

Review Essay - Some Remarks on the Constitutionalisation of Cyberspace

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Klaus Grewlich, Konstitutionalisierung des „Cyberspace“ – zwischen europarechtlicher Regulierung und völkerrechtlicher Governance (The Constitutionalisation of "Cyberspace" – Between European Legal Regulation and International Legal Governance), Baden-Baden 2001, Nomos Verlagsgesellschaft, 118 pp.

*"Time will say nothing but I told you so,
Time only knows the price we have to pay;
If I could tell you I would let you know.*

...

*There are no fortunes to be told, although,
Because I love you more than I can say,
If I could tell you I would let you know...." (1)*

[1] The title of the book at hand sounds like a promise in two senses. Not only does the author promise us to speak about something that is highly controversial (the constitutionalisation of cyberspace), but the subject of this promise is also a promise in itself (namely the term "constitutionalisation"). Constitutionalisation and constitution have highly-loaded historical connotations (2), associated with struggles as well as promising hopes and fears, that are very important to us 'old Europeans'. How can one today, in the days of globalisation, of the emergence of a world society, of the digital revolution and of cyberspace, still do justice to the challenges of the future with such old connotations? The book's title promises us to speak to this issue. Correspondingly, our expectations are great.

[2] This is a book review, and a book review means, above all, a presentation of the author's arguments, his most important theses and, building upon this, a review, a critique – that is to say, that the reviewer regularly engages in an - in the academic milieu already highly dogmatised - 'scientific' exercise that demands a clear distinction between an objective presentation and a subjective assessment. My book review is therefore divided in two parts. In the first part, I will attempt as objectively as possible to relay the book's most important theses following the author's thought process (I.). In the second part, that which I have attempted to exclude before (*i.e.* a subjective element) will then be presented more decisively. (II.)

I.

[3] The foundations for understanding both the so-called *digital revolution* and cyberspace are set out in the book's first section. Cyberspace, which is to be understood as a consequence of the digital revolution, is pictorially described as "an ever-thickening electronic-ethereal wrapping which encompasses our planet" (3). Especially important for a better understanding of the author's intention, appears to be his observation that cyberspace stands in a national and international legal continuity with the discovery of the New World and the invention of the printing press in the Middle Ages. (4) This observation must be emphasised, as it sets the tone for the author's discussion in the third section, dedicated to issues of governance and, in particular, to the prospects for a *constitutionalisation* of cyberspace. Grewlich thus observes that we are today

"experiencing the emergence of a new international law conditioned through the epoch of global communication and the rapid change, which has dawned everywhere on the planet" (5).

[4] International law, in its more recent appearance, can no longer be described as law merely regulating the co-existence and contest of sovereign, territorial states, but as an international law of co-operation that concerns itself with the question of the right international legal order for the competition of enterprises and the contest of states. (6) On the one hand, this new international law is characterised in particular by the creation of rules for both conflictual and co-operative developments on the various levels of activity (multi-level analysis). On the other, it is characterised by the behaviour of different, newly emerging actors, namely states and business entities like transnational enterprises, associations and industrial alliances, but also by groups and organisations of civil society (multi-actor analysis). (7)

[5] According to the author, the example of cyberspace best illustrates the necessity of such an international law of co-operation in our time. Cyberspace is limited neither only to an area for the strategic business operation of enterprises and industrial alliances nor to a political and cultural meeting sphere characterised by harmony and peace, but encompasses a sphere also of forbidden, illegal activities as well as political conflicts. Accordingly, an international legal framework is required for the different regulatory attempts by nation-states and members of civil

society which can serve to limit conflict while enhancing efficiency. (8) To the author's mind, the creation of such a framework is the most important task that the new international law of co-operation has to fulfil today.

[6] The second section of the book presents, in detail, the lines of activity in European and international economic legal regulation. Here, the emphasis lies on maintaining market access through specific sectoral or competitive regulation (access regulation) on the one hand and on achieving non-economic goals such as the protection of basic rights, especially data protection, diversity of opinion, child protection and questions of security (public-interest regulation) on the other. This section of the book also deals with the increasingly important issue of "system competition". (9)

[7] In the third section, the author unfolds his understanding of 'governance' and of a possible constitutionalisation of cyberspace. It is precisely this last section that I want to concern myself more closely with in this book review. The term governance is used by the author to clarify the following four aspects : (10)

- *An essential element of governance is the "multi-actor analysis": the transition to the epoch of "cyberspace" affects not only states but also employers associations and transnational enterprises, as well as the international civil society as partners of states under the rule of law.*

