

Grimm, Dieter

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Can the 'post-national constellation' be re-constitutionalized

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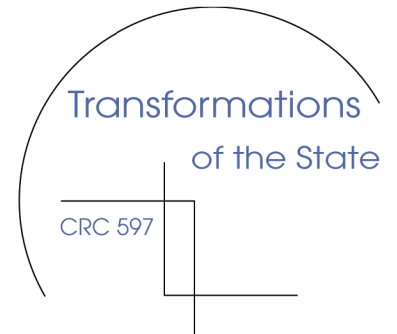
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TranState Working Papers

CAN THE 'POST-NATIONAL
CONSTELLATION' BE
RE-CONSTITUTIONALIZED?

Dieter Grimm

No. 2

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Staatlichkeit im Wandel / Transformations of the State

Postfach 33 04 40

D - 28334 Bremen

Tel.: + 49 421 218-8720

Fax: + 49 421 218-8721

Homepage: <http://www.state.uni-bremen.de>

Can the ‘Post-national Constellation’ be Re-constitutionalized?

ABSTRACT

The constitutionalization of the state, the juridification of political power is one of the major achievements in the civilization of modern politics. Can and will this achievement survive the post-national constellation?

The state no longer possesses all powers but some of its ruling authority has been transferred to non-state actors. Increasingly, regulations are the result of negotiations and agreements between state agencies and private parties. This, on the one hand, affects democratic legitimacy, since the parliaments are more and more sidelined. But these processes also undermine the rule of law. Such agreements evade the necessary formalization of law as they are rarely publicized. Nevertheless they are necessary to provide public goods. Globalization and internationalization further aggravate this problem. And the constitutionalization of international politics offers no ready-made solution for this problem: The WTO or even the EU both have to rely on the regular means of physical coercion still controlled by nation states. Even the EU is not a union of the people but of its member states, its democratic legitimacy is limited and, above all, its legalization and constitutionalization is rather circumscribed, and that can be attributed to the very same forces which also undermine democratic accountability at the state level.

The aspiration expressed in the concept of constitutions and constitutionalization can, therefore, not even be approximately realized on the global level.

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Can the ‘Post-national Constellation’ be Re-constitutionalized?*

I. THE CLAIM OF THE CONSTITUTION

In 1973 Niklas Luhmann could still assert that a radical change in the state of the constitution and the institutional and operational understanding of constitutional arrangements comparable to the establishment of the constitutional state in the late eighteenth century has never occurred again (Luhmann 1973: 4). In the meantime, such a change is looming. Its cause is the process of the decline of statehood [*Entstaatlichung*], which could not then be foreseen. In essence, this consists of the transfer of public power to non-state actors and its exercise in non-state procedures. This has consequences for the constitution because it originally referred to the state. Its historical significance lay in the juridification [*Verrechtlichung*] of public power, and public power was identical to state power. Owing to the advantages associated with this, the constitution was regarded as a civilizing achievement up to the present day (Luhmann 1990). Pre-state forms of political rule not only had no constitution, they could not have had one. The question is whether this achievement can survive in the “postnational constellation.” (Habermas 2001).

By constitution I understand here the law produced through a political decision that regulates the establishment and exercise of political rule. The constitution in this sense is a novelty of the eighteenth century that of course did not arise out of nothing, but had not previously existed in this form (Grimm 2002a; 1995b: 10ff.). The normative constitution came into being in 1776 on the periphery of what was then the western world, in North America. Thirteen years later, in 1789, it reached Europe. In Europe and the other parts of the world it influenced, the whole nineteenth century was permeated and determined by the struggle around the spread of the constitution. The victory the idea of constitutionalism seemed to win at the end of the First World War, however, turned out to be short-lived. Only toward the end of the twentieth century, after numerous detours and reversals, did constitutionalism prevail universally. Today, constitutionless states are the exception, which, of course, is not to say that the constitution is intended or taken seriously everywhere.

* This paper is an expanded and revised version of the inaugural lecture for the Collaborative Research Centre (Sfb) “Transformations of the State,” (TranState) presented on January 15, 2004 in *Die Glocke* in Bremen. For a German version see „Die Verfassung im Prozess der Entstaatlichung“, in: Michael Brenner, ed., *Der Staat des Grundgesetzes. Kontinuität und Wandel. Festschrift für Peter Badura zum siebzigsten Geburtstag* (Tübingen: Mohr-Siebeck) 2004, pp. 145-167.

