> Independent agencies protect established interest groups against newcomers who would use parties through parliament and the executive; and protect these established interests against politically induced redistributive policies. The autonomous independent regulatory agencies are created in the name of the needs of the socio-economic regime (or the whole polity) to protect the regime against its own self-destructive mechanisms. The independent central bank is built to resist the welfarist inflationary policies of elected governments, etc.

<sup>12</sup> Moravcsik and Majone argue that states accept transfer of their power to networks as an act of irrevocable precommitment.

<sup>13</sup> For a study of the constitutional relevance of independent agencies and their networking, Sajó: *op. cit.*; Sajó A.: Neutral Institutions: Implications for Government Trustworthiness in East European Democracies. In: Kornai J.–Rose-Ackerman, S. (eds.): *Building a Trustworthy State in Post-Socialist Transition*. New York, 2004.; on networking in international relations Slaughter, A.-M.: Global Government Networks, Global Information Agencies, and Disaggregated Democracy. *Michigan Journal of International Law* 24 (2003) 1041–1075; on European networks Dehousse, R.: Regulation by Networks in the European Community: the Role of European Agencies. *Journal of European Public Policy* (1997) 246–261. In 2002 Majone found that although political compromise resulted in institutional designs with ambiguous responsibilities and uncertain competencies, “the issue of independent and credible European agencies is still very much alive”. Majone, G.: Functional Interests: European Agencies. In: Peterson, J.–Shackleton, M. (eds.): *The Institutions of the European Union*. Oxford, 2002. 322.

Any discussion of democratic accountability in the network age should start from Slaughter's warning: “the impossibility of fully “reaggregating” the state in a tidy democratic package will ultimately require a much more sophisticated understanding of networks and the interaction of nodes in a network with each other, whether individual or institutional.” *op. cit.* 1068.

Beyond their contribution to pre-commitment, the *relative* success of networks<sup>14</sup> may also indicate that traditional values represented in constitutionalism do not represent any more the shared political values of the community. Alternatively, the nation-state as a political community is losing its attractiveness as people turn to communities that are offered by virtual and actual networks. Perhaps the efficiency based credibility of the network is more attractive than the norms and values of constitutionalism. After all, transgovernmental networks are more successful in knowledge management than traditional state bureaucracies. Besides “as public policy becomes increasingly influenced by global conditions, formal policy-making institutions – national legislatures, government agencies, and multilateral institutions, among others – often lack the scope, speed, and contacts to acquire and use crucial information needed to formulate effective policy.”<sup>15</sup>

Constitutions are understood as taking “stock of the values that comprise the preferred forms of life of a given community (and are compatible with universal constitutional values).”<sup>16</sup> But perhaps the values with universal aspirations are not the preferred set for people inhabiting the networks. Instead of the normative validity based on value legitimacy there is a trend towards efficiency/interest maximization as a source of legitimacy: in this regard traditional rule of law bound constitutional solutions cannot compete with what the professional networks promise to achieve. Or, perhaps, global networks are successful because states cannot match the normative expectations of their own professed constitutionalism.<sup>17</sup> Perhaps the sovereign state is *not* the democratic

<sup>14</sup> Once again, transgovernmental networks emerge only in case there is a fundamental epistemic agreement among the participants and even in this case the network might run into the successful resistance of the nation-state. For an example of lack of value agreement and consequently little networking in the context of European privacy regulators, see Francesca Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, *Michigan Journal of International Law* 26 (2005) 807–868.

<sup>15</sup> Reinecke, W. H.: *The Other World Wide Web: Global Policy Networks*. *Foreign Policy* (1999–2000) 44–57. 45. For a recent critique of the deliberation within professional networks see Shapiro, M.: “Deliberative,” “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the E. U.? *IILJ Working Paper 2004/5*. Global Administrative Law Series. New York University Law School.

<sup>16</sup> Closa, C.: *Deliberative Constitutional Politics and the Turn Towards a Norms-Based Legitimacy of the EU Constitution*. *European Law Journal* 11 (2005) 411–431. at 419.

<sup>17</sup> On the performance deficit of constitutionalism see Grimm, D.: *Die Zukunft der Verfassung*. In: Preuss, U. K. (ed.): *Zum Begriff der Verfassung*. Frankfurt, 1994. 227.

expression of the political community. Or the political community is simply a marriage of convenience.