- *At the same time, governance involves "multi-level analysis", namely the local, the regional or European and the global level (subsidiarity).*

- *The instruments of behavioural control can according to their legal nature be of a sovereign, contractual but also self-regulating kind. Alongside international economic law comes the behavioural control power of the private legal order and international private law.*

- *"Governance" is no final state but is describable as a normative jumble in transition to networked systems of rules on universal and regional levels, as part of a process of international legal constitutionalisation.*

[8] The author then proceeds to give clearer contours to the term "constitutionalisation" itself. By constitutionalisation the author does not mean a world government in the Kantian sense – this idea is actually rejected as an unrealistic, romantic simplification. Rather, Grewlich's approach is one of seeing constitutionalisation as a

"complex process whose finality – as for example also in the case of the debate about a European constitution – is still open and that may lead us to a normative 'multi-level association' in a multi-regional or a global framework." (11)

[9] In other words, Grewlich equates the constitutionalisation of cyberspace with the constitutionalisation of international relations and international law in the broadest sense, thus including both transnational, economic actors and civil society. Cyberspace contributes to this process of the constitutionalisation of international law as catalyst. It requires no special legal regime itself. It is at this point that I would like to outline my critique.

II.

[10] What could constitutionalisation of a transnational area such as cyberspace mean? I cannot speak directly to this theme (*If I could tell you I would let you know*), but I may say what constitutionalisation is not. Constitutionalisation is not to be equated with regulation. In Grewlich's book we are, this is my suspicion, dealing with a misunderstanding. When he speaks about the constitutionalisation of cyberspace, he (mis-?)understands it as the regulation of cyberspace through a new instrument of international politics, namely what he calls the international law of co-operation. Regulation is, however, a much wider term, one in fact which regularly implies a heteronomous imposition of the logic of those who want to regulate upon those that are being regulated. According to Grewlich, the logic of the new international law should be imposed upon cyberspace. Today, we are surely experiencing a constitutionalisation of international law in the sense of a formation of a constitution, which alongside states comprises other actors traditionally not recognised as international legal subjects, such as international organisations, multinational enterprises, international unions, associations of interests and NGOs, as well as individuals as bearers of basic and human rights, but this has little to do with the constitutionalisation of cyberspace. (12) The constitutionalisation of cyberspace implies other structures and processes. That should not, however, be taken to mean that the constitutionalisation of international law has no effects on cyberspace. (13) The opposite is true. According to this reading, the book's title is inappropriate. The book should either be titled "*The Constitutionalisation of International Law in View of Consequences of the Digital Revolution*" or "*The Regulation of Cyberspace through a new (ordo-liberal?) International Law of Co-operation.*"

[11] In cyberspace today, autonomous law is being *produced* in a most complex and decentralised manner. This norm production takes place at relative distance to the centres of law formation with which we have so far been

acquainted – national Parliaments, global legislative institutions and inter-state agreements. (14) Some examples of such an autonomous law formation in cyberspace include the norm-generating activities of the standardisation organisations of the Internet (15) (*i.e.* where the *Code* is produced that, with Lawrence Lessig, can be described as the law of cyberspace (16)); the activity of the ICANN Arbitration panels, which render binding decisions over domain disagreements and enforce their decisions through electronic compulsory execution (17) ; the emergence of a digital customary law in the form of *netiquette*-rules (18) ("no spamming"); the creation of *click wrap rules* (19) and general terms of business of Internet service providers (20) etc. But, so I would like to ask: "Why do these examples never appear in Klaus Grewlich's book?"

[12] The first task of practice-oriented work on the theory of the phenomenon of 'transnational law' would be to look for elements of constitution formation in the sense of a constitutionalisation in different branches of "simple" law, because where autonomous law is produced, norms of constitutional quality are also produced. (21) Here, we are dealing with a latent phenomenon. These norms of constitutional quality do indeed not emerge in a *big bang*, a spectacular, revolutionary act, resembling the American or French model. Instead, they develop in long-term, underground evolutionary processes, as sectors of society become ruled by law. (22) Such an evolutionary process may today in our eyes appear fully improbable, but one forgets that the constitutional question for the monarchical political system of more recent European history appeared equally improbable.

[13] The question as to whether we will, in the future, enjoy the fruits of such a constitutionalisation can here only remain unanswered („*Time will say nothing but I told you so/Time only knows the price we have to pay*"). Nevertheless, it now appears more urgent than ever to theoretically support and further these trends towards constitutionalisation in the various societal sectors.

(1) WH Auden [2000], "If I Could Tell You", in J Fuller, *Poems selected by John Fuller* (London: faber and faber). The review essay is translated from the German by Malcolm Maclaren.

(2) See generally: P Zumbansen [2000], *Ordnungsmuster im modernen Wohlfahrtsstaat, Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* (Baden-Baden: Nomos).

(3) K Grewlich [2001], *Konstitutionalisierung des „Cyberspace“ – zwischen europa-rechtlicher Regulierung und völkerrechtlicher Governance* (Baden-Baden: Nomos), 15.

(4) Grewlich [2001], 17.

(5) Grewlich [2001], 17.

(6) K Grewlich [2000], "Governance im Cyberspace – Regulierung globaler Netze im Systemwettbewerb?", 337 *Recht der Internationalen Wirtschaft* 5, 338.

(7) See, hereto, e.g. M Wilkinson, Postnationalism, (Dis)organised civil society and De-mocracy in the European Union: Is Constitutionalism Part of the Solution or Part of the Problem?, in: 3 *German Law Journal* No. 9 (1 September 2002), available at: http://www.germanlawjournal.com/past_issues.php?id=192.

(8) Grewlich [2001], 21.

(9) See also Baelz/Baldwin [2002] and Mock [2002], both in this issue; and Schanze/Jütters, in: Die Aktiengesellschaft [2003], issue 1, *forthcoming*; cf. the comprehensive study by E-M Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt* (Mohr Siebeck: Tübingen 2002); Heine and Kerber, European Corporate Laws, Regulatory Competition and Path Dependence, *European Journal of Law and Economics* 13 (2002), 47-71; Esty and Geradin (ed.), *Regulatory Competition and Economic Integration*, (Oxford/New York 2001).

(10) Grewlich [2001], 53.

(11) Grewlich [2001], 54.

(12) B Fassbender [1998], "The United Nations Charter as Constitution of the International Community", 529 *Columbia Journal of Transnational Law* 37; P Dupuy [1997], "The Constitutional Dimension of the Charter of the United Nations Revisited", 1 *Max Planck Yearbook of United Nations Law* 1; R Uerpman [2001], "Internationales Verfassungsrecht", 565 *Juristenzeitung* 56; C Tomuschat [1993], "Obligations Arising for States Without or Against Their Will", 195 *Recueil des Cours*; S Oeter [2000], "Inter-nationale Organisation oder Weltföderation? Die

organisierte Staatengemeinschaft und das Verlangen nach einer 'Verfassung der Freiheit' in H Brunkhorst (ed.), *Globalisierung und Demokratie: Wirtschaft, Recht, Medien* (Frankfurt: Suhrkamp); C Walter [2001], "Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law", 170 *German Yearbook of International Law* 44; J Paust [2002], "Human Rights Responsibilities of Private Corporations", 801 *Vanderbilt Journal of Transnational Law* 35; P Muchlinski [2001], "Human Rights and Multinationals: Is There a Problem?", 31 *International Affairs* 77. In the context of the European integration process: C Joerges, Y Meny and JHH Weiler (eds.) [2000], *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Florence: Robert Schuman Centre); U Di Fabio [2000], "Eine europäische Charta", 737 *Juristenzeitung* 55; A v Bogdandy [1999], *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform: Zur Gestalt der Europäischen Union nach Amsterdam* (Baden-Baden: Nomos).

(13) FC Mayer [2002], "Das Internet, das Völkerrecht und die Internationalisierung des Rechts", 93 *Zeitschrift für Rechtssoziologie* 23; HH Perritt [2000], "The Internet is Changing the Public International Legal System", 885 *KY L. R.* 88.

(14) To resolve any misunderstanding: as Gunther Teubner also explicitly mentions an autonomous legal formation does not exclude an external political intervention. Each Global Law in question (*lex mercatoria*, *lex electronica* etc.) is expressly viewed from a legal pluralistic perspective as an empirically variable mixture of autonomous societal and political legal formation. See G Teubner [1997] "Global Bukowina: Legal Pluralism in the World Society" in G Teubner (ed.), *Global Law Without a State* (Aldershot: Dartmouth Gower).

(15) JL Reidenberg [1998], "Lex Informatica: The Formulation of Information Policy Rules Through Technology", 553 *Texas Law Review* 76; P Mayer [2000], "Selbstregulierung im Internet: Institutionen und Verfahren zur Setzung technischer Standards", 13 *Kommunikation & Recht* 1.

(16) L Lessig (1999), *Code and Other Laws of Cyberspace* (New York: Basic Books). For a similar argument, though diametrically opposite to the regulatory aspirations of Lessig see: DG Post [1995], "Anarchy, State and the Internet: An Essay on Law Making in Cyberspace", *Journal of Online Law* art. 3, available at (<http://www.temple.edu/lawschool/dpost/Anarchy.html>)

(17) ML Mueller [2002], *Ruling the Root: Internet Governance and the Taming of Cyber-space* (Cambridge Mass.: MIT Press); V Karavas and G Teubner [2003 *forthcoming*], "<http://www.CompanyNameSucks.com>: Grundrechte gegenüber 'Privaten' im autonomen Recht des Internet?" in W Hoffmann-Riem and KH Ladeur (eds.), *Innovationsoffene Regulierung des Internet* (Baden-Baden: Nomos); GP Calliess [2002 *forthcoming*], "Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law", *Zeitschrift für Rechtssoziologie* 24; D Lehmkuhl [2002], "The Resolution of Domain Names vs. Trademark Konflikts", 61 *Zeitschrift für Rechtssoziologie* 23; K Blackman [2001], "The Uniform Domain Name Dispute Resolution Policy: A Cheaper Way to Hijack Domain Names and Suppress Critics", 211 *Harvard Journal of Law & Technology* 15; A Goldstein [2002], "ICANNSucks.biz (And Why You Can't Say That): How Fair Use of Trademarks in Domain Names is Being Restrained", 1151 *Fordham Intellectual Property, Media & Entertainment Law Journal* 12; D Hancock [2001], "An Assessment of ICANN's Mandatory Uniform Dispute Resolution Policy in Resolving Disputes Over Domain Names", *The Journal of Information, Law and Technology* 1, available at (<http://elj.warwick.ac.uk/jilt/01-3/hancock.html>); DC Najarian [2001], "Internet Domains and Trademark Claims: First Amendment Considerations", 127 *Journal of Law & Technology* 41; RS Sorgen [2001], "Trademark Confronts Free Speech on the Information Super-highway: 'Cybergrippers' Face a Constitutional Collision", 115 *Loyola of Los Angeles Entertainment Law Review* 22.

(18) KH Ladeur [2002], "Rechtsfragen des Ausschlusses von Teilnehmern an Diskussionsforen im Internet: Zur Absicherung von Kommunikationsfreiheit durch netzwerkgerichtetes Privatrecht", 787 *Multimedia und Recht* 5; P Zumbansen [2003 *forthcoming*], "Die engen Wände der Internetwelt: Autonomie und Kontrolle jenseits staatlicher Steuerung und gesellschaftlicher Eigenorganisation" in W Hoffmann-Riem and KH Ladeur (eds.), *Innovationsoffene Regulierung des Internet* (Baden-Baden: Nomos); A Mefford [1997], "Lex Informatica: Foundations of Law on the Internet", 211 *Indiana Journal of Global Legal Studies* 5; P Flichy [2001], *L' Imaginaire d' Internet* (Paris: éditions la découverte).

(19) GE Evans [1999], "Opportunity Costs of Globalising Information Licences: Embedding Consumer Rights within the Legislative Framework for Information Contracts", 267 *Fordham Intellectual Property, Media and Entertainment Law Journal* 10; JH Reichman and JA Franklin [1999], "Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information", 875 *U. Pa. L. Rev.* 147; CR McManis [1999], "The Privatization (or 'Shrink-Wrapping') of American Copyright Law", 173 *California Law Review* 87.

(20) A Tangl [2000], "'Elektronische' Geschäftsbedingungen ('e-AGB'): Ein Blick auf einschlägige Rechtsgrundlagen und Entwicklungen in der EU (insbes. Österreich) und in den USA, Überlegungen zu einer 'internetspezifischen'

Einbeziehungskontrolle" in *Jahrbuch Junger Zivilrechtswissenschaftler* 2000 (Stuttgart: Richard Boorberg).

(21) P Zumbansen [2002], "Piercing the Legal Veil: Commercial Arbitration and Transnational Law", 8 *European Law Journal* pp. 400-432, also available at <http://www.iue.it/PUB/law02-11.pdf>

(22) G Teubner [2003 *forthcoming*], "Societal Constitutionalism: Alternatives to State-centred Constitutional Theory" in C Joerges, IJ Sand, G Teubner (eds.), *Constitutionalism and Transnational Governance* (London: Hart).