Concerning its novelty, we should not let ourselves be deceived by the fact that the notion of ‘constitution’ is older than the US and French constitutions. Before their appearance it was not a normative concept but an empirical one (Mohnhaupt/Grimm 2002). Brought into political language from the description of nature, it designated the condition of a country, as shaped by the character of its territory and inhabitants, its historical development and prevailing power relations, its legal norms and political institutions. With social philosophy’s increasing effort to restrict state power in favor of the freedom of subjects, the notion of “constitution” was narrowed; its non-normative elements were gradually cast off until the constitution finally appeared to be the condition determined by public law. It was nevertheless not the kernel of constitutional norms but rather the condition they determined that was designated by the word “constitution.”

The late-eighteenth-century revolutions in North America and France violently overthrew ancestral rule and established a new order on the basis of rational planning and legal codification. Only then, did a transition from a descriptive to a prescriptive concept occur. Since then the constitution has ordinarily been identified with the complex of norms that fundamentally and comprehensively regulate the establishment and exercise of state power. The empirical constitution did not disappear, but returned in the shape of the “constitutional reality” that influences the law. But when we speak of constitutionalization, we always speak of the legal and not the factual constitution. The legal constitution does not reproduce social reality but addresses expectations to it, the fulfillment of which does not go without saying and for just this reason requires legal support. The constitution thus takes its distance from political reality and only thereby acquires the ability to serve as standard for political behavior and judgment.

If the legal constitution did not arise earlier, this is because it depends on preconditions that did not exist in the past. For a long time the constitution in the sense of a law that specializes in norming political rule lacked an object.¹ Before the functional differentiation of society there was no social system that, by its delimitation from other systems, specialized in the exercise of political rule. Rather, the tasks of ruling were divided up by location, subject matter, and function among numerous independent bearers. There was no comprehensive political body to which the particular rights of rule could have been ascribed. Rights referred less to territories than to people. Their bearers exercised them not as independent functions but as an adjunct of a certain social status, namely, as landholders. What are now held apart as private and public were still mixed together.

¹ See Helmut Quaritsch (1970: 182ff.); on the older order of domination, see Quaritsch (1970: 196ff.), as well as Otto Brunner (1970); on the significance of the transition to functional differentiation, see Niklas Luhmann (1997: 595ff.; 2000: 69ff.).

This is not to say that rule was exercised without any legal bounds. To the contrary, there was a dense mesh of legal bonds that were traced back to a divine foundation or held traditionally. For this reason they had priority over the enacted law and could not be altered by it. But these legal bonds did not represent a constitution in the sense of a particular law specializing in the exercise of political rule. Just as the authority to rule was only a dependent adjunct of other legal positions, it was governed by the corresponding law. From this we see that not every juridification of authority results in a constitution. The many works devoted to the ancient or medieval constitution do not thereby lose their value. But one must not confuse these constitutions with the normative text, implemented on the basis of a political decision that claims to regulate rule.

From the perspective that interests us here, the decline of statehood, however, it is more significant that only with the modern state does an object emerge capable of having a constitution. Like the normative constitution, the state too was a historical novelty, but temporally it preceded the constitution. State-building arose when religious divisions removed the basis for the medieval order based on divine revelation and a new form of political domination developed in continental Europe in reaction to the confessional civil wars of the sixteenth and seventeenth centuries (cf. Schnur 1962; Tilly 1975; Anderson 1979; Dyson 1980). It was based on the conviction, prepared by Bodin and other French theorists, that only a superior power can settle civil wars. This superior power raises itself above the warring parties and possesses sufficient power resources to establish and enforce a new order independent of contested religious truths, and thus to reestablish domestic peace.

In this effort, the princes of various territories, starting with France, undertook to unite the numerous, scattered prerogatives and consolidate comprehensive public power over the territory. Because of the need to build a new order, public power also included the right to make laws, which was no longer limited by a higher law derived from God. In fact, rulers continued to regard themselves as divinely legitimated, and did not disavow the bindingness of divine command. But this command no longer had legal effect. Instead, law was made by a worldly authority and in this sense positivized. As positive, it no longer drew its validity from its accordance with God's plan for salvation, but from the ruler's will; divine or natural law, its name notwithstanding, lost its legal quality and was now only morally binding.

The previously unknown notion of the "state" soon became current for this new kind of polity. If it was later also applied by historians to earlier periods, this was a matter of the reassignment of an object of another kind. The state possessed sovereignty, defined as the highest power, subordinate to no other external or internal power. Like the thing it designated, this concept too was new (see Quaritsch 1970, 1986; Boldt 1990; Weinacht 1968). At its core, sovereignty signified the ruler's right to make the law for all his

subjects without himself being legally bound. Externally, this designated the right to determine domestic conditions free from the interference of other states. The means for enforcing this claim was the monopoly on the use of force in Max Weber's sense,² the flipside of which was the elimination of all intermediary powers. The establishment of the sovereign state thus went along with the privatization of society. The mixture of private and public was dissolved.

Of course, the establishment of the state was not an event but a process that did not reach its conclusion anywhere on the continent before the French Revolution and which had scarcely begun in England when it was limited by the Glorious Revolution of 1688 (Schröder 1986). Unlike the French and American Revolutions that followed a century later, England saw a revolution in defense of the old order, namely the rights of parliament, against the crown's transformative designs. For this reason it did not lead to a constitution in the modern sense.³ On the continent, however, there was now an object capable of having a constitution in the form of a state that did not hold a number of prerogatives but public power, and specialized in its exercise. If nevertheless no constitution in the modern sense emerged, this was because the state developed under these conditions as an absolutist princely state, defined precisely by not being bound by law.

This is not to assert the complete absence of legal restrictions on the ruler. There were restrictions of this kind even under absolute monarchy. But insofar as they were not simply the vestiges of earlier historical layers, they could only be conceived as self-restrictions on princely power. Normally they were wrested from the ruler by particular groups of well-placed subjects and fixed in so-called charters [*Herrschaftsverträgen*], whose validity was based on the unanimous wills of the participants (Vierhaus 1977). As contractually binding, however, these restrictions always presupposed the authority of the monarch to rule. They restricted his authority to rule, which was in principle comprehensive, only punctually. They did not benefit all the subjects; rather, their effects were reserved for the privileged contractual partners. As far as they extended, they juridified political rule, but nowhere did they appear with the comprehensive claim to legitimation and regulation that distinguishes the modern constitution.

Nor did the social philosophy of the time, which saw at once that the new concentration of power confronted it with the question of a non-transcendental legitimation of rule, extend its efforts as far as the idea of a constitution.⁴ For social philosophy, any

² Max Weber (1921/1978: pt. I, ch. 1, § 17; pt. II, ch. 8, § 2; ch. 9, § 2) and Anter (1995).

³ But see the short-lived "Instrument of Government" imposed after the abolition of the monarchy under Cromwell: text in Samuel Gardiner (1968: 405).

⁴ The sole exception was Emer de Vattel (1758); see Mohnhaupt and Grimm (2002: 91f., 105).

rule that – assuming rational behavior – could be thought of as emerging from the free agreement of all was legitimate. In this way, the consensus of the subjects of rule was elevated to the central category grounding legitimacy. In social contract theory, however, it was neither traced back to an actual contract nor fixed in a written agreement, but rather used as a hypothetical test of whether one could consent to rule. The theory of the social contract thus did not fundamentally place in question existing rule that was independent of consensus as long as it corresponded to the particular rational imperatives for which the contract was only a theoretical bridge.

Nevertheless, the conditions under which philosophy assumed the readiness of rational beings to leave the state of nature and to submit themselves to government changed in the course of time (v. Gierke 1958; Kersting 1994; Klippel 1976). In response to civil war, it even arrived at a justification of absolute rule. Only when the individual ceded all his natural rights to the state and completely submitted to it would the state be in the position to guarantee his physical safety. In the face of the existential threat of civil war, this had the highest priority. Once the absolutist state had successfully concluded the civil war and re-established domestic peace, the complete surrender of natural rights no longer appeared plausible. Now it sufficed for the individual to give up the right to use force in pursuit of his own interests. Otherwise he retained his natural freedoms, and the state drew its justification precisely from protecting those freedoms from encroachments.

These ideas were put into action when in North America and France ancestral rule was toppled by revolution and the resulting power vacuum had to be filled. In this situation, it was decisive for the emergence of the constitution that in both cases the revolutionaries were not satisfied with replacing the overthrown rulers with other ones. Acting as representatives of the people, they first designed a model of legitimate rule; only on the basis of this model were individuals called upon to exercise the rights of rule. Central here were two basic principles that had been developed in theory as mere regulative ideas and were now reformulated as real conditions: first, that legitimate domination arose from the consensus of those subject to it; and second, that the latter had innate and inalienable rights, the securing of which was the legitimizing aim of political rule.

The task of securing equal freedom, which according to the conviction of the time would lead to prosperity and justice without intervention by the state, also required power. The French Revolution therefore touched neither the state nor its attribute of sovereignty. It rather completed the state-building that had begun under absolutism by dissolving the intermediary powers that had survived under the absolutist regime, thus making public and state power identical. By the same stroke, however, the bearer of state power was replaced. The nation took the place of the monarch. Rule could therefore not be legitimated by one's own but only be a derived right. Article Three of the

1789 *Déclaration des droits de l'homme et du citoyen* formulated the basic principle of the democratic constitutional state: “The principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority which does not proceed directly from the nation.”

Unlike in France, in America the revolution was not preceded by state-building in the continental sense. In the motherland of the American colonists, religious disunity had not led to the rise of absolutist monarchy but, to the contrary, to the strengthening of parliament and an essentially liberal legal order. The American revolutionaries therefore were not in a position to take over a state in the continental sense in order to supply it with a new basis of legitimacy and adjust it to the principle of individual freedom. Nonetheless, they too constituted a political unity they understood as government, which possessed the qualities of states. Although the American state lagged behind continental states in its tasks, instruments, and bureaucratic apparatus, it too was the focal point of all public power, which it took from the people so that there could no longer be any claim to rule that could not be traced back to its will.

The possession and exercise of public power were thus separated. The political system therefore had to be organized in a way that established a relation of legitimation and responsibility between those who possessed the ruling powers and those who exercised them, as much as possible preventing their misuse. It was these constructive tasks of state organization and limitation that well-nigh compelled legal regulation. Only law had the ability to elevate the consensus concerning the project of legitimate rule above the fleetingness of the moment, to make it last, and to give it binding force. The Americans were the first to take this step. It helped them that they had already inherited a familiar model for the legally binding organization of public power in the English declarations of rights and colonial charters bestowed on them by the mother country (Kelly/Harbison 1963: chs. 1, 2; Adams 1973: 30ff.; Lutz 1988: 13ff.; Stourzh 1989: 1ff.). France, in its revolution thirteen years later, could look to the American model.

First, however, it was necessary to clear another hurdle: since its positivization, the law that was now to bind the state was a product of precisely this state. Under these circumstances, the state could only be bound successfully if one resorted to the idea of a hierarchy of norms, but cut it off from its transcendental roots. This led to a splitting of the positivized legal order into two complexes: a traditional one that was produced by the state and bound the individual; and a new one that proceeded from or was ascribed to the sovereign and bound the state. The latter is the constitution as distinct from the laws and taking precedent over them. This was the very step by which the Americans surpassed the English “constitution” (Grimm 2002b: 75ff.: 2002c). While the English “constitution” did not constitute government but only partially restricted it, American and then French constitutional law was to precede all governmental powers. In the con-

stitution the law accordingly became reflexive: the process of legislation and implementation were for their part juridified.

Primacy therefore is an indispensable element of constitutionalism. Where it is missing, the constitution cannot carry out the task for which it was invented (Wahl 1981: 485). In America and France this was clear from the beginning. In the Federalist Papers (no. 78) it was compared to the relationship of principal to deputy, or servant to master (Hamilton et. al. 1999: 432-440). Sieyès summed it up in the distinction between the *pouvoir constituant* and the *pouvoir constitué* (1975: 117-96; Pasquino 1998). The *pouvoir constituant* generates the *pouvoir constitué*; its decision is thus not legally bound itself. But it does not go beyond creating and regulating legitimate rule. Ruling itself is a matter for the *pouvoir constitué*. However, the latter may act only on the basis of and within the framework of the constitution. In a constitutional state there can be no extra- or supra-constitutional powers beneath the *pouvoir constituant*. Only thus can the goal of the constitutionalization of public power be ensured – a “government of laws and not of men.”⁵

As against older legal restrictions on rule, the constitution was not only rule-modifying but rule-constituting, limiting state power not only for the benefit of a privileged group but generally, and deploying its state-limiting effect not only in certain respects but comprehensively.⁶ This is not to assert the total juridification of the state. That would render politics impossible and ultimately dissolve it into a mere implementation of the constitution. The constitution is not to make politics superfluous but only to channel it, commit it to certain principles, and contain it within certain limits. It prescribes certain principles and procedures, not outcomes. But it is comprehensive insofar as no one who lacks constitutional legitimation is entitled to exercise public power, and no act of rule can claim validity that is not consistent with constitutional requirements.

This tacitly presupposes the concentration of all ruling authority in the state. Only on this presupposition could the claim to comprehensively juridify political rule through a special set of legal norms addressed to the state be redeemed. This presupposition implies the clear distinction between private and public. The principle of freedom is fundamental for the private sphere, and the principle of bindingness is fundamental for the state. Only when society is privatized in the sense that it does not possess the instruments of rule, while, conversely, all authorities to rule are concentrated in the state, can these principles hold. Here we have not one conceivable form of constitution among others, but a constitutive feature of constitutionalism in general. The constitution would

⁵ Marbury v. Madison, 5 US (Cranch) 137 (163). 1803.

⁶ In more detail see Grimm (2002), Badura (1973), Böckenförde (1991), Brunner (1956), Dilcher (1988), Hofmann (1986), McIlwain (1966: 31ff.), Mohnhaupt (1998: 121ff.) and Quaritsch (1970: 178ff.).

be undermined if the state enjoyed the freedom of the private, just as if the private possessed the coercive means of the state. To this extent, the border between private and public is essential to constitutionalism.

But the constitution was also bound to the state constitution in the sense that its comprehensive validity claim was territorially limited from the beginning. Although the idea of constitutionalism claimed universal validity, it was realized in the particular, in different states from the start. These were separated by borders, beyond which state power did not extend. The borders might shift, for example as a result of wars. But that did not alter the fact that only one state power existed on the territory of a state, and that it did not share its entitlement to rule with anyone. To this extent, the constitution also presupposed a clear separation of inside and outside. Had its borders been permeable to external claims to rule, it could not have fulfilled its own. Above the state was not a lawless space, but rather international law. However, it regulated only relations between states and lacked a supranational power that could hold sway irrespective of state power.

Of course, a constitution could fail to fulfil its function of comprehensively juridifying public power, for instance because it was porous and contradictory from the start, was unable to adjust to later social change, or lost acceptance. There are many examples of this in constitutional history. But such a failure discredits constitutionalism as little as the existence of numerous semi- and pseudo-constitutions that sprang up shortly after the founding of the constitutional state in the American and French revolutions, and continue to appear today. The constitution's character as an achievement is rather demonstrated by the fact that in such cases its function can only be taken over by another constitution, not sustained without one. No functional equivalent can stand in for a failed or ineffective constitution (Luhmann 1973: 168).

II. THE CONSEQUENCES OF DENATIONALIZATION

The decline of statehood places not individual constitutions but constitutionalism as such in question. The reason for this lies in the constitution's reference to the state. The rise of the state awoke the need to tame it legally and at the same time allowed it to be satisfied in the form of the constitution. From a historical perspective, the constitution presupposes the state as a form of political community. It is distinguished from older forms of the political community by the bundling of the various scattered powers and their concentration in a uniform public power, including the authority to use physical force within a delimited territory. Denationalization thus means that ruling authority is detached from the state and transferred to non-state bearers. This transition need not necessarily lead to the end of the state. It is entirely possible that it will remain as a basic unit of a new political order; however, just as it had initially not yet arrogated all powers, in the future it will *no longer* possess all powers.

The constitution is of course not only affected when the state disappears. Its claim to comprehensively regulate political rule is already impaired when the identity of state power and public power dissolves, so that acts of public authority can be taken on the territory of the state by, or with the participation of, non-state institutions. The notion of denationalization allows us to grasp two processes that started in the second half of the twentieth century, without their consequences for constitutionalism initially being noticed. They concern precisely the two borders that are presupposed by and constitutive of the constitution: that between inside and outside, and that between private and public. In the domestic realm it has to do with the participation of private actors in the exercise of public power. Outside the state it has to do with the rise of supra-national entities or institutions that can make decisions that claim validity within state territory.

Regarding the border between private and public,⁷ it is striking that sovereign measures often no longer come about through one-sided state decisions in legally regulated procedures, but are rather the result of bilateral agreements between state bodies and private interests that come out of informal negotiations. We encounter such negotiations in the fields of administration and adjudication, but also in legislation. Either the state enters into negotiations over the content of a law with its private addressees or the latter offer talks with the prospect of avoiding or mitigating regulation. The result can be a negotiated bill that must then go through the constitutionally prescribed procedures in order to become generally binding. But the legislative power can also serve merely as a threat in order to reach an agreement in which a private party that creates a problem agrees to commit itself to “good behavior” while the state responds by forgoing regulation.

While agreements which result in a bill only reach their goal when they subsequently achieve legal form through the designated state procedures, in the case of agreements that replace law, not only the negotiation but also its result, the solution of the problem, remain in the informal realm. All the same, the desired effect only sets in when both sides feel bound by it. For this reason, such negotiations cannot be equated with the long-customary influence of pressure groups on legislation. The attempt to influence legislation is limited to a preliminary stage that is not governed by constitutional law, whereas the final decision is solely a matter for the state. Where informal agreements replace the law, however, the results of negotiations and the content of regulation are identical. It therefore does not do justice to the negotiations to describe them in terms of influence. They can only be adequately grasped in terms of participation.

⁷ On this, see the early essay by Böckenförde (1976); on the following: Grimm (1994; 2001; 2003b); Benz (1994); Rossen-Stadtfeld 1999); Helberg (1999), Köpp (2001), Michael (2002), Tsebelis (2002), Herdegen and Morlok (2003).

With regard to denationalization, this means, on the one hand, that there are now private parties who are no longer restricted to their general civic status as voters, participants in public discourse, and representatives of interests; beyond this they participate in political decision making without being subject to the principles of legitimation and accountability to which the constitution submits the bearers of public power. On the other hand, to the extent that the state commits itself at the negotiating table, the constitutionally prescribed decision-making authorities and procedures are downgraded. This affects the legislature in particular. The negotiations are conducted not by it, but by the government. If a bill emerges, it can only attain legal validity through a parliamentary decision. The majority parties, however, are under practically irresistible pressure to ratify. If there is an agreement to forego regulation, parliament remains outside the game altogether.

Without parliament, the advantages of parliamentary procedures are lost. These are above all transparency, participation, and control. They have no place in negotiations. Negotiations are not public, include only those who possess veto power rather than all those affected, and give the opposition no chance to intervene. But the weakening of parliament also affects the content of the law or its informal substitute. Since the government only negotiates with those in a position to veto, their interests have a better chance of being considered. Under these circumstances the law risks falling short of general acceptance on which its legitimacy is based. The reason for privileging particular private parties lies not in their pre-political strength, which to a certain extent can be shrugged off, but in the procedures created by the state that reward precisely the positions of social power the constitution sought to neutralize.

The losses affect not only the constitution's democratic claim, but also the rule of law. The linchpin of all constitutional functions is the law (in detail Grimm 2002d). Without the law's inherent formality, its effect would not obtain. The agreements, however, evade this formalization. As a rule they are set into writing, but not necessarily publicized. Rather, the parties to the negotiation have discretion over whether and how they are announced. Compliance is not institutionally guaranteed. Sometimes reporting duties and control mechanisms are included, sometimes not. Above all, however, affected third parties have no legal protection against informal agreements. Often even the necessary knowledge of the agreement's content is lacking. If one knows nothing about it, one can neither bring a claim against it nor have it reviewed. In the absence of a law there is neither a legal standard for controlling compliance nor an object for constitutional review.

Despite these losses to democracy and the rule of law, the practice cannot simply be eliminated because it has its own logic. This results from the fact that many state tasks can no longer be adequately fulfilled with the specific state tool of imperative law.

Sometimes the tasks are such that the use of imperative tools is in fact impossible because they elude regulation. Research results or economic upturns cannot be commanded. Sometimes the use of imperative tools is not legally permissible because basic rights ensure private actors' freedom of choice. Ordering them to invest or obliging them to create jobs would be unconstitutional. Sometimes imperative tools are in fact possible and permissible, but ineffective or inopportune, be it because the addressees of regulation could evade it, because the state lacks the information for effective steering, or because the implementation costs are too high.

Negotiation owes its emergence to this situation. To this extent, it has structural causes and is thus largely immune to constitutional prohibition. The claim of the constitution can therefore only be re-established by constitutionalizing the practice of negotiation. This would of course be essentially to approve it, including its basic characteristic, its informality. A thoroughgoing formalization would deprive it of its distinctiveness and therefore has little chance of success. On the other hand, if informality is retained, constitutional regulation cannot penetrate to the core of the phenomenon but only alter its parameters, for instance by requiring publicity, making it obligatory to inform parliament, and opening possibilities for constitutional review (Brohm 1992; Herdegen/Morlok 2003). That does not change the fact, however, that the constitution cannot cope satisfactorily with phenomena that cross the border between private and public. It can fulfil its claim of comprehensive regulation only to a diminished extent.

Like the border between public and private, the border between inside and outside has not disappeared.⁸ In relations among states it retains its traditional significance. The authority of the state and the applicability of domestic law ends at the border. Above the states, however, entities and organizations, while owing their existence to international treaties between states, have developed that are different from traditional international organizations. Their activity is not limited to the international realm but penetrates states. This is because they are authorized to take acts of public authority that claim domestic validity without being transformed by the state into national law. On the other hand, the pooling of sovereignty has not gone so far that various states have been fused into a new superstate that would displace rather than relativize the borders between inside and outside.

This development is not expressly directed against the constitution. More recent constitutions often open themselves to international law by stipulating that it be applied domestically or allowing sovereign rights to be transferred (cf. di Fabio 1998; Hobe 1998; Wahl 2001; 2002b; Hecker 2002). All the same, the constitution does not remain untouched. It determines the conditions under which states may transfer sovereign

⁸ On the significance of the state's borders, see di Fabio (2001: 51ff.).

rights to supranational entities. Once transferred, however, their use by these entities is no longer subject to the rules of the national constitution.⁹ It then regulates domestic laws and their application only partially – namely, to the extent that they stem from a national source of law. These are, however, confronted with a growing number of legal measures that make the same validity claim as national law, but without having to satisfy the same constitutional requirements. The most advanced example of this is the EU, with its numerous sovereign rights replacing the regulative power of the nation-state.

So far there has been no supranational arrangement of the same density either outside Europe or on a global scale. But other international organizations also contribute to the relativization of borders. The most prominent of these is the WTO (v. Bogdandy 2001; Krajewsky 2001). To be sure, it does not itself make law, but rather provides a forum for the treaty agreements of its member-states. But since 1995 its dispute-settlement mechanism has made the treaty-based law independent of the contracting parties and submitted them to the decisions of the WTO authority. The World Bank and the IMF lack such powers (Kranz 1994; Shihata 1995). They may not interfere in the politics of states. However, law and justice are not considered politics in this sense. As a result, they often make their financial assistance conditional on domestic legal changes the affected countries usually cannot avoid. To this extent, the requirements of their own constitutions concerning political decisions are supplanted.

Alongside these institutions created by states, meanwhile, are global actors like multinational firms and non-government organizations, which, by virtue of the range of their activities, can largely follow their own systemic logic without having to respect the standards and obligations that prevail within states. All the same, they too cannot live without legal regulation. The globalized sector of the economy depends on a transnational law no national legislator can provide. But even the international organizations developed by states can only satisfy this need in part. Global actors therefore take up law-making themselves. Beyond nation-states and the international organizations they have established forms of law-making that are no longer under the control of politics, be it domestic or international, but are driven mainly by large global law firms and international arbitration panels (Teubner 1997; Santos 1995; Günther 2001).

In addition, international courts relativize the constitution to the extent that they do not stay within the traditional framework of international law and may only administer justice if parties submit themselves to judgment in a concrete case in advance. The European Court of Human Rights is an early example of this. In the meantime, how-

⁹ This is recognized in principle, although the particulars are still contested. See the ruling of the Bundesverfassungsgericht on the review of European legislation, BVerfGE 37, 271; 73, 339; 89, 155. See Grimm (1997); Slaughter et.al. (1998).

ever, international criminal courts have emerged to try war crimes and crimes against humanity even when it concerns members of states that have not submitted themselves to their jurisdiction or have refused to hand over the accused (Cassese 1998: 2; Meron 1998; Symposium 1999). Here again, the jurisdiction of the EU has an exceptional position. It was the European Court that secured the immediate validity of Community law and its precedence over national law, including national constitutions. In this way, it considerably narrowed the latter's field of application, and for its part took up functions that constitutional courts possess on the national level (Weiler 1999; Iglesias 1992: 225; Mayer 2003: 229).

This development is nevertheless still far from the end of stateness. States are ceding functions to supranational units and organizations. But they are doing so in the interest of increasing problem-solving capacity without thereby making themselves superfluous. Rather, in the end supranational organizations and even global economic actors depend on states. The reason is that as yet no supranational political unit or international organization possesses the means of physical coercion, which belongs specifically to states. As soon as the coercive enforcement or implementation of international law is required, national authorities must step in. This is true even of the EU. The norms whose implementation is in question may be made externally; their implementation is a national matter and falls under national law. But this does not change the fact that the scope of validity of the national constitution constricts as that of law made externally expands.

The question this raises is whether and how the achievement of constitutionalism can be preserved in view of this development. Here we must distinguish between the national and the international level. On the national level the possibilities appear limited. National constitutions can provide for the state's opening to supranational arrangements and establish the conditions for the transfer of sovereign rights. Beyond this, they can safeguard constitutional requirements in the determination of national negotiating positions for supranational decision-making processes, such as parliamentary participation. This is not unimportant, since supranational legislation is consistently executive legislation, following a model of bargaining rather than deliberation (v. Bogdandy 2000). This does not, however, guarantee that these positions will prevail. Other possibilities on the national level are not visible. The national constitution has neither formal nor material influence on laws that penetrate the state from the outside.

The more important question is thus whether the constitution can be transferred to the international level. There has lately been much discussion of this of. Scholars see constitutionalization at work everywhere. A constitutionalization of the EU was ascertained very early on. But in the meantime a constitutionalization of international organizations like the WTO and the UN has been perceived as well. Even international law as

a whole is supposed to be on the way to a constitution.¹⁰ This observation is correct insofar as a strong push toward juridification has been occurring at the international level. But not all juridification merits the name of constitutionalization.¹¹ Rather, constitutionalization has shown itself to be a special form of the juridification of rule that presupposes the concentration of all ruling authority within a territory, and is distinguished by a certain standard of juridification. This standard includes a democratic origin, supremacy, and comprehensiveness (detail Grimm 2003: 58ff.).

The need for juridification develops where political rule is exercised. Whether it can be satisfied in the form of a constitution depends on certain preconditions and standards being met. More strongly put, the question is whether the constitution, as a form of juridification that originally referred to the state, can be detached from it and transferred to non-state political entities that exercise public power. If not, it will remain a matter of mere juridification, which is by no means worthless, but should not be passed off as equivalent to a constitution. Of course, the question cannot be answered in the same way for all political entities that are ascertained to exercise sovereign powers or make decisions whose effect is tantamount to such powers. There are important differences between them in the degree of consolidation and plenitude of powers that are relevant to the possibility of constitutionalization.

If we ask this question first of all concerning the EU, we find a structure that has grown far beyond traditional international organizations but has still not become a state. It unites a considerable number of sovereign rights in different political fields that can be exercised with immediate validity in the member states. Even without a monopoly on the use of force, which its members so far retain, it is closely interwoven with the member states and their legal orders in a way similar to the national and the member states in a federal state. The resulting need for a juridification of the public power has surely long since been satisfied. Primary Community law, which spread step by step, has overlain the EU with a tightly-woven net of provisions that have pre-eminence over the Secondary Community law produced by the EU and fulfils most of the functions of constitutions in the member states.

¹⁰ On the EU, see Weiler (1999), Pernice (1999: 427)); Möller (2003: 1), Badura (1999: 695), Oeter (1999: 901), and Peters (2001); on the EMRK, see Walter (1999: 961), on the WTO Petersmann (1991), Langer (1995), v. Bogdandy (2001), Krajweski (2001), Stoll (1997: 83), and Nettesheim (2001: 381); on the UN Faßbender (1998: 529), and on international law Frowein (2000).

¹¹ On constitutionalization and “international” constitutional law, see Biaggini (2000: 445), Uerpmann (2001: 565), Walter (2000: 1), Pernice, Huber, Lübke-Wolff, and Grabenwarter (2001: 148–349, esp. 155ff., 199ff.), Wahl (2002a: 191), and Haltern (2002).

Measured by the demanding concept of the constitution that has become the standard since the American and French Revolutions, they lack only one element – which, however, is surely essential. They are, not only in their development but also according to their legal nature, international treaties that have been contracted by the member states. So, they can only be altered by them in the intergovernmental Conference, which is not an EU organ, with subsequent ratification within each member state. The public power the EU exercises accordingly emanates not from the people, but from the member-states. Responsibility for the basic order that sets its goals, establishes its organs, and regulates its authorities and procedures, cannot be ascribed to the constituent power of the people. Nor is any EU organ that represents the people responsible for it. As distinct from the constitution as the basic legal order of states, it is heteronomously, not autonomously, determined (see Grimm 1995a). Not being attributed to the people, it lacks democratic origin, which is an element of a somewhat meaningful notion of constitution.

Admittedly, there can be no doubt that the EU, by virtue of its consolidation and volume of powers, is capable of being constitutionalized. Nothing prevents the member states from giving up their control over the basic legal order of the EU in a final international treaty, placing the Union on a democratic basis, and thereby bestowing upon it self-determination over the form and content of its political community. They could then still reserve the right to participate in amendments of the constitution – not, however, as the bearers of federal power, but rather as parts of its organs. With this, the treaties, without requiring any other substantive change, would carry over into a constitution in the full sense of the word. Yet, by such an act, the EU would quietly transform itself from a federation of states into a federal state. For the line separating the two is heteronomy or self determination of its basic order.

A constitutionalized EU would nevertheless be no more immune to a relativization of its borders than the nation-states are (Walter 2000). Its constitution could not, any more than the national constitutions, fulfil the claim to comprehensively regulate all acts of rule on its territory. The constitutional question is therefore posed again at the global level. Here too the process of juridification is proceeding apace. Its main fields of application are, although unconnected, economic relations and human rights. The share of compulsory international law that therefore takes primacy over the treaty-making power of the states is increasing. It is also increasingly judicially enforceable. That the internal constitutionalization (of states) is now being followed by external constitutionalization (of the community of states), as is asserted (di Fabio 2001: 68), however, does not prove true upon closer examination. If we maintain the distinction between juridification and constitutionalization, it emerges that already the basic precondition for the latter is lacking: an object that could be constitutionalized.

Just as public power at the international level breaks down into numerous unconnected institutions with sharply limited jurisdictions, so its legal regulation breaks down into numerous unconnected partial orders. A bundling that could make them appear as the expression of unified intention and would also allow a unified interpretation of them is not to be expected even in the long-term. Even more, democratic legitimation and responsibility is far off. The aspiration contained in the concept of constitutionalism can therefore not even be approximately realized on the global level. This is no reason to attach little value to the progress connected to the increasing juridification of the world order. To equate it with the constitution, however, is to paper over the fundamental difference and create the impression that the declining significance of national constitutions can be made good at the international level. There is no prospect of that for the time being.

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BIOGRAPHICAL NOTE

Dieter Grimm is Rector of the Wissenschaftskolleg, Berlin and Professor of Public Law at Humboldt University. He served as a justice on the German Federal Constitutional Court from 1987 to 1999. His recent books include *Die Zukunft der Verfassung* (2002, 3rd edn.), *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart* (with Heinz Mohnhaupt, 2002, 2nd edn.), and *Die Verfassung und die Politik* (2001).

Telephone: +49 030 89001-119

Fax: +49 030 89001-300

Address: Wissenschaftskolleg zu Berlin, Institute for Advanced Study,
Wallotstrasse 19, 14193 Berlin, Germany