On the other hand it is not necessarily the case that all the above developments are contrary to values embedded in national constitutions. The network ‘constitutions’ do not replace or overwrite national constitutions. The content of the national constitution, however, changes. (This development is beyond the loss of relevance problem). The transgovernmental norms represent a different logic, mostly that of expert knowledge that disregards rule of law logic and follows efficiency considerations dictated by the bounded rationality of the professions. International courts, on the other hand, emphasize values that are perhaps not alien to constitutional values but have different accents.<sup>18</sup> Once again, I have to emphasize that the transgovernmental networks effect is countered in many instances. Network power is a function of the existing power of the nation state (i.e. it could not happen if the states were able to/interested in stopping these developments). It is not by accident that the Supreme Court of the United States is committed to a defense of the national constitution against internationalization.<sup>19</sup> But smaller, weaker states are/have to be more opportunistic. At least neo-realists suggest that a weak state would sign to the internationally developed normative expectations to ensure its existence (bandwagoning).<sup>20</sup>

Are these developments lamentable from a constitutionalist perspective? Certainly the lack of accountability and the democratic deficit (that cannot be undone by deliberative democracy of the select and invited network participants and token representatives of “society”) makes one very uncomfortable. Transgovernmental networks are even less concerned about human rights than judicially controlled traditional executive bureaucracies were.<sup>21</sup> After all, the democratic ideal requires “that politically responsible institutions should determine the direction of government policy.”<sup>22</sup>

<sup>18</sup> See the tensions between the ECJ and national courts in matters of rule of law, where the ECJ is primarily concerned with the efficient application of a harmonized European legal system and is ready to read the requirements of the rule of law in that context. See *Alcan*.

<sup>19</sup> For a systematic attack on globalism from an Americanist perspective see John Bolton, Should We Take Global Governance Seriously? *Chicago Journal of International Law* 1 (2000) 205.

<sup>20</sup> Walt, S. M.: Alliances: Balancing and Bandwagoning. In: Art R.–Jervis, R. (eds.): *International Politics*. New York, 1992. 71.

<sup>21</sup> Bignami: *op. cit.* offers an empirical example: The administrative practice of the European privacy network... alters substantially the rights calculus. 810.

<sup>22</sup> Sandalow, T.: Racial Preferences in Higher Education: Political Responsibility and the Judicial Role. *University of Chicago Law Review* 42 (1975) 653–704, 695 and 700.



This is not to exclude the possibility of the evolution of a new constitutionalism that reflects network based operations. After all, transgovernmental networks prevent the concentration of power: in that regard they have a strong constitutional potential in times of cabinet dictatorship. Networks are by definition pluricentric. However, so far there is very little in the network world that would point towards the affirmation of traditional constitutional values of freedom. Moreover, professional considerations in networks make conflict of interest and rule of law considerations irrelevant or even unacceptable.

To end on an optimistic note: the network phenomena “are rooted in the information-technology revolution ... that simultaneously empowers individuals and groups [while] diminish[ing] traditional authority.”<sup>23</sup> To the extent the empowerment element will prevail the concern with freedom will resurface. Although the transgovernmental networks raise issues of democratic deficit, it is not out of question that networks themselves will offer legitimate alternatives to the constitutionally and democratically problematic official government structure of the nation state. After all, there are important arguments in favor of transgovernmental networks: “the transgovernmental cooperation is a significant development in international law, but it is likely to bolster liberal internationalism as much—or more—than it will undermine or displace it.”<sup>24</sup> Perhaps, alternative forms of control (supervision) and self-referential accountability might ease the challenge that traditional constitutional structures could not handle so far. After all, as Majone has pointed out, the credibility of the members of the network depends on each other’s reputation, hence they will monitor each other—are in a way accountable to each other.<sup>25</sup> Besides, there are a number of forms of accountability that are not based on the political process.<sup>26</sup> These elements point to a socially acceptable transgovernmental governance that will *not* rely on constitutionalism.

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Michelman finds these positions to be two distant or different positions. Michelman, F. I.: Terry Firma: Background Democracy and Constitutional Foundations. *Michigan Law Review* 99 (2001) 1827–1851, 1839.

<sup>23</sup> Slaughter, A.-M.: Government Networks: The Heart of the Liberal Democratic Order. In: Fox, G. H.– Roth, B. R. (eds.): *Democratic Governance And International Law*. Cambridge, 2000. 199, 200.

<sup>24</sup> Raustiala, *op. cit.*

<sup>25</sup> Majone, G.: The New European Agencies: Regulation by Information. *Journal of European Public Policy* 4 (1997) 262–275, 262, 272.

<sup>26</sup> See Keohane, R. O.: Governance in a Partially Globalized World. *American Political Science Review* 95 (2001) 1–13. at 